COBBETT'S

COMPLETE COLLECTION

OF

State Trials.

VOL. VIII.

COBBETT'S
COMPLETE COLLECTION
OF
State Trials
AND
PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS
FROM THE
EARLIEST PERIOD TO THE PRESENT TIME.

VOL. VIII.

COMPRISING THE PERIOD FROM THE THIRTY-SECOND YEAR OF THE REIGN OF KING CHARLES THE SECOND, A. D. 1680, TO THE THIRTY-FOURTH YEAR OF THE SAID REIGN, A. D. 1682.

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TO

VOLUME VIII.

STATE TRIALS IN THE REIGN OF KING CHARLES THE SECOND.

*** *The new Matter is marked* [N.]

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COBBETT'S
COMPLETE COLLECTION
OF
State Trials.



272. Proceedings against RICHARD THOMPSON,* Clerk, for a High Misdemeanor against the Privilege of Parliament: 32 CHARLES II. A. D. 1680.

HOUSE OF COMMONS, *November* 9, 1680.

ORDERED, That Richard Thompson,† clerk, be sent for in custody of the serjeant at arms attending this House, to answer at the bar of this House, for his high Misdemeanor against the Privilege of this House.‡

December 8.

A Petition of Richard Thompson, clerk, in custody of the serjeant at arms, having been read, it was ordered, That the consideration thereof, as also of the matter of the complaint

* 'I appoint Francis Smith, and Benjamin 'Harris, to print this Report and Resolution, 'perused by me, according to the Order of the 'House of Commons: And that no other per- 'son presume to print the same, December 24, '1680. W. WILLIAMS, Speaker.'

† Oldmixon calls this Thompson a "noisy, insolent, ignorant priest," and adds, "I take the more liberty with him because I knew him." It appears that the king soon after these proceedings made him dean of Bristol.

‡ I have not found in the Journals any earlier entry concerning this matter of Richard Thompson, nor does it appear so distinctly as might be wished in what respects his "high misdemeanor" was "against the privilege of the House."

It is observable that Mr. Justice Blackstone, in speaking of Privilege of Parliament, seems to use the term in its more confined sense, of an immunity or exemption from such direct interruptions and molestations, as obstruct the exercise of the functions of parliament, and from the liability to have their freedom of speech and debates and proceedings in parliament impeached or questioned in any court or place out of parliament. He does indeed say, that to assault by violence a member of either House or his menial servant is a high contempt of parliament, and there punished with the utmost severity: but with this exception, he seems to contemplate all their privileges, and especially when he speaks of their indefiniteness, (See the note to the Case of Shirley and Fagg, *ante*, vol. 6, p. 1121.) as possessed by them almost exclusively for the purpose of protection from attacks of prerogative. And of such privileges it may be truly said, in the words of the Remonstrance and Petition presented to Charles the First by both Houses on Dec. 17th, 1641, (See 1 Clarendon's Hist. of the Rebellion, 328. 8vo ed. 2 Cobb. Parl. Hist. 978.) that "they are the birth-right and inheritance not only of the two Houses of parliament but of the whole kingdom, wherein every one of the king's subjects is interested;" but it is by no means clear that this may with equal truth be said of an uncontrolled discretionary power in each House of parliament to imprison for whatever such House of parliament shall adjudge to be a contempt towards itself: more particularly if a like uncontrolled discretionary power in courts is to be supported by analogy to this.

Upon the whole matter it may, perhaps, be safely said that whatever be the extent of parliamentary privileges, every patriotic member of parliament will concur in the sentiment expressed by the learned and upright sir Robert Atkyns in the Case of lord Clarendon. (See vol. 6 of this Collection, p. 355). "Though privilege is much spoken of, I shall never be fond of any privilege which shall intrench upon my liberty as a subject:" and that every wise House of Commons, knowing that confidence and affection between them and the body of the people is the great foundation of their dignity and importance in the state, will be very abstemious in the exercise of any power by which that confidence and affection is liable to be diminished or impaired.

for which he stood committed, should be referred to a committee to examine the matter thereof, and to report the same, with their opinions therein, to the House.

December 23.

Colonel Birch reports from the committee to whom the examination of the complaint against Richard Thompson, clerk, was referred, That the committee having taken the same into their consideration, had directed him to make a special Report thereof to the House: which he read in his place, and afterwards delivered the same in at the Clerk's table.

Ordered, That the said Report be read at the table to-morrow morning.

December 24.

The REPORT from the Committee of the Commons in Parliament, appointed to consider the Petition of Richard Thompson, and to examine the matter of the Complaint against him.

In the first place, the committee read unto the said Thompson, the heads of the complaints against him; which (for the most part) he denying, desired to have his accusers brought face to face: whereupon the committee proceeded to the examination of witnesses, to prove the said complaint.

The first Witness examined, saith, That there being a great noise and rumour, that Mr. Thompson had prepared a sermon to be preached on the 30th of January, 1679, the said witness went to the said sermon, and did hear Mr. Thompson publicly declare, that the Presbyterians were such persons, as the very devil blushed at them; and that the villain Hampden grudged, and made it more scruple of conscience, to give twenty shillings to the king, for supplying his necessities by Ship-money and Loan, which was his right by law, than to raise rebellion against him. And that the Presbyterians are worse (and far more intolerable) than either priests or jesuits.

The second saith, That hearing a great talk and noise spread of a sermon to be preached by Mr. Thompson, on the 30th of January, 1679; he was minded to hear the same, and accordingly did; at which he writ some notes: amongst which, he saith, that Mr. Thompson openly preached, that the devil blushed at the Presbyterians; and that the villain Hampden grudged more to give the king twenty shillings, which was his just due by law (Ship-money and Loan), than to raise rebellion against him; and that a Presbyterian brother, *qua talis*, was as great a traitor by the statute, as any priest or jesuit whatsoever. That he heard, that Mr. Thompson said, that he hoped the Presbyterians would be pulled out of their houses, and the gaols filled with them: and wished their houses burnt.

The third saith, That he was cited to the Bishop's Court, to receive the Sacrament last Easter; but being out of town at that time, did receive it at a place called Purl in Wiltshire; and that a month after he came home, was again cited to the said Court, and he did accordingly appear, and told the Court, that he hoped his absence and business might be accepted for a lawful excuse; upon which Mr. Thompson immediately said, that they would proceed to excommunicate him. Upon which, this informant produced his certificate, of which the Chancellor approved, and said it was lawful. Hereupon Mr. Thompson said, that his receiving the Sacrament from any other minister, than the minister of the parish wherein he dwelled, was damnation to his soul; and that he would maintain this doctrine.

The fourth saith, That being at Bristol fair he heard a great talk and noise of a Satire-sermon prepared, and designed to be preached by Mr. Thompson against the Presbyterians, on the 30th of January, 1679; and that very many resorted to hear him: in which sermon the said Mr. Thompson declared and said, that there was a great talk of a plot: but (says he) a Presbyterian is the man; and further added, that the villain Hampden scrupled to give the king 20*s*. upon Ship-money and Loan, which was due by law, but did not scruple to raise rebellion against him.

The fifth saith, That Mr. Thompson, in a sermon preached the 30th of January, 1679, did say, that the presbyterians did seem to outvie Mariana, and that Calvin was the first that preached the king-killing doctrine; and that after he had quoted Calvin often, said, if this be true then, a Presbyterian brother, *qua talis*, is as great a traitor as any priest or Jesuit: and that then he condemned all the proceedings of parliament.

The sixth saith, That he the said Mr. Thompson, had uttered many scandalous words concerning the act for burying in woollen; affirming, that the makers of that law were a company of old fools and fanatics, and that he would bring a school-boy should make a better act than that, and construe it when he had done.

The seventh saith, That Mr. Thompson in a Sermon by him preached (while petitions for sitting of this parliament were on foot) speaking of a second rebellion by the Scotch, who had framed a formidable army, and came as far as Durham, to deliver a petition forsooth; and that they seemed rather to command than petition their sovereign to grant; and comparing that petition with the then petition on foot, greatly inveighed against it, and scoffed much at it.

The eighth saith, That Mr. Thompson (when the petition was on foot for the sitting of this parliament) used at the funeral sermon of one Mr. Wharton these words (pointing at the dead said), that he was no schismatical petitioning rebel, and that by his instigations the grand-

In sir Edwin Sandys's Case, Mr. Chancellor of the Dutchy wisely observed, 'It is an easier 'matter to raise an inflammation by the spe'cious title of privileges than to allay it again.' See Proceedings and Debates of the House of Commons in 1620, and 1621, vol. 2. p. 259.

jury of Bristol made a presentment of their detestation against petitioning for the sitting of the parliament; that the said Mr. Thompson had told him, that he was governor to Mr. Narbor, when he was beyond sea; and said, that he had been very often (and above one hundred times) at mass in the great church at Paris, and usually gave half a crown to get a place to hear a certain Doctor of that church, and that he was like to be brought over to that religion; and that when he went beyond sea, did not know but that he might be of that religion before his return. That he is very censorious, and frequently casts evil aspersions against several divines at Bristol of great note, viz. Mr. Chetwind, Mr. Standfast, Mr. Crosman, Mr. Palmer, and others, saying, that such as went to their lectures were the brats of the devil.

The ninth saith, That Mr. Thompson in his preaching inveighed bitterly against subscribing petitions for sitting of this parliament, saying, that it was the seed of rebellion, and like to Forty-one; and that the devil set them on work, and the devil would pay them their wages; saying, that before he would set his hand to such petitions, he would cut it off, yea and cut them off.

The tenth saith, That about two years since, being in the chancel of St. Thomas's church in Bristol, where queen Elizabeth's effigies is, Mr. Thompson pointing his finger to it, said, that she was the worst of women, and a most lewd and infamous woman; upon which this informant replied, he never heard any speak ill of her: thereupon Mr. Thompson said, she was no better than a church-robber, and that Hen. 8, begun it, and that she finished it.

The eleventh, Rowe, saith, That in the year 1678, he waited on the mayor to church, and that Mr. Thompson, who was there, railed at Hen. 8, saying, he did more hurt in robbing the Abbey lands, than he did good by the reformation. That after dinner, Mr. Thompson comes to this informant, and claps his hands on his shoulders, saying, Hah, boy, had queen Elizabeth been living, you needed not to have been sword-bearer of Bristol. The said Rowe asked him why? He replied, She loved such a lusty rogue (so well) as he was; and he would have been very fit for her drudgery at Whitehall.

The twelfth saith, That he heard a great noise of a sermon to be preached by Mr. Thompson on the 30th of January, 1679, to the second part of the same tune; and that he was present at the same sermon, in which Mr. Thompson said, there was a great noise of a Popish Plot, but, says he, here is nothing in it but a Presbyterian Plot; for here they are going about to petition for the sitting of the parliament, but the end of it will be to bring the king's head to the block, as they have done his father.

The thirteenth saith, That in January last, or thereabouts, there was a petition going about for the sitting of this parliament, when Mr. Thompson, in Redcliff church, in his sermon said, it was a seditious and rebellious petition, and rather than he would sign it, his hand should be cut off.

The fourteenth saith, The 8th day of April, he going to pay Mr. Thompson his dues, speaking concerning the meeters in private; Mr. Thompson said, he would haul them out, and fill the gaols with them, and hoped to see their houses a fire about their ears in a short time; and this he, the said Thompson, doubled again and again.

The fifteenth saith, That about December, 1679, Mr. Thompson came to visit his mother, being sick; and discoursing of religion, Thompson said, if he were as well satisfied of other things, as he was of justification, auricular confession, penance, extreme unction, and chrism in baptism, he would not have been so long separated from the Catholic Church. And further affirmed, that the Church of Rome was the true Catholic Church. He further endeavoured to prove extreme unction, and auricular confession, as well as he could, out of the Epistles. Further, he hath heard him say, the king was a person of a mean and soft temper, and could be led easily to any thing, but yet a Solomon in vices; but that the duke of York was a prince of a brave spirit, would be faithful to his friends, and that it was our own faults that he was a Roman catholic, in that we forced him to fly into France, where he embraced that religion. About the same time, he the said Thompson said the church would be militant; but greatly commended the decency of solemnizing the mass in France; and that it was performed with much more reverence and devotion than any other religion doth use. He further heard him say, in a Sermon, about the time of petitioning, he would rather cut off his hand than sign it, and had many bad expressions of it; that it was the seed of rebellion, and like forty and forty-one. And further, the said Mr. Thompson, at one Sandford's shop-door in Bristol, speaking of Bedloe, said, that he was not to be believed, because Bedloe had said he, meaning Mr. Thompson, was at St. Omer's, where Mr. Thompson said he was not; and that Bedloe was of a bad life, and in many Plots, and not be credited in any thing he said. And that in another discourse he commended the Romish clergy for their single life, and is himself so; and did at the same time vilify and rail at the English clergy for marrying; saying, it was better for a clergyman to be gelt than to marry; and that the Calvinists in France were lecherous fellows, and could scarce be two years a priest without a wife. About the time, and after the election of sir John Knight to this parliament, Mr. Thompson said, he was not fit to be believed, and as bad as any fanatic. He further said in the pulpit at St. Thomas's, that after excommunication by the bishop, without absolution from the spiritual court, such a one was surely damned; and he would pawn his soul for the truth of it.

Evidence ended; Mr. Thompson, after the evidence given by every particular person, face to face, was asked to every one, if he had any questions to ask before they called another? Who answered, he should not say any thing at present. When the witnesses before-mentioned were all examined, Mr. Thompson being desired to make his defence, and declare whether he were guilty of the matters laid to his charge, did for the greatest part confess words spoken to that effect; and in other things endeavoured to turn the words with more favour towards himself; but the witnesses being of great credit, and many more being ready to have made good the same things, the Committee looked upon the business to be of a high nature; and therefore ordered the matter to be reported specially, leaving it to the wisdom of the House.'

A debate arising in the House thereupon;

Resolved, nem. con., That Richard Thompson, clerk, hath publicly defamed his sacred majesty; preached Sedition; vilified the Reformation; promoted Popery, by asserting popish principles, decrying the Popish Plot, and turning the same upon the protestants; and endeavoured to subvert the liberty and property of the subject, and the rights and privileges of parliament: And that he is a scandal and reproach to his function.

Resolved, &c That the said Richard Thompson be impeached, upon the said Report and Resolutions of the House.

Ordered, That a Committee be appointed to prepare the said Impeachment. And it is referred to sir Wm. Jones, and others: And the said Committee is impowered to receive further informations against the said Richard Thompson: And to send for persons, papers, and records.

January 5, 1681.

A Petition of Richard Thompson, clerk, in custody of the Serjeant at Arms attending this House, was read.

Ordered, That the said Serjeant at Arms be impowered to receive sufficient security for the forthcoming of the said Richard Thompson, to answer to the Impeachment of this House against him.

The Parliament was soon afterwards dissolved, and I have not found in the Journals any subsequent proceedings against this Thompson.

It should be noticed, that at the time when this Case occurred, the House of Commons practised commitments, as for Breach of Privilege, with a frequency and extent which seem to have excited much disgust and discontent; and it is not improbable that the prevalence of those feelings thus excited greatly contributed to enable king Charles the Second—odious, and very justly odious as he was to the majority of his subjects—without a House of Commons to carry on his government during the four last years of his life.

In his 'Declaration to all his loving subjects, touching the causes and reasons that moved him to dissolve the two last parliaments' (which Declaration, his majesty in council, on the 8th of April, 1681, ordered to be printed and published, and read in all churches and chapels throughout the kingdom, and which, as it appears, was drawn up by lord chief justice North) he specially mentions in the catalogue of the vicious measures of the House of Commons, 'arbitrary orders for taking our subjects into custody, for matters that had no relation to Privileges of Parliament.'

The mention of this matter by two of the contemporaneous historians, Roger Coke and Roger North, is curious and perhaps instructive:

"The Commons, heated by the Dissolutions of the two last parliaments, when they were searching into the discovery of the Popish Plot, and exasperated against the Tories, for ridiculing the Popish Plot, and for abhorring petitioning the king to let the parliament sit, in order to prosecute and secure the nation against it, &c. proceeded in another temper, I think, than any other ever before; and, in truth, I do not desire the prosecution of the Commons in the Long Parliament, in the first ten years, against the Protestant Dissenters, and of the Commons of this parliament against the Tories, should be taken for precedents by any parliament in time to come.

"When parliaments met annually, or at least frequently, I think complaint cannot be found against any man for Breach of Privilege: but when there were long intervals of parliaments, from whence the consequence resolved into long sittings of parliaments, which began in the reign of Henry 8, then the inconvenience of privilege first began; nor do I find any before the latter end of Henry 8, nor does Mr. Petit, in his Precedents [of Exemptions] from arrests, and other privileges of parliament-men, cite any before the 34th of Henry 8, in case of Mr. George Ferrers, burgess for the town of Plymouth, being arrested for debt; and this was taken for such a novelty, that he takes up near seven pages to recite the proceedings of the Commons upon it; and how the king being advertised thereof, called the Chancellor, the Judges, the Speaker of the Commons, and the gravest persons of them, wherein he commended the wisdom of the Commons in maintaining their privileges, and that the privileges of parliament extend to the servants of the Commons from arrests, as well as to the persons of the Commons. It is worthy observation with what sobriety and justice the Commons proceeded herein: they ordered their serjeant forthwith to repair to the Compter in Bread-street, wherein Mr. Ferrers was committed, with his mace, to demand his delivery;

which the serjeant did to the officers of the Compter, who notwithstanding refused to do it, and beat and hurt some of the serjeant's officers, and broke his mace; and during the brawl, the sheriffs of London came in, who countenanced the officers of the Compter, and refused to deliver Mr. Ferrers, and gave the serjeant proud language, and contemptuously rejected his message: Hereupon the Commons commanded the serjeant to require the sheriffs of London to deliver Mr. Ferrers by shewing them his mace, which was his warrant for so doing. Whereupon the sheriffs delivered him accordingly; but then the serjeant having further command from the Commons, charged the sheriffs to appear personally on the morrow by eight of the clock, before the Speaker, in the nether House, to bring thither the Clerks of the Compter, and such other of their officers as were parties in the fray, and to take into custody one White, who had wittingly procured the said arrest in contempt of the privilege of parliament.

"Next day the two sheriffs, with one of the clerks and White, appeared in the Commons House; where the Speaker charging them with their contempt and misdemeanor, they were compelled to make immediate answer, without being admitted to council [qu. to have counsel]; and in conclusion the sheriffs and White were committed to the Tower, and the clerk (which was the occasion of the fray) to a place called Little Ease, and the officer which did the arrest, called Taylor, with four other officers, to Newgate, where they remained from the 28th to the 31st March, and then were delivered at the humble suit of the mayor and their other friends.

"The next breach of privilege reported by Petit, is eight years after, viz. the 4th of Edward 6, by one Withrington, who made an assault upon the person of one Brandling, Burgess of Newcastle; but the parliament drawing towards an end, the Commons sent Withrington to the privy council, but the council would not meddle in it, and sent the bill of Mr. Brandling's complaint back again to the Commons according to the antient custom of the House; whereupon the bill was sent to the Lords from the Commons, when Withrington confessed he began the fray upon Dr. Brandling, upon which he was committed to the Tower. This was in the year 1550.

"Mr. Petit finds not another breach of privilege till the 14th of Elizabeth which was done by one Arthur Hall, for sundry lewd speeches used as well in the Commons House, as abroad; who was warned by the serjeant to appear before the bar of the Commons to answer for the same, and upon his knees, upon the humble confession of his folly, he was remitted with a good exhortation given him by the Speaker. Here I observe these three particulars: 1. The rarity of these breaches of privileges of parliament in former times. 2. The justice of the Commons in their proceedings of breach of privilege, to cite the person or persons to appear before them, to answer for themselves before the House passed any censure upon them. 3. That in none of these censures they enjoined the delinquent to pay their fees to their serjeant, for the serjeant is the king's officer; and by the 26th West. 1, no officer of the king's shall take any fee or reward for doing his office, but what he receives from the king, upon penalty of rendering double to the plaintiff, and be further punished at the will of the king. And sir Edward Coke in his first Inst. lib. 3. sect. 701, tit. Extortioners, says, this was the antient common law, and the penalties added by the statutes; and that, though some statutes since have allowed the king's officers in some cases to take fees for executing their offices, yet none other can be taken but what such statutes allow; and that all officers of the king, who take fees otherwise, are guilty of perjury. I would know by what law the Commons' serjeant takes his fees, and how the Commons can absolve him from perjury for taking such fees.

"Whereas in this parliament rarely a day passed wherein men upon bare suggestions, and absent, were not judged, and execution ordered for high and notorious breaches of the Commons' privileges, yet most of these not foreknown, and ordered to be taken into custody, though in Northumberland and Yorkshire: and rarely I think any of them were discharged without paying their fees; nay, they outrun all that was ever thought of before: for on the 14th of December, having voted one Mr. Herbert Herring to be taken into custody, and Herring absconding, the House resolved, 'That if he did not render himself by a certain day they would proceed against him by bill in parliament for endeavouring by his absconding to avoid the justice of the House.'

"It was strange methought that the Commons should be so zealous against any arbitrary power in the king, and take such a latitude to themselves, which puts me in mind of a story I have heard of an old usurer, who had a nephew who had got a licence to preach, and the uncle having never done any thing for his nephew, he resolved to be revenged upon his uncle in a sermon which he would preach before his uncle in the parish where he lived: he made a most invective sermon against usury and usurers; but after the sermon was done, the uncle thanks his nephew for his good sermon, and gave him two 20*s.* pieces: the nephew was confounded at this, and begged his uncle's pardon for what he had done, for he thought he had given him great offence: 'No,' said the uncle, 'Nephew, go on and preach other fools out of the conceit of usury, and I shall have the better opportunity of putting out my money.'" 2 Coke's Detection, p. 255.

"Afterwards he" [Kennett] "comes to the great work of mortifying these Abhorrers, and there he is full as copious and honest; for he tells only of nine or ten, in a naked list of gen-

tlemen, sent for by the serjeant at arms, and committed by the House of Commons, without any distinction of cases or circumstances, but only for detesting and abhorring petitioning for the sitting of the parliament. That is his tune upon all occasions. And here he is forced to croud in by the by, that it was a breach of the privilege of parliament; which vote did indeed come forth at last, otherwise this committing folks had gone with less colour. But, withal, that the proceeding raised a great clamour in the country; for it had not been usual to send for gentlemen in custody for what they did upon grand juries, and in way of duty, as well in giving testimony of their loyalty to the king, as in resisting a tumultuous trade of hand gathering in the country, to the very great disturbance of the neighbourhood and the public peace, only because they happened to be misunderstood in the House of Commons. It certainly was prejudicial to the authority of the House of Commons, and added to the disposition in the kingdom of relying upon the king's good government; and many said, Shall they take away the liberties of the king's people, who are entrusted to defend them against all arbitrary powers whatsoever? And it gave occasion to the king to justify the dissolving, saying, as in his declaration,—'That they returned arbitrary orders for taking our subjects 'into custody for matters that had no relation 'to privileges of parliament.—Strange illegal 'votes!—declaring divers persons to be enemies to the king and kingdom, without any 'order or process of law, any hearing of their 'offence, or any proof so much as offered 'against them.'

"The effect of these harsh proceedings appeared in the case of one Mr. Stavel, or Stowel,* a gentleman of a good family in Devonshire. He was foreman of a grand jury at Exeter, and presented to the judge of assize the grand jury's Address to his majesty in the tenor of an Abhorrence. Upon naming him in the House of Commons, for the leader of this Abhorrence, he was ordered to be taken into custody of the serjeant at arms. And the serjeant sent down his deputy to bring the gentleman up; but he would not submit to the arrest, the officer might take his course. For which he alledged that he knew no law for the taking away his liberty on account of what he did as a grand jury man, in a court of justice, sworn, or to some such effect; whereupon the officer returned without his prey. This was a dash of cold water, and took down the ferment of the whole business. And the matter was hushed up, some saying that he was indisposed, others that he could not be found; and so nothing was farther done against him. And no more men of any sort were sent for into custody upon this account; for the wisest of the faction began to perceive there had been too many sent for already. I remember well that the name of this Mr. Stowell was famous, and cried up in and about London, and all over England, and celebrated in healths of course, as of a general after victory, or rather a solemn assertor of the people's liberty. I never knew the like in the case of a private person, except that of Dr. Sacheverel; the latter run higher, but the difference was only in 'majus et minus.' It was impossible a faction (without doors) should rage and tyrannise, as the party did about the beginning of this parliament, and not lose the hold they had of the people, whom they had led into a tolerable opinion of them. There was scarce a day past, but they were gratified with hearing some person was sent for in custody for abhorring. Sir George Treby said, they (meaning the House of Commons) kept an hawk, (which was their serjeant at arms) and they must every day provide flesh for their hawk. I can better relate this for truth, because it was spoke to myself. The serjeant's name was Topham, and the much work he had upon his hands, at this time, 'ad terrorem populi Regis,' had made it proverbial, on all discourse of peremptory commitments, to say 'take him Topham;' which, for ought I know to the contrary, may, from that authentic original, continue a proverb at this day. Whatever the commitments were, the dread was almost universal; for after the vote, that traducing petitioning should be punished as a Breach of Privilege, who could say his liberty was his own? For, being named in the House for an Abhorrer, 'take him Topham.' But the consequence of this proceeding, as I have hinted it, may be a lesson to all powers, on whatsoever foot they are erected, that they take care to perform their duty according to the intent of their institution, thereby making themselves useful, and not a terror to the people under them; for if, instead of that, out of private regards, they grow intemperate, irregular, and injurious, they will lose ground, and

* Commons Journal, "Sabbati, 4to die Decembris, 1680, p. m. The House being informed that Mr. William Stawell, in custody of the Serjeant at Arms attending this House is sick, and not able to appear before this House, Ordered, That Mr. Stawell have a month's time given him for such his appearance." It seems probable that this entry relates to the person mentioned by North. Mr. Hume, indeed, 8 Hist. 131. Ed. of 1807. tells us, that "the vigour and courage of one Stowel, of Exeter, an Abhorrer, put an end to the practice" [of arbitary and capricious commitments]. "He refused to obey the serjeant at arms, stood upon his defence, and said, that he knew of no law by which they pretended to commit him. The House finding it equally dangerous to proceed or to recede, got off by an evasion; they inserted in their votes that Stowel was indisposed, and that a month time was allowed him for the recovery of his health." He quotes no authority; so that he "stood upon his defence," and "got clear off by an evasion," (no very dignified historical phraseology), may perhaps be mere inventive decoration.

at length be humbled, if not wholly lost." North's Examen, p. 560.

So, too, Burnet, 1 Own Times, 484, fol. ed. of 1724;

"The House did likewise send their serjeant to many parts of England, to bring up abhorrers as delinquents: upon which the right that they had to imprison any besides their own members came to be much questioned, since they could not receive an information upon oath, nor proceed against such as refused to appear before them. In many places, those for whom they sent their serjeant refused to come up. It was found that such practices were grounded on no law, and were no elder than queen Elizabeth's time. While the House of Commons used that power gently it was submitted to in respect to it; but now it grew to be so much extended, that many resolved not to submit to it." [Query, as to what Burnet says of the House of Commons not proceeding against such as refused to appear before them, see the Proceedings in the Case of Jay and Topham, A. D. 1689, *infra.*] See, too, Ralph, 516, 517.

Much attention has been lately (I write in the month of June 1810) directed to the topic of commitment by the House of Commons, in consequence of the publication of a Letter, from "Sir Francis Burdett to his Constituents denying the power of the House of Commons to imprison the people of England." And in addition to the copious discussion of the subject in parliament, it has been ventilated from the press with much erudition. Mr. Williams Wynn has published a learned "Argument upon the jurisdiction of the House of Commons to commit in cases of Breach of Privilege," and a powerful writer, (Mr. Evans) under the signature of 'Publicola' has published "Six Letters on the Liberty of the Subject and the Privileges of the House of Commons." So likewise have been published, "The Speech of Mr. Ponsonby on the question relative to the Privileges of the House of Commons as connected with the committal of Sir Francis Burdett and Gale Jones;" "Speech of William Adam, esq. &c.;" "A Concise Account of the Origin of the two Houses of Parliament, with an impartial Statement of the Privileges of the House of Commons, and of the Liberty of the Subject, by Edward Christian, esq. &c."; "The Law and Usage of Parliament in cases of Privileges and Contempt, &c. by Francis Ludlow Holt, esq.;" "A Vindication of the Privileges of the House of Commons, &c. by Henry Madock, jun. esq.;" "The Question considered: Has the House of Commons a right of committal to prison, &c. by E. A. Burnaby, esq.;" and an anonymous "Short Examination into the power of the House of Commons to commit, in a Letter to Sir Francis Burdett, bart." The House of Commons also has, by Votes of 11th and 23d May, 1810, caused to be printed the following documents:

These Reports are as follows:

REPORTS from the SELECT COMMITTEE appointed to consider of the Proceedings had, and to be had, with reference to the several Papers signed "FRANCIS BURDETT;" the Contents of which relate to his being apprehended, and committed to the Tower of London. Together with an APPENDIX. [As amended on Recommitment.]

FIRST REPORT.

It appears to your Committee, after referring to the Order of the House of the 5th day of April last, for the commitment of sir Francis Burdett to the Tower; the Warrants of the Speaker for that purpose; the Letter of sir Francis Burdett to the Speaker, dated the 17th day of April last; the Report and Examination of the Serjeant at Arms, touching his proceedings in the execution of such warrants; the notices to the Speaker referred to your Committee; the demand made upon the Serjeant at Arms of a copy of the warrant under which he arrested sir Francis Burdett; the writ served upon the Serjeant, and the summons served upon the Speaker, and the notice of Declaration filed against the Serjeant; which said notices, demand, writ and summons, are all at the suit or on behalf of the said sir Francis Burdett, and all bear the name of the same solicitor, John Ellis; That the said proceedings have been brought against the Speaker, and the Serjeant, on account of what was done by them respectively in obedience to the Order of the House; and for the purpose of bringing into question, before a court of law, the legality of the proceedings of the House in ordering the commitment of sir Francis Burdett, and of the conduct of the Speaker, and the Serjeant, in obedience to that Order.

1. Your Committee, not in consequence of any doubt upon the question so intended to be raised, but for the purpose of collecting into one view such Precedents of the proceedings of the House upon cases of Breach of Privilege as might afford light upon this important subject, have in the first place examined the Journals, with relation to the practice of the House in commitment of persons, whether members or others, for Breaches of Privilege, by offensive words or writings derogatory to the honour and character of the House, or of any of its members; and they have found numerous instances in the history of Parliament, so far as the Journals extend, of the frequent, uniform, and uninterrupted practice of the House of Commons to commit to different custodies, persons whom they have adjudged guilty of a Breach of their Privileges by so offending.

The statement of these Precedents, which establish the Law of Parliament upon this point by the usage of Parliament: the utility of such law, and the necessity which exists for its continuance, in order to maintain the dignity and

independence of the House of Commons; its Analogy to the acknowledged powers of courts of justice, and the recognition of such right in various instances, by legal authorities, by judicial decisions, and by the other branch of the legislature; as well as the invariable assertion and maintenance of it by the House of Commons, are topics which may be reserved for a further Report. And although there are some instances in which the House has thought proper to direct prosecutions for such offences, yet the Committee confidently state that the more frequent practice of the House, at all times, has been to vindicate its own Privileges by its own authority.

2. The subject which appears to your Committee to press most urgently for an immediate report, is, The state of the law and the practice of the House in cases either of criminal prosecution or civil action against any of its members, for any thing spoken or done in the House of Commons; or for any proceeding against any of its officers or other persons acting under its authority.

The principal instances to be found under this head arose out of those proceedings, which, in the time of Charles the 1st, Charles the 2nd, and James the 2nd, were instituted by the officers of the crown, in derogation of the Rights and Privileges of the Commons of England. Those proceedings were resisted, and resented by the House of Commons; were condemned by the whole legislature, as utterly and directly contrary to the known laws and statutes and freedom of this realm; and led directly to the Declaration of the Bill of Rights, "That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament;" and your Committee have no hesitation in stating, that this article in the Bill of Rights extends as clearly to Actions or Indictments brought, or prosecutions by individuals, as to Informations or other proceedings directly instituted by the authority of the crown.

The Law of Parliament on this subject, so far as relates to words spoken in Parliament, was legislatively declared in a statute to be found in the Parliament Roll of the 4th of H. 8: By that act, the rights and privileges of free speech in Parliament are established, and a special action is given in favour of the party injured by any action brought against him for words spoken in Parliament. And, from this statute, it appears that Parliament at that time, when the case occurred which seemed to shew the expediency of legislative provision to give fuller force and protection to its privileges, made it the subject of such provision.

In the 5th of Charles 1, an Information was filed against sir J. Elliot, Denzel Holles, esq. and Benjamin Valentine, for their speeches and conduct in the House of Commons; Judgment was given against them in the King's-Bench, they were sentenced to imprisonment, and were fined: In the Parliament which met in 1640, the House of Commons, after a Report made of the state of the cases of Mr. Holles and the rest of the imprisoned members, in the 3rd of Charles, came to several Resolutions; by which they resolved, That these proceedings were against the law and privilege of Parliament; and condemned the authors and actors in them as persons guilty of a breach of the privilege of Parliament. [ii. Com. Jour. July 6 and 8, 1641. State Trials, vol. 3, p. 310, of this Collection.]

In the reign of Charles 2, these proceedings were again taken into consideration; and the House of Commons came to several Resolutions. On the 12th of November, 1667, they resolved, That the act of Parliament in the 4th year of the reign of Henry 8, above referred to, is a declaratory law of the ancient and necessary rights and privileges of Parliament. On the 23rd of November, 1667, they resolved, That the Judgment above referred to against sir J. Elliot, D. Holles, and B. Valentine, esquires, in the King's-Bench, was an illegal Judgment; and on the 7th of December, 1667, they desired the concurrence of the Lords. The Lords on the 12th of December agreed with the Commons in these Votes.

Your Committee next refer to the case of sir William Williams; the detail of which they proceed to insert from the Report of a former Committee of this House. [27 Mar. 1771. iii. Com. Rep. p. 11.]

'The Case of sir William Williams, against 'whom after the dissolution of the Parliament 'held at Oxford, an Information was brought 'by the Attorney General, in the King's-'Bench, in Trin. Term 36 Car. 2, for a mis-'demeanor, for having printed the Information 'against Thomas Dangerfield, which he had 'ordered to be printed when he was Speaker, 'by Order of the House. Judgment passed 'against him on this Information, in the 2nd 'year of king James the 2nd. This proceed-'ing the Convention Parliament deemed so 'great a grievance, and so high an infringe-'ment of the rights of Parliament, that it ap-'pears to your Committee to be the principal, 'if not the sole object of the first part of the 'eighth head of the means used by king James 'to subvert the laws and liberties of this king-'dom, as set forth in the Declaration of the 'two Houses; which will appear evident from 'the account given in the Journal, 8th of Feb. '1688, of the forming of that Declaration, the 'eighth head of which was at first conceived 'in these words; viz. "By causing In-'formations to be brought and prosecuted in "the Court of King's-Bench, for matters and "causes cognizable only in Parliament, and by "divers other arbitrary and illegal courses."

11th February 1688. "To this Article the "Lords disagreed; and gave for a reason, Be-"cause they do not fully apprehend what is "meant by it, nor what instances there have "been of it; which therefore they desire may "be explained, if the House shall think fit to "insist further on it."

12th February 1688. "The House disagree "with the Lords in their amendment of leaving "out the eighth Article. But in respect of the "liberty given by the Lords in explaining that "matter; resolved, That the words do stand "in this manner; By prosecutions in the "Court of King's-bench for matters and "causes cognizable only in parliament, and by "divers other arbitrary and illegal courses." 'By which Amendment, your Committee observes, that the House adapted the Article 'more correctly to the case they had in view; 'for the Information was filed in king Charles 'the Second's time; but the prosecution was 'carried on, and judgment obtained, in the 'second year of king James.'

'That the meaning of the House should be 'made more evident to the Lords, the House 'ordered, "That sir William Williams be "added to the managers of the Conference;" 'and sir William Williams the same day reports the Conference with the Lords; and, "That their lordships had adopted the Article "in the words as amended by the Commons." 'And corresponding to this Article of Grievance, is the assertion of the Right of the Subject in the ninth Article of the Declaratory 'part of the Bill of Rights; viz. "That the "freedom and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament."

'To which may be added, the latter part of 'the sixth Resolution of the Exceptions to be 'made in the Bill of Indemnity, Journal, vol. x. 'p. 146, wherein, after reciting the surrender 'of Charters, and the violating the rights and 'freedoms of elections, &c. it proceeds in these 'words: "And the questioning the proceedings of parliament, out of parliament, by "Declarations, Informations or otherwise, are "crimes for which some persons may be justly "excepted out of the Bill of Indemnity."

On the 11th of June 1689, the House ordered, "That the Records of the Court of "King's-bench, relating to the proceedings "against William Williams, esq. now sir William Williams, knight and baronet, late "Speaker of this House, be brought into this "House, by the Custos Brevium of the said "Court, on Thursday morning next." [x Com. Jour. p. 177.]

On the 12th of July, "The Record was "read; and the House thereupon resolved, "That the Judgment given in the Court of "King's-bench, in Easter term 2 Jac. 2d, "against William Williams, esq. Speaker of "the House of Commons in the parliament "held at Westminster 25th October 32 Car. "2d, for matter done by Order of the House of "Commons, and as Speaker thereof, is an illegal judgment, and against the freedom of "parliament.

"Resolved, That a bill be brought in to reverse the said Judgment." [Ibid. p. 215.]

'This Bill was twice read, but went no further in that session:'—A similar Bill was in the following session ordered to be brought in; and a third Bill passed the Commons in 1695, and was sent up to the House of Lords, but did not proceed there to a second reading.

It appears further, that on the 4th June 1689, "A Petition of John Topham, esq. was read; "setting forth, That he, being a Serjeant at "Arms, and attending the House in the years "1679 and 1680, when several orders were made, and directed to the petitioner, for the taking into his custody the several persons of sir Charles Neal, &c. &c. and others, for several misdemeanors by them committed in breach of the privilege of the House; and after that the Commons were dissolved, the said persons being resolved to ruin the petitioner, did, in Hilary term, the 33d or 34th 'of king Charles, sue the petitioner in the 'King's-bench in several actions of trespass, 'battery and false imprisonment, for taking 'and detaining them as aforesaid: to which 'actions the petitioner pleaded to the jurisdiction of the Court, the said several orders; 'but such his plea was over-ruled; the then 'judges ruling the petitioner to plead in chief, 'and thereupon he pleaded the orders in bar to 'the actions: notwithstanding which plea and 'orders, the then judges gave judgment 'against him, &c." [x Com. Journ. p. 164.]

"Upon the Report from the Committee of 'Privileges and Elections, to whom this petition of J. Topham was referred, the House 'Resolved, That this House doth agree with 'the Committee, That the Judgment given by 'the Court of King's-bench, Easter term '34 Car. 2, Regis, upon the plea of John Topham, at the suit of John Jay, to the jurisdiction of that Court; and also the judgments given against the said Mr. Topham, at the suit of Samuel Verdon, &c. are illegal, 'and a violation of the privileges of parliament, 'and pernicious to the rights of parliament." Whereupon it was ordered, "That sir Francis Pemberton, sir Thomas Jones, and sir Francis Wythens, do attend this House on "Wednesday morning next." [x. Com. Jour. p. 209.

"In consequence of this order, sir Francis "Pemberton and sir Thomas Jones, who had "been two of the judges of the Court of "King's-bench at the time when the judgment "was passed, were heard in their defence; "and afterwards committed to the Serjeant at "Arms, for their breach of the privileges of "this House, by giving judgment to over-rule "the plea to the jurisdiction of the Court of "King's-bench." [x. Com. Jour. p. 227.]

Your Committee think it proper to state, That sir Francis Pemberton and sir Thomas Jones, in defending themselves at the bar of this House for their conduct in over-ruling the plea to their jurisdiction in the actions of Jay *v.* Topham, &c. defended the Judgment they had given, by resting upon the nature of the pleading, and not by denying the jurisdiction or authority of this House; and sir Francis Pemberton expressly admitted, that for any

thing transacted in this House, no other Court had any jurisdiction to hear and determine it. [State Trials.]

Your Committee in the next place think it expedient to state to the House, that there are various instances in which persons committed by the House of Commons have been brought up by Habeas Corpus before the judges and courts of common law; and in these case upon its appearing by the return to the Habeas Corpus that they were committed under the Speaker's warrant, they have been invariably remanded.

3.—Having stated these instances of the manner in which the Acts and Commitments of this House have been brought into judgment in other courts, and the consequences of such proceedings; your Committee further think it proper, and in some degree connected with this subject, to advert to the course which was adopted for staying proceedings in suits brought against members and their servants, while they were protected from such suits during the sitting of parliament.

The Roll of Parliament 8 Ed. 2, affords the earliest trace which your Committee has found upon this subject. It is a writ from the king confirmatory of the privilege of being free from suits in time of parliament, and is in the following words: 'Rex mandavit Justiciariis suis ad 'assisas, jurat: &c. capiend. assignat: quod 'supersedeant Captioni corandem ubi comites 'barones et alii summonati ad Parl' regis sunt 'partes quamdiu dictum Parliamentum dura- 'verit.' [4 Co. Inst. 24.]

There have been various modes of proceeding to enforce this privilege. In Dewes's Journal, pa. 436, 31 Eliz. 1588—1589, Friday 21st of February, your Committee find the following entry: "Upon a motion made by "Mr. Harris, that divers members of this "House having writs of Nisi Prius brought "against them to be tried at the assizes in "sundry places of this realm to be holden and "kept in the circuits of this present vacation, "and that writs of Supersedeas might be "awarded in those cases in respect of the privilege of this House due and appertaining to the members of the same; it is agreed, that 'those of this House which shall have occa- 'sion to require such benefit of privilege in 'that behalf, may repair unto Mr. Speaker, 'to declare unto him the state of their cases, 'and that he, upon his discretion (if the cases 'shall so require) may direct the warrant of 'this House to the Lord Chancellor of Eng- 'land, for the awarding of such writs of Su- "persedeas accordingly."

But the House used to stay also proceedings by its own authority; sometimes by sending the Serjeant at arms to deliver the person arrested out of custody; and sometimes by letter from the Speaker to the Judges before whom the cause was to be tried. Of this latter mode of proceeding, your Committee find many instances previous to the 3rd of Charles I. Your Committee find a decision [Hodges *v.* Moor. Trin. 3 Car. I.] against the authority of such a letter, in the court of King's bench, which is reported in the marg. of Dyer's reports, p. 60, and in Latch, pp. 48 and 150. And shortly after the refusal by the Court of King's bench to notice this letter from the Speaker, the parliament was dissolved. There are, however, many other instances of this course of proceeding after the Restoration; and in the instance of lord Newburgh (23 February 1669) the House ordered the proceedings to outlawry to be staid during the sessions, and the record of the exigents to be vacated and taken off the file. [ix. Com. Jour. p. 126].

The last instance which your Committee find of such letters having been written, occurs in the lord Bulkeley's case in 1691, in which the Speaker is directed to write a letter to the prothonotary that he do not make out, and to the sheriff of the county of Pembroke that he do not execute any writ, whereby the lord Bulkeley's possessions may be disturbed, until Mr. Speaker shall have examined and reported the matter to the House, and this House take further order thereon. [x. Com. Jour. p. 537.] By the 12 and 13 W. 3. c. 3. this Privilege was curtailed; and further by Stat. 2 and 3 Ann, c. 18.—11 Geo. 2. c. 24.—10 Geo. 3. c. 50.

Lord chief justice De Grey says in Crosby's case, "If a member was arrested before the "12 and 13 W. 3. the method in Westminster "hall was to discharge him by writ of privilege "under the great seal, which was in the nature "of a Supersedeas to the proceeding. The "statute of William has now altered this, and "there is no necessity to plead the privilege of "a member of parliament." [3 Wils. Rep. 201.]

All these acts merely apply to proceedings against Members in respect of their debts and actions as individuals, and not in respect of their conduct as members of parliament; and therefore they do not in any way abridge the ancient law and privilege of parliament so far as they respect the freedom and conduct of members of parliament as such, or the protection which the House may give to persons acting under its authority.

4.—Upon the whole, it appears to your Committee, That the bringing these actions against the Speaker, and the Serjeant, for acts done in obedience to the orders of this House, is a breach of the privileges of this House.

And it appears, that in the several instances of actions commenced in breach of the privileges of this House, the House has proceeded by commitment, not only against the party, but against the solicitor and other persons concerned in bringing such actions; but your Committee think it right to observe, that the commitment of such party, solicitor, or other persons, would not necessarily stop the proceedings in such action.

That as the particular ground of action does not necessarily appear upon the writ or upon the declaration, the court before which such action is brought cannot stay the suit or give

judgment against the plaintiff, till it is informed by due course of legal proceeding that such action is brought for a thing done by order of the House.

And it therefore appears to your Committee, That even though the House should think fit to commit the solicitor or other person concerned in commencing these actions; yet it will still be expedient that the House should give leave to the Speaker, and the Serjeant, to appear to the said actions, and to plead to the same; for the purpose of bringing under the knowledge of the court, the authority under which they acted: and if the House should agree with that opinion, your Committee submits to the House, whether it would not be proper that directions should be given by this House, for defending the Speaker, and the Serjeant, against the said actions.

SECOND REPORT.

Your Committee, resuming the consideration of the principal matters reserved in their former Report, do not think it necessary to state all the various Precedents which are to be found of the exercise of the power of Commitment by the House of Commons for breaches of Privilege and Contempt in general, conceiving that to be a power too clear to be called in question, and proved, if proof were necessary by the same Precedents, which they have collected with a view to the point to which they have more immediately directed their attention, and which Precedents are subjoined to their Report. (Appendix A.)

The Cases which your Committee have selected as most directly connected with the subject referred to them, are those for Commitments for Libel, an offence which tends to excite popular misapprehension and disaffection, endangers the freedom of the debates and proceedings in parliament, and requires the most prompt interposition and restraint. The effect of immediate punishment and example is required to prevent the evils necessarily arising from this offence, which evil it is obvious would be much less effectually guarded against by the more dilatory proceedings of the ordinary courts of law; nevertheless upon some occasions the House of Commons have proceeded against persons committing such offences, by directing prosecutions, or by addressing his majesty to direct them, as appears by the Precedents collected in Appendix (B.)

From the series of precedents which your Committee find on your Journals, it will most clearly appear that the House of Commons have treated Libels as contempts; that they have frequently punished the authors and publishers of them by commitment, whether those authors and publishers were or were not members of the House; and that this power has been exercised at all times, as far back as the Journals afford an opportunity of tracing it. And your Committee cannot forbear observing, that the Precedents subjoined to their Report establish this Law of Parliament, upon the ground and evidence of an immemorial usage, as strong and satisfactory as would be held sufficient in a court of law, for the establishment of any legal right. (Appendix A.)

Your Committee also beg leave to observe, that the general power of Commitment was solemnly asserted by the House of Commons in 1675, and in their Resolutions of 1701; and was also claimed by the House of Commons, and admitted by the House of Lords in the most explicit terms, in the conference between the two Houses, in the Case of Ashby and White, in 1704; although other points arising in that case were strongly controverted between the two Houses. (Appendix C.)

Your Committee further state, that it has been recognized by legal authority, and by the most solemn decisions of the courts of law on various occasions, whenever any question upon it has been brought before them:

By eleven of the Judges—in the Case of the Aylesbury men. 2 Lord Raym. p. 1105. 3 Wils. p. 205.

By the Court of King's-Bench—in Murray's Case. 1 Wils. p. 299. 1751.

By the Court of Common Pleas—in the Case of Brass Crosby. 3 Wils. p. 203. 1771.

By the Court of Exchequer—in the Case of Oliver. 1771.

And that this power of commitment by either House of Parliament, was further recognized by the court of King's Bench in the Case of Benjamin Flower, 8 Term Reports, p. 323, who had been committed by the House of Lords. And your committee have not found the authority of a single decision to the contrary in any court whatever. (Appendix D.)

Your Committee also beg leave to state, that the Judges of the Common Law have considered Libels upon their courts or the proceedings in judicature as contempts and have frequently punished the authors and publishers of them by summary commitment. This appears from various instances stated in the Appendix (E.) which have occurred both in courts of law and equity.

Amongst the Judges who have concurred in those decisions, upon the power of parliament and of the courts of law and equity to commit for such contempts, are to be found lawyers the most distinguished for their zealous regard for the liberty of the subject, and the most upright, able and enlightened men that ever adorned the seat of justice; and the doctrines laid down by them all coincide with the opinion solemnly delivered by Lord Chief Justice De Grey in Crosby's case, that the power of commitment is "inherent in the "House of Commons from the very nature of "its institution, and that they can commit "generally for all contempts." 3 Wils. p. 198.

Under all these circumstances, Your Committee can have no hesitation in submitting their decided opinion, that the power of commitment for a libel upon the House, or upon its members, for or relative to any thing said or done therein,

is essential to the Freedom of Debate, to the Independence of Parliament, to the security of the Liberty of the Subject, and to the general preservation of the State.

This power is in truth part of the fundamental Law of Parliament; the Law of Parliament is the Law of the Land; part of the Lex Terræ, mentioned in Magna Charta, where it is declared, that, "no Freeman shall be taken or "imprisoned but by lawful judgment of his "Peers, or by the Law of the Land;" and it is as much within the meaning of these words, "the Law of the Land," as the universally acknowledge power of Commitment for contempt by the Courts of Justice in Westminster-hall, which courts have inherent in them the summary power of punishing such contempts by commitment of the offenders, without the intervention of a Jury.

Your Committee therefore are of opinion, That this power is founded on the clearest principles of expediency and right, proved by immemorial usage, recognized and sanctioned by the highest legal authorities, and analogous to the power exercised without dispute by courts of Justice; that it grew up with our constitution; that it is established and confirmed as clearly and incontrovertibly as any part of the Law of the Land, and is one of the most important safeguards of the Rights and Liberties of the People.

APPENDIX.

APPENDIX (A.)

PRECEDENTS of COMMITMENTS for Words and Publications, Speeches, &c. reflecting on the Proceedings of the House.

I.—From the beginning of the Journals, to the Commonwealth.

1559.—TROWER.—For contumelious words against the House.—To the Serjeant—i Jour. 59.

1580.—HALL, a Member.—For publishing a book against the authority of the House.—To the Tower, also fined and expelled—i Jour. 122, 124, 125, 126, 132.

1625.—MONTAGUE.—For a great contempt against the House, for publishing a book traducing persons for petitioning the House. —To the Serjeant—i Jour. 805, 806.

1628.—LEWES.—For words spoken against the last Parliament.—To the Serjeant—i Jour. 922.

1628.—ALEYN.—For a libel on last Parliament.—To the Serjeant—i Jour. 925.

1640.—PIERS.—Archdeacon of Bath, for abusing the last Parliament.—To the Serjeant—ii Jour. 63.

1640.—PRESTON.—Scandalous words against this House.—To the Gatehouse—ii Jour. 71.

N. B.—The King did not leave London till the 10th of January 1641. In the year preceding there are very many cases of strangers committed for contemptuous words spoken against the Parliament.

II. Precedents of the like nature, from the Restoration to the Revolution.

1660.—LENTHALL, a Member.—For words in the House against the preceding Parliament—To the Serjeant—viii Jour. 24.

—DRAKE.—For a pamphlet reflecting on the Parliament; and impeached.—To the Serjeant—viii Jour. 183. 185, 186.

—CRANFORD. Ditto, Ditto, viii Jour. 193.

1661.—GREGORY and WITHERS.—For pamphlets reflecting on the justice of the House. —To the Tower—viii Jour. 368.—They were prisoners in Newgate, and were committed to the Tower, and ordered into close custody.

1662—GREEN. Ditto, To the Serjeant—Ibid. 446.

1670—WOODWARD.—For a breach of Privilege against a Member, and speaking contemptuous words against this House.—To the Serjeant—ix Jour. 117.

1675.—HOWARD.—For a scandalous paper, and a breach of the Privilege of the House. —To the Tower—ix Jour. 364.

1680.—SIR ROBERT CANN, a Member.—For words in the House, reflecting on a Member, brought to the bar, and received a reprimand from the Speaker:—And for words spoken out of the House—committed and expelled.—To the Tower—ix Jour. 642.

1680.—YARINGTON and GROOME.—For a pamphlet against a Member.—To the Serjeant—ix Jour. 654, 656.

1685.—COOKE, a Member.—For words in the House.—To the Tower—ix Jour. 760.

III.—Precedents, &c. from the Revolution to the end of King William.

1689.—CHRISTOPHER SMELT.—Spreading a false and scandalous report of sir Peter Rich, a Member.—To the Serjeant, 29th July—x Jour. 244.

1690.—W. BRIGGS.—Contemptuous words and behaviour, and scandalous reflections upon the House and upon Sir Jonathan Jennings, a Member thereof.—To the Serjeant, 18th Dec.—x Jour 512.

1691.—RICHARD BALDWIN.—Printer of a pamphlet entitled, "Mercurius Reformatus," reflecting on the proceedings of the House. —To the Serjeant, 9th and 21st Nov.—x Jour. 548, 558.

1693.—WILLIAM SOADER.—Affirming and reporting that Sir Francis Massam, a Member, was a pensioner.—To the Serjeant, 9th Mar.—xi Jour. 123.

1695.—Sir GEORGE MEGGOT.—Having scandalized the House, in declaring that without being duly chosen he had friends enough in the House to bring him into the House.—To the Serjeant, 27th Dec.—xi Jour. 371.

1696.—JOHN MANLEY.—A Member, for words in the House.—To the Tower, 9th Nov. xi Jour. 581.

1696.—FRANCIS DUNCOMBE.—Having declared, before two witnesses that he had distri-

buted money to several Members of the House, and afterwards denied it before a Committee of the House.—To the Serjeant, 5th Jan.—xi Jour. 651.

1696.—JOHN RYE.—Having caused a libel, reflecting on a Member of the House, to be printed and delivered at the door.—To the Serjeant, 11th Jan.—xi Jour. 656.

1699.—JOHN HAYNES.—For being the occasion of a letter being written, reflecting upon the honour of the House, and of a Committee.—To the Serjeant, 24th Jan.—xiii Jour. 111.

1701.—THOMAS COLEPEPER.—Reflections upon the last House of Commons.—To Newgate, Feb. 7.—xiii Jour. 735.—And Attorney General ordered to prosecute him for his said crimes.

IV.—*Precedents of the like nature, from* 1701 *to* 1809.

1703.—JOHN TUTCHIN, JOHN HOW, BENJAMIN BRAGG.—As Author, Printer, and Publisher of a printed paper, entitled, "The Observator," reflecting upon the Proceedings of the House.—To the Serjeant, 3d Jan.—xiv Jour. 270.

1704.—JAMES MELLOT.—False and scandalous reflections upon two Members.—To the Serjeant, 9th Mar.—xiv Jour. 565.

—EDWARD THEOBALDS.—Scandalous reflections upon a Member.—To the Serjeant, 2d Mar.—xiv Jour. 557.

1712.—SAMUEL BUCKLEY.—As Printer of a pretended Memorial printed in the "Daily Courant," reflecting upon the Resolutions of the House.—To the Serjeant, 11th Apr.—xvii Jour. 182.

1715.—E. BERRINGTON, J. MORPHEN.—As Printer and Publisher of a pamphlet, entitled, "The Evening Post," reflecting on His Majesty and the two Houses of Parliament.—To the Serjeant, 1st July—xviii Jour. 195.

1729.—RICHARD CORBET.—Reflecting upon the Proceedings and the authority of a Committee.—To the Serjeant, 31st Mar.—xxi Jour. 307.

1733.—WILLIAM NOBLE.—Asserting that a Member received a pension for his voting in Parliament.—To the Serjeant, 19th Feb.—xxii Jour. 245.

1740.—WILLIAM COOLEY, JOHN MERES, JOHN HUGHES.—As Author, Printer, and Publisher of papers reflecting upon His Majesty's Government, and the Proceedings of both Houses of Parliament. Cooley to Newgate, 2d Dec.; Meres and Hughes, To the Serjeant, 3d December—xxiii Jour. 545, 546, 547.

1746.—SAMUEL JOHNS.—Author of a printed paper containing impudent reflections on the Proceedings of the House.—To the Serjeant, 13th May—xxv Jour. 154.

1768.—DENNIS SHADE.—Sticking up a paper to inflame the minds of the people against the House.—To the Serjeant, 9th of December—xxxii Jour. 97.

1768.—JOSEPH THORNTON.—Giving directions for sticking up the above-mentioned paper.—To Newgate, 10th Dec.

1771.—HENRY BALDWIN, THOMAS WRIGHT.—Printing the Debates, and misrepresenting the Speeches of Members.—To the Serjeant, 14th March—xxxiii Jour. 258, 259.

1774.—H. S. WOODFALL.—For publishing a Letter highly reflecting on the character of the Speaker.—To the Serjeant, 14th February—xxxiv. Jour. 456.

1805.—PETER STUART.—For printing in his Paper libellous reflections on the character and conduct of the House.—To the Serjeant, 26th April—lx Jour. 217.

APPENDIX (B.)

CASES since 1697, of PROSECUTIONS at LAW against Persons for LIBELS, &c. upon the House of Commons or any of its Members, and whether by Order or Address.

1699.—EDWARD STEPHEN.—Libel on the House, and on an individual Member.—By Order, 27th February—xiii Jour. 230.

1701.—THOMAS COLEPEPER.—A Letter to the Freeholders and Freemen of England, aspersing the House.—By Order, 7th February—xiii Jour. 735.

1702.—MR. LLOYD.—Aspersing the character of a Member.—By Order, 18th November—xiv Jour. 37.

1702.—DYER.—Misrepresenting the Proceedings of the House.—By Order, 26th February—xiv Jour. 207, 208.

1740.—JOHN MERES.—"The Daily Post."—Highly and injuriously reflecting upon an act of Government, and the Proceedings of both Houses of Parliament.—By Address, 3d Dec.—xxiii Jour. 516.

1750.—Author, Printer and Publisher.—Publishing paper, entitled, "Constitutional Queries," grossly reflecting on the House.—By Address, 22d Jan.—xxvi Jour. 9.

1751.—Authors, Printers and Publishers.—The case of the Honourable Alexander Murray.—Aspersing the Proceedings of the House, and tending to create misapprehensions of the same in the minds of the people.—By Address, 20th Nov.—xxvi Jour. 304.

1774.—Author, Printers and Publishers.—Publishing paper called the "South Briton," reflecting on the House.—By Order, 16th February—xxxiv Jour. 464.

1788.—Authors, Printers and Publishers.—"The Morning Herald, The Gazetteer, and New Daily Advertiser."—Grossly reflecting on the House and the Members, and tending to prejudice the defence of a person answering at the Bar.—By Address, 8th February—xliii Jour. 213.

1788.—Authors, Printers and Publishers.—"Review of the Principal Charges against Warren Hastings," &c.—Highly disrespectful to His Majesty, and the House; and indecent Observations reflecting on the motives which induced the House to prefer the

Impeachment against Warren Hastings.—By Address, 15th February—xliii Jour. 232.

1789.—Printer and Publisher—"The World"—Containing matter of scandalous and libellous nature, reflecting on the Proceedings of the House—By Address, 16th June—xliv Jour. 463.

1795.—JOHN REEVES.—As author of a pamphlet, entitled, "Thoughts on the English Government;" which was adjudged by the House to be a malicious, scandalous, and seditious libel, containing matter tending to create jealousies and divisions among His Majesty's loyal subjects; to alienate their affections from our present happy form of Government in King, Lords, and Commons, and to subvert the true principles of our free Constitution; and to be a high breach of the Privileges of the House.—By Address, 15th December—li Jour. 119, 235.

APPENDIX (C.)

CLAIM and RECOGNITION of the PRIVILEGES of PARLIAMENT, and the Power of COMMITMENT.

11 Rich. 2. Rot. Parl. vol. iii. 244.

En yeest parlement, toutz les Seign'rs si bien espiritels come temporels alors presentz clamerent come lour libertee & franchise, q'les grosses matires moevez en cest parlement, & a movers en autres parlementz en temps a venir, tochantz Pieres de la Terre, serroient demesnez, ajuggez, & discus par le cours de parlement, & nemye par la Loy Civile, ne par la commune Ley de la Terre, usez en autres plus bas Courtes du Roialme: quell claym, liberte, & franchise le Roy lour benignement alloua & ottroia en plein parlement.

32 Hen. 6. Rot. Parl. vol. v. p. 239.—Thorp's Case.

The seid Lordes Spirituelx and Temporelx

parlement, but egally after the cours of lawe to mynystre justice, and to have knowlegge what the lawe will wey in that behalve, opened and declared to the justices the premissez, and axed of them whether the seid Thomas ought to be delivered from prison, by force and vertue of the privelegge of parlement or noo. To the which question the chefe justcez, in the name of all the justicez, after sadde communication and mature deliberation hadde among theem, aunswered and said, that they ought not to aunswere to that question, for it hath not be used afore tyme that the justicez should in eny wyse determine the privelegge of this high court of parlement.

4 Hen. 8. The original Roll in the parliament office.—Stroude's Case.

This is the act conc'nyng Richard Stroude for matt's resoned in the p'liament.—The act begins by reciting the petition of Rd. St'oude, and after that recital proceeds thus:

HENRY R. Soit baill aux Senio's.

And on that be it inacted by the seide autorite, That al' suts, accusementis, condempnacons, execucions, fynys, am'ciamentis, punyshements, correccons, grev'ncez, charges, & impositions putt or hadde or her aft' to be put or hadde unto or apon the seide Richard, and to every other of the p'son or p'sons afore specyfyed that nowe be of this p'sent p'liament or that of any p'liament her after shall be for any bylle speyking, reasonying or declaryng off any mat' or maters conc'nying the p'liament to be comenced and treated off, be utt'ly voyde & of none effecte, and on that be hyt inacted by the seid autorite, That if the seid Richard Strode or any of all the seide other p'son or persons her'after be vexyd, trobeled or other wyse charged for any causes as is aforesaide, that then he or they & every of them so vexed or troubled off and for the same, have acc'on upon the case agaynste ev'ry such p'son or p'sons so vexying or trobelyng any cot'rie to this ordin'ns & p'vision, in the whych acc'on the p'tie greyvd shall be recov' treby 'll damages & costis & that no p'teccon, essoine nor wager of lawe yn the seide acc'on in anywise be admytted nor receyvid.—A Ce'st Bill Ley Seinos ss Assent.

1606.—Com. Journ. vol. i. p. 349.

The Commons tell the Lords "that they doubt not, but the Commons House is a Court, and a Court of Record."

1620.—Com. Journ. vol. i. p. 545.

In a Report of Precedents by sir Edward Coke, it is agreed, "The House of Commons, alone, hath a power of punishment, and that judicial."—Hall's Case 23 Eliz., and Long's Case 5 Eliz. cited.

1675, June 4th.—Com. Journ. vol. ix. p. 354.

In the matter of the appellant jurisdiction of the House of Lords, the Commons assert their right "to punish by imprisonment a Commoner that is guilty of violating their privileges, that being according to the known laws and custom of Parliament and the right of their privileges declared by the king's royal predecessors in former Parliaments and by himself in this;" and "that neither the Great Charter, the Petition of Right, nor any other laws, do take away the law and custom of Parliament, or of either House of Parliament."

1701.—Vol. xiii. p. 767.—Kentish Petition.

Resolved, That it is the opinion of this committee, that to assert the House of Commons have no power of Commitment, but of their own members, tends to the subversion of the constitution of the House of Commons.

Resolved, That it is the opinion of this committee, That to print and publish any books or libels reflecting upon the proceedings of the

House of Commons, or any member thereof, for or relating to his service therein, is a high violation of the rights and privileges of the House of Commons.

Ashby and White.

Conferences between the two Houses.

The Commons at the second conference with the Lords re assert their Resolution of 1701:

"For it is the ancient and undoubted right of "the House of Commons to commit for breach "of privilege; and the instances of their committing persons (not members of the House) for "breach of privilege, and that to any her "majesty's prisons, are ancient, so many, and "so well known to your lordships, that the "Commons think it needless to produce them." —Lords Journ. vol. xvii. p. 709.

Lords Journ. vol. xvii. p. 714.

The Lords in answer say,—"The Lords "never disputed the Commons power of committing for breach of privilege, as well persons who are not of the House of Commons "as those who are," &c.

APPENDIX (D.)

RECOGNITION of the Law and Privilege Parliament, and of the Power of the House of Commons to commit for Contempt, by Legal Authorities, and by the Decision of Courts of Justice.

Coke, 4 Inst. fo. 15.

Lord Coke observes, upon the claim of the Lords, in 11 of Rich. 2. sanctioned by the king (as stated in the first paragraph of Appendix C.) under the head of 'Lex et Consuetudo 'Parliamenti;' as followeth—"And as every "court of justice hath laws and customs for its "direction, some by the common law, some by "the civil law and common law, some by peculiar laws and customs, &c. so the high "court of Parliament—suis proprijs legibus et "consuetudinibus subsistit—It is lex et consuetudo Parliamenti, that all weighty matters "in any Parliament, moved concerning the "Peers of the realm, or Commons in Parliament assembled, ought to be determined, "adjudged, and discussed by the course of "Parliament, and not by civil law, nor yet by "the common laws of this realm used in inferior courts; which was so declared to be— "secundum legem et consuetudinem Parliamenti—concerning the Peers of this realm, "by the King, and all the Lords spiritual and "temporal: And the like, *pari ratione*, is for "the Commons for any thing moved or done "in the House of Commons."

Coke, 4 Inst. fo. 50.

And on another occasion, in treating of the laws, customs, liberties and privileges of the court of Parliament, which he saith, "hath "been much desired, and are the very heartstrings of the commonwealth:" Lord Coke says,—"All the justices of England and "barons of the Exchequer, are assistants to the "Lords to inform them of the common law, "and thereunto are called severally by writ: "neither doth it belong to them (as hath been "said) to judge of any law, custom, or privilege of parliament: And to say the truth, "the laws, customs, liberties, and privileges of "parliament, are better to be learned out of the "rolls of parliament, and other records, and by "precedents and continued experience, than "can be expressed by any one man's pen."

26 Car. 2.—1674.—State Trials, Soame's Case.

Lord Chief Justice North said,—"I can see "no other way to avoid consequences derogatory to the honour of the parliament, but to "reject the action; and all others that shall "relate either to the proceedings or privilege "of parliament, as our predecessors have "done."

"For if we should admit general remedies in "matters relating to the parliament, we must "set bounds how far they shall go, which is a "dangerous province; for if we err, privilege "of parliament will be invaded, which we ought "not in any way to endamage."

1675.—State Trials,—Earl of Shaftesbury's Case.*

In the case of the earl of Shaftesbury, who was committed by the House of Lords, "for high contempts committed against the "House," on being brought up to the King's-bench on the return of an Habeas Corpus, the court unanimously determined against entertaining the case; when Rainsford, Chief-Justice, said, "This court has no jurisdiction "of the cause, and therefore the form of the "return is not considerable. We ought not to "extend our jurisdiction beyond its limits, and "the actions of our ancestors will not warrant "such an attempt.

"The consequence would be very mischievous, if this court should deliver a member of 'the House of Peers and Commons who are "committed, for thereby the business of parliament may be retarded; for it may be the "commitment was for evil behaviour, or indecent reflections on other members, to the disturbance of the affairs of parliament.

"The commitment in this case is not for safe "custody; but he is in execution of the judgment given by the Lords for contempt; and "therefore, if he should be bailed, he would "be delivered out of execution; for a contempt "*in facie curiæ* there is no other judgment or "execution.

"This court has no jurisdiction, and therefore he ought to be remanded. I deliver no "opinion whether it would be otherwise in case "of a prerogative."

1751, Feb. 7th.—1 Wilson, p. 200.—Murray's Case.

When he was brought up to the King's-

* See vol. 6, p. 1270 of this Collection.

bench by a Habeas Corpus, and the court unanimously refused to discharge him, Mr. Justice Wright said, "It appears upon the "return of this Habeas Corpus, that Mr. "Murray is committed to Newgate by the "House of Commons, for an high and dangerous contempt of the privileges of that "House; and it is now insisted on at the bar, "that this is a bailable case, within the meaning of the Habeas Corpus act.

"To this I answer, that it has been determined by all the judges to the contrary; that "it could never be the intent of that statute to "give a judge at his chamber, or this court, "power to judge of the privileges of the House "of Commons.

"The House of Commons is undoubtedly an "high court; and it is agreed on all hands "that they have power to judge of their own "privileges; it need not appear to us what the "contempt was for; if it did appear, we could "not judge thereof.

"Lord Shaftesbury was committed for a "contempt of the House; and being brought "here by an Habeas Corpus, the court remanded him; and no case has been cited "wherever this court interposed.

"The House of Commons is superior to this "court in this particular; this court cannot "admit to bail a person committed for a contempt in any other court in Westminster-"hall."

Dennison, Justice.—"This court has no "jurisdiction in the present case. We granted "the Habeas Corpus, not knowing what the "commitment was; but now it appears to be "for a contempt of the privileges of the House "of Commons: what those privileges (of either House) are, we do not know; nor need "they tell us what the contempt was, because "we cannot judge of it; for I must call this "court inferior to the House of Commons with "respect to judging of their privileges, and "contempts against them. I give my judgment "so suddenly, because I think it a clear case, "and requires no time for consideration."

Foster, Justice.—"The law of Parliament "is part of the law of the land; and there "would be an end of all law, if the House of "Commons could not commit for a contempt. "All courts of record (even the lowest) may "commit for a contempt; and lord Holt, "though he differed with the other judges, yet "agreed the House might commit for a contempt in the face of the House. As for the "prisoner's illness, we can take no notice of it, "having no power at all in this case."

The prisoner was remanded.

1771.—3 Wils. 188.—Crosby's Case.*

In the year 1771, Brass Crosby, esq. the Lord Mayor, who was committed to the Tower by order of this House, under the Speaker's Warrant, on 25th March 1771, was brought up by Habeas Corpus before the Court of Common Pleas in Easter Term. The question was fully argued, and, by the unanimous judgment of the Court, he was remanded.

The Lord Chief Justice de Grey, in giving the opinion of the Court, stated, "That this "power (viz. of commitment) must be inherent "in the House of Commons, from the very "nature of its institution; and therefore is part "of the law of the land. They certainly always could commit in many cases; in matter of elections, they can commit sheriffs, "mayors, officers, witnesses, &c. and it is now "agreed, that they can commit generally for "all contempts. All contempts are either punishable in the Court contemned, or in some "higher court. Now the parliament has no "superior court; therefore the contempt "against either House, can only be punished "by themselves."

"The Stat. of James 1. cap. 13, sufficiently "proves that they have power to punish it, in "these words: 'Provided always, that this "Act or any thing therein contained shall not "extend to the diminishing of any punishment "to be hereafter by censure in parliament inflicted upon any person which hereafter shall "make or procure to be made any such arrest "as aforesaid;' so that it is most clear that the "legislature have recognized this power of the "House of Commons. In the case of the "Aylesbury men, the counsel admitted, Lord "Chief Justice Holt owned, and the House of "Lords acknowledged, that the House of "Commons had power to commit for contempt or breach of privilege. Indeed, it "seems they must have power to commit for "any crime. When the House of Commons "adjudge any thing to be a contempt or a "breach of privilege, their adjudication is a "conviction, and their commitment in consequence an execution;† and no Court can "discharge or bail a person that is in execution by the judgment of any other Court."

And he concluded his judgment in these words:

"I am perfectly satisfied that if lord Holt "himself were to have determined it, the Lord "Mayor would have been remanded. In the "case of Mr. Murray, the judges could not "hesitate concerning the contempt by a man "who refused to receive his sentence in a proper posture; all the judges agreed, that he "must be remanded, because he was committed by a Court having competent jurisdiction. Courts of justice have no cogni-

* See this Case hereafter in this Collection. It seems rather surprising that notice of the earl of Devonshire's Case (in this Collection, A. D. 1687) was not taken either in Wilkes's Case, or Crosby's Case.

† The Commitment in Rudyard's Case, 2 Vent. 22, was a Commitment in execution, and therefore it was necessary in that case to state the evidence, per lord Camden in Wilkes's Habeas Corpus Case, A. D. 1763, in this Collection.

"zance of the acts of the Houses of Parlia-"ment, because they belong *ad aliud examen.* "I have the most perfect satisfaction in my "own mind in that determination. Sir Mar-"tin Wright, who felt a generous and distin-"guished warmth for the liberty of the sub-"ject; Mr. Justice Denison, who was so free "from connections and ambition of every kind; "and Mr. Justice Foster, who may be truly "called the Magna Charta of liberty, of per-"sons as well as fortune; all these revered "judges concurred in this point. I am there-"fore clearly and with full satisfaction of opi-"nion, that the Lord Mayor must be re-"manded."

Gould, Just.—"I entirely concur in opinion "with my Lord Chief Justice, that this Court "hath no cognizance of contempt or breach of "privilege of the House of Commons; they "are the only judges of their own privileges; "and that they may be properly called judges, "appears in 4 Inst. 47, where my lord Coke "says, an alien cannot be elected of the par-"liament, because such a person can hold no "place of judicature. Much stress has been "laid upon an objection, that the Warrant of "the Speaker is not conformable to the order "of the House; and yet no such thing ap-"pears upon the return, as has been pretended. "The Order says, that the Lord Mayor shall "be taken into the custody of the serjeant or "his deputy; it does not say, by the serjeant "or his deputy. This Court cannot know the "nature and power of the proceedings of the "House of Commons: it is founded on a dif-"ferent law: the 'lex et consuetudo parlia-"menti,' is known to parliament men only. "Trewynniard's Case, Dier, 59, 60. When "matters of privilege come incidentally before "the Court, it is obliged to determine them, to "prevent a failure of justice. It is true this "court did, in the instance alluded to by the "counsel at the bar, [Wilkes's Case, 2 Wils. "151.] determine upon the privilege of parlia-"ment in the case of a Libel; but then that "privilege was promulged and known; it "existed in records and law books, and was al-"lowed by parliament itself. But even in that "case, we now know that we were mistaken; "for the House of Commons have since deter-"mined, that privilege does not extend to mat-"ters of Libel. The cases produced respect-"ing the High Commission Court, &c. are "not to the present purpose, because those "courts had not a legal authority. The reso-"lution of the House of Commons is an adju-"dication, and every court must judge of its "own contempts."

Blackstone, Justice.—"I concur in opinion, "that we cannot discharge the Lord Mayor. "The present case is of great importance, be-"cause the liberty of the subject is materially "concerned. The House of Commons is a "supreme court, and they are judges of their "own privileges and contempts, more espe-"cially with respect to their own members.—"Here is a member committed in execution "by the judgment of his own house.' All "courts, by which I mean to include the two "Houses of parliament and the courts of West-"minster-Hall, can have no control in matters "of contempt.* The sole adjudication of con-"tempts, and the punishment thereof, in any "manner, belongs exclusively, and without "interfering, to each respective court. In-"finite confusion and disorder would follow, if "courts could by writ of Habeas Corpus exa-"mine and determine the contempts of others.†

* Here is a laxity of expression which might not have been expected from the learned author of the 'Commentaries.' The meaning seems to be, that the two Houses of Parliament and the courts of Westminster-hall, are not subject to control in matters of contempt, but that other courts are subject to control in such matters. See Clarke's case, Tremaine's Pleas of the Crown, 442. 2 Levinz. 200. 1 Vent. 302. 327. 3 Keb. 764. 799. 811. Dr. Bentley's case 8 Mod. 148. Fortescue 202. 2 Lord Raym. 1334. Strange 557. 2 Kyd on Corporations 79. In Murray's case Mr. Justice Foster says, that, "all courts of Record, even the lowest," [as the Court of Piepoudre we may suppose] "have power to imprison for contempts." And as to contempts 'in facie curiæ,' which obstruct the proceedings of the court, it seems that they must of necessity have power to remove the obstruction; to abate the nuisance, and so is Moor 247. 'Si un dit al Judge, Magistrate, ou auter officer paroles que luy disable defaire son office ou fait auter contempt, il peut luy imprison." So too Dean's case, Croke, Eliz. 689. "A man may be imprisoned for a contempt done in court but not for a contempt out of court."

So, too, is Sparkes, and others, v. Martin, 1 Vent. 1. "The Court of Admiralty may punish one that resists the process of their court, and may fine and imprison for a contempt to their court acted in the face of it."

So, too, sir George Newman says, (Proceedings and Debates of the House of Commons in 1621, p. 109.) "The Judges have oft-times cause to commit for contempt in the Court."

If there be any principles of law whereby the sufficiency of a commitment for contempt may be judged of in the case of one court, it is not very apparent why the same principles should not be applied to the judging of the sufficiency of commitments for contempts by any other court. That courts of Westminster-hall will take cognisance of each others commitments for contempts, see the argument of Chief Justice Vaughan in Bushell's case in this Collection, vol. 6, p. 999, and the cases of Astwick, Apsley, and Milton, cited in that Case, pp. 1004, 1022.

† Lord Mansfield, in the case of Hassells and another against Simpson (93 Dougl. Rep. in note 2d edit.), speaking of Mr. Justice Blackstone, warned his hearers against implicit reliance on great names. It would have been more satisfactory if Mr. Justice Blackstone

"This power to commit results from the first "principles of justice; for if they have power "to decide, they ought to have power to punish. No other court shall scan the judgment of a superior court, or the principal "seat of justice. As I said before, it would

had specified some particulars of the 'infinite 'confusion and disorder' which, he lays it down 'would follow, if courts could by writ of 'Habeas Corpus examine and determine the 'contempts of others;' and had also given some proof that this 'infinite confusion and disorder' must follow, together with some account of the way in which it would follow. For there appears not to be any absurdity in supposing that the examinability of commitments for contempts, might tend to render those who should order such commitments more circumspect and cautious in the exercise of that power than otherwise they might be; that it would tend to render their respective courses of proceedings less capricious, more consistent, and more uniform, than they otherwise might be; that in consequence of these tendencies it might probably by degrees produce an intelligible definite practical code, respecting contempts and the punishments for them; that if these consequences should ensue, 'confusion and disorder' would be prevented rather than promoted; and that, if from the operation of competitions for pre-eminence, of erroneous notions of dignity, or of any other cause, 'confusion and disorder' should in fact arise, such 'confusion and disorder' probably would not be infinite, but might be speedily, easily and completely suppressed by a legislative definition of at least the limits of contempts, and of the punishments applicable to them. Predictions of 'confusion, disorder,' and other mischief to ensue from interruption of the exercise of irregular powers, have not always been verified. When the powers of issuing general warrants and warrants for seizure of papers, which had been sanctioned by numerous precedents, were questioned (See the cases in this Collection of Leach v. Money, and others, A. D. 1765, and of Entick v. Carrington, and others, in the same year), many such predictions were made, but since the exercise of those powers has been annulled, I have not met with any complaint (except indeed one which occurs in sir John Hawkins's life of Dr. Johnson, but which is too frivolous to deserve notice; it relates to the detention of artizans who attempt to emigrate) that this annulment has produced a single bad consequence. In like manner while the judges claimed the right of deciding two questions of fact (for such they are), viz. those of 'intention' and of 'tendency' in criminal prosecutions for libels, which claim was supported by the precedents of Clarke's case, before lord Raymond, of Franklin's case before the same judge (in this Collection, A. D. 1731,) and of numerous other cases, it was repeatedly stated by magistrates of transcendant talents, learning, experience and authority (such, for instances, as lord Mansfield, lord Thurlow, lord Kenyon, and Mr. Justice Buller,) that infinite disorder and confusion would ensue, if juries had the right to determine in such prosecutions any other matters, than the mere fact of publication, and the application of the innuendoes. The declaratory statute 32 Geo. 3, c. 60, has fully established the right of juries in such cases to 'give a general verdict of Guilty or Not Guilty 'upon the whole matter put to issue on the indictment or information.' This statute originated in the House of Commons, where the motion for the bill was made by Mr. Fox and seconded by Mr. Erskine. Most undoubtedly the success of the bill is in a very high degree to be attributed to the inflexible constancy and unremitted zeal, with which the latter of these two great men had exerted the vast powers of his eloquence in maintenance of those rights of juries, which the statute asserts. And a most striking illustration it is of the fallibility of such predictions, as that of Mr. Justice Blackstone in Crosby's case, that whereas, previously to the passing of the act of 32 Geo. 3, c. 60, disagreements and altercations between the court and the counsel, and the jury, took place in a great proportion of the trials which were had on criminal prosecutions for libel, and notwithstanding it had been declared as we have seen by magistrates of the greatest learning, that the establishment of such a system would produce infinite confusion and disorder; nevertheless so it is, that since the indisputable establishment of this system, no confusion whatever has occurred, the functions of judges and juries have been executed within their respective limits; without any competition for jurisdiction; to the advancement of justice, and to the dignity of its administration. The change which has been operated by the statute cannot be more perspicuously stated, nor can its beneficial effects be more happily illustrated than in the following passage, which I extract from a note on the 'subject of the trial of the dean of St. 'Asaph' in the 'Speeches of the honourable 'Thomas Erskine' (now lord Erskine), &c. vol. 1, p. 382.

"The venerable and learned Chief Justice [lord Mansfield] undoubtedly established by his argument, that the doctrine so soon afterwards condemned by the unanimous sense of the Legislature when it passed the Libel Act, did not originate with himself; and that he only pronounced the law as he found it, established by a train of modern decisions. But, supported as we now are by this judgment of Parliament, we must venture humbly to differ from so truly great an authority. The Libel Bill does not confer upon the Jury any jurisdiction over the law, inconsistent with the general principle of the constitution: but considering that the question of libel or no libel is frequently a question of fact rather than of law, and in many cases of fact and law almost inseparably blended together; it directs the Judge, as in other cases, to deliver his opinion to the

"occasion the utmost confusion, if every court "of this Hall should have power to examine "the commitments of the other courts of the "Hall for contempts; so that the judgment "and commitment of each respective court as "to contempts, must be final and without con- "trol. It is a confidence that may, with per- "fect safety and security, be reposed in the "judges and the Houses of Parliament.* The "legislature since the revolution (see 9 and 10 "W. 3, c. 15,) have created many new con- "tempts. The objections which are brought, "of abusive consequences, prove too much, be- "cause they are applicable to all courts of "dernier resort: 'et ab abusu ad usum non "'valent consequentia,' is a maxim of law as "well as of logic. General convenience must "always outweigh partial inconvenience; even

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Jury upon the whole matter, including of course the question of libel or no libel, leaving them at the same time to found their verdicts upon such whole matter, so brought before them as in all other criminal cases. The best answer to the apprehensions of the great and eminent Chief Justice, regarding this course of proceeding, as then contended for by Mr. Erskine, and now established by the Libel Act, is the experience of seventeen years since that act passed.

"Before the statute it was not difficult for the most abandoned and profligate libeller, guilty even of the most malignant slander upon private men, to connect his cause with the great privileges of the Jury, to protect innocence. Upon the Judge directing the Jury, according to the old system, to find a verdict of Guilty upon the fact of publication; shutting out altogether from their consideration the quality of the matter published, ingenious counsel used to seize that occasion to shelter a guilty individual under the mask of supporting great public right; and Juries, to show that they were not implicitly bound to find verdicts of Guilty upon such evidence alone, were too successfully incited to find improper verdicts of acquittal: but since the passing of the Libel Act, when the whole matter has been brought under their consideration; when the quality of the matter published has been exposed when criminal, and defended when just or innocent, Juries have listened to the Judge with attention and reverence, without being bound in their consciences (except in matters of abstract law), to follow his opinion, and instead of that uncertainty anticipated by lord Mansfield, the administration of justice has been in general most satisfactory, and the public authority been vindicated against unjust attacks, with much greater security and more supported by public opinion, than when Juries were instruments in the hands of the fixed magistrates; whilst at the same time public liberty has been secured by leaving the whole matter in all public libels to the judgment and consideration of the people. This reformed state of the law, as it regards the liberty of the press, is now so universally acknowledged, that the highest magistrates have declared in the House of Lords, that no new laws are necessary either to support the state, or protect the people."

Sir Edward Coke (Proceedings and Debates of the House of Commons, in 1620 and 1621, vol. 2, p. 109) predicted that "if the mittimus of the Privy Council must contain the cause of commitment, it would hinder the finding out of divers mischiefs both of state and commonwealth."

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* It seems generally to happen, that persons, who either possess or lay claim to power of any kind, are strongly disposed to be of opinion that they may be safely entrusted with such power. Thus in our own history, to omit the various instances of claims on the part of the crown to exorbitant power, and to confine ourselves to a few judicial cases, it is not unreasonable to believe that privy-counsellors of old thought they might be safely intrusted with the vast power which they so mischievously and oppressively assumed in the ancient 'Court of Requests;' that the council in James the first's time thought they might be safely intrusted with the power to summon before them members of the House of Commons, to command them to burn the notes, arguments and collections which they had made for preparing themselves to a conference with the Lords upon a most momentous constitutional question, and afterwards to imprison and otherwise to punish them for no other cause but that they had been assigned by the House of Commons to be agents in such conference (see Hargrave's Preface to lord Hale's Treatise on the Jurisdiction of the Lords House or parliament, p. ix. Note.); that lord Bacon thought he might safely be intrusted with the power by arbitrary injunctions to protect debtors from payment of their just debts (see Proceedings and Debates of the House of Commons in 1620 and 1621, &c. Oxford 1766 vol. 1. p. 157 et seq.); that archbishop Laud and his coadjutors thought they might safely be intrusted with the arbitrary power which they so cruelly exercised in the Courts of Star Chamber and High Commission; that Chief Justice Kelyng and other judges thought they might be safely intrusted with the arbitrary power of fining and imprisoning jurors (as to which see the Cases of Penn and Mead, and of Bushell, *ante*, vol. 6, p. 951, 999, and the notes to those cases;) and that Jefferies, Crew, Cartwright, Wright, Herbert, and Jenner, thought they might be safely intrusted with the power which as 'Commissioners of Ecclesiastical Affairs' they employed for the purpose of subverting the protestant religion. It is to be regretted, that the learned judge did not adduce any proofs of his assertion, that, "this confidence may with perfect safety and security be reposed in the Judges and the Houses of Parliament;" for indeed the truth of the assertion is by no means self-evident. It is sufficiently obvious that the

"supposing (which in my conscience, I am "far from supposing) that in the present case "the House has abused its power. I know, "and am sure that the House of Commons "are both able and well inclined to do justice. "How preposterous is the present murmur

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cases in which discretionary uncontrouled power is most likely to be abused, and in which consequently it is most dangerous, are those in which the interests or the personal feelings of the party exercising such power are concerned. Now, if it be so indisputable, as the learned judge appears to have thought it was, that each of the Houses of Parliament and that courts may safely be intrusted with a discretionary uncontrouled power of imprisonment for whatever it may please them respectively to adjudge to be a contempt towards themselves, in most of which cases their personal feelings at least will be concerned; it may not perhaps be found very easy to shew why they might not *a fortiori* be still more safely intrusted with the like discretionary uncontrouled power of imprisonment in other cases, in which their interests and their feelings are not concerned. But I apprehend the learned judge would scarcely have maintained that in such other cases they might be safely intrusted with discretionary uncontrouled power of imprisonment: seeing that, in the first volume of his Commentaries, p. 135, when illustrating "the great importance to the public of the preservation of personal liberty," he says, and with great truth, that "If once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, there would soon be an end of all other rights and immunities." Yet indeed it is very easily discoverable that if a vote or an adjudication of contempt by a House of Parliament or a court be unexaminable elsewhere, and if the power of imprisonment upon such vote or adjudication be discretionary and uncontrouled; each House of Parliament and each court possesses a discretionary and uncontrouled power of imprisonment for every action and every omission of a man's life; nay, for the bare unproved imputation of any action or omission; nay even without the imputation of any specified act or omission. "If" as Mr. Hargrave (1 Jurid. Arg. and Coll. 16) very forcibly states it, "the doctrine of contempts be thus wide; if the House of Lords or Commons or the Court of Chancery, or any of the great Courts of Westminster Hall, may construe what they please into contempts, and may under that denomination without trial by jury convict all persons of crime, and have also an indefinite power of punishing by fine and imprisonment, and if all this when done be thus unappealable and thus unexaminable, what is there but their own wisdom and moderation, and the danger of abusing so arbitrary a power, to prevent the House of Lords or the House of Commons, or any court of Westminster Hall, under shelter of the law of contempts, from practising all the monstrous tyranny which first disgraced and at length overwhelmed the Star-Chamber?"

Indeed the House of Commons has often manifested a very laudable jealousy of illegal commitments by others. While the statute, 16 Car. 1, c. 10, was in its passage, that House resolved, (see lord Camden's judgment in the Case of Entick against Carrington and others, A. D. 1765, in this Collection), "that the body of the Lords of the Council, nor any one of them in particular, as a privy counsellor, has any power to imprison any freeborn subject, except in such cases as they are authorized by the statutes of the realm." "It is all one," says lord Hale (Jurisdiction of the Lords House or Parliament, p. 109), "to make a law, and to have an authoritative power to judge according to that which the judge thinks fit should be law, though in truth there be no law extant for it.

How far the conclusion against the truth of the learned judge's *dictum*, to which the preceding considerations appear to lead, has been fortified by experience I cannot undertake to affirm, because I have not been able to examine so extensively as that would require into the precedents upon the subject: but if the exercise of this discretionary power shall be found to have been at all analogous to the exercise of other sorts of uncontrouled discretionary power as recorded in our history, the precedents will certainly not corroborate sir William Blackstone's gratuitous assertion. I will mention a few cases. And first an action of trespass brought in parliament in 18 Ed. 1.

"In an action of trespass brought in parliament in 18 Ed. 1. (as was then the practice) by the king, the king's steward (of his household) Peter de Chanet, the king's marshal (of his household) Walter de Fanecourt, the earl of Cornwall and the abbot of Westminster against the prior of the Holy Trinity in London, and Bogo de Clare, (or, as the record expresses it, in which the two latter persons were attached to answer the five former) for that the said prior served an ecclesiastical citation upon the earl of Cornwall as he was going through Westminster Hall to attend the parliament according to the writ of summons he had received, by which citation the earl was commanded to appear on such a day at such a place before the archbishop of Canterbury, and the said Bogo de Clare procured the said prior to serve the said citation, which serving the said citation is laid to have been in contempt of the lord the king, and to his disgrace of 10,000*l.*; also to have been to the prejudice of the ecclesiastical franchise of the abbot of Westminster granted him by the court of Rome, by which Westminster Hall, as being within the jurisdiction of the abbot of Westminster, is exempted from all jurisdiction episcopal or archiepiscopal, and to the abbot's damage thereby of 1,000*l.* also to have been to the prejudice of the office of the steward and marshal (of the king's household),

"and complaint! The House of Commons "have this power only in common with all the "courts of Westminster-Hall: and if any per- "sons may be safely trusted with this power, "they must surely be the Commons, who are "chosen by the people; for their privileges

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to whose office alone it appertaineth, and to no other, to serve all summonses and attachments within the king's palace; and also to have been to the damage of the earl of Cornwall of 5,000*l.* The prior and Bogo de Clare confess the fact, and put themselves upon the king's mercy. And judgment is given against them that they be committed to the Tower during the king's pleasure. Afterwards Bogo de Clare is fined to the king in 2,000 marks, (a great sum now, in those days an immense one) and agrees to pay 1,000*l.* damages to the earl of Cornwall for the trespass committed against him, which the earl of Cornwall at the instance of the bishops of Ely and Durham, and other great men, afterwards remitted excepting 100*l.*"

Another early case is that of John de Northampton referred to in the Appendix (E.) (Analogy) to the Report before us. This man was an attorney of the Court of King's Bench, (to which circumstance attention should be given in considering the case as an authority), and having written of the judges of that court, that they had independence enough, not to be swayed by royal commands, he was adjudged in so doing to have been guilty of a contempt of the court, was committed into custody, and as it seems was obliged to find mainperners. Lord Coke thus relates the case, with some confusion of John and Robert.

Mic. 18 E. 3, coram rege Rot. 151. Libellum.

John de Northampton, an attorney of the King's-Bench, wrote a letter to John Ferrers one of the king's counsel, that neither sir Wm. Scot chief justice, nor his fellows the kings justices, nor their clerks, any great thing would do by the commandment of our lord the king, nor of queen Philip, in that place, more then of any other of the realm; which said John being called, confessed the said letter by him to be written with his own proper hand. 'Judicium 'Curiæ. Et quia prædictus Johannes cognovit 'dictam literam per se scriptam Roberto de 'Ferrers, qui est de concilio regis, quæ litera 'continet in se nullam veritatem: prætextu 'cujus dominus rex erga curiam et justiciarios 'suos hic in casu habere posset indignationem, 'quod esset scandalum justic' et curiæ. 'Ideo dictus Johannes committitur maresc' et 'postea invenit 6 manucaptores pro bono gestu.'

In 1621 the House of Commons proceeded against one Edward Floyde for speaking contemptuous words against Elizabeth daughter of king James the first, and her husband the Elector Palatine. It is, perhaps, not quite clear whether the House of Commons did or did not consider these words alledged to have been spoken against the prince and princess to be a breach of their own privileges, or a contempt toward themselves, but the harsh sentence which they passed upon Floyde may be seen at vol. 2, p. 1153 of this Collection, in a brief report of his case, which appears to have been throughout a tissue of irregularity, usurpation, and oppression. In illustration of the topic now under consideration I will subjoin, at the end of this Case, some passages respecting Floyd which occurred in the House of Commons, together with lord Oxford's reprobation of the proceedings in the case.

In Michell's Case, 1621, (see a brief report of it, vol. 2, p. 1131, of this Collection,) the House of Commons took upon them to order:

"That he should be held unworthy to be a justice of the peace; and be declared disable and unworthy to be of that commission, or any other whatsoever. To be sent at two of the clock in the afternoon to the Tower through the street on foot."—He was pardoned to have any farther punishment, in respect of his father's worth, who was secretary to Walsingham, and suffered much for religion in queen Mary's time, and was then held to be a very honest, religious gentleman: And so Michell was called to the bar to hear his sentence on his knee.—After sentence passed he desired to be heard, but it was denied.

Mr. Chancellor of the Dutchy. That he might be heard after judgment, so as it be an humble suit; or any thing not concerning the sentence given by the House.

Sir Edward Cooke. That he ought not to be heard after judgment: And so it was agreed by the Vote of the whole House.

In the same year the House of Lords sentenced John Blount (this, Mr. Hargrave, Juridical Arguments and Collections, 197, tells us the first privilege precedent he finds for imprisonment for a term certain by the Lords) to the pillory, and to imprisonment and labour in Bridewell for life. His offence was counterfeiting a peer's protection. In 1623, the Lords sentenced Morley for a libel on the Lord-Keeper (this, Mr. Hargrave, *ub. sup.* tells us is the first privilege precedent of a fine by the Lords) to a fine of 1,000*l.* and the pillory. Two other cases I will report in the words of Mr. Hargrave, (Preface to lord Hale's Tract on the Jurisdiction of the Lords' House or Parliament.)

"Another case, in which judicature as between the two Houses became the subject of consideration, occurred soon after the impeachment of lord Clarendon. It arose on petition to the Commons from a Mr. Fitton, complaining of some exercise of jurisdiction by the Lords: and on a report of the case from a committee that the matter of jurisdiction was fit to be argued at the bar of the House of Commons, the House appointed a day to hear it accordingly, and at the same time appointed a committee to inquire into precedents in cases of a

"and powers are the privileges and powers of "the people. There is a great fallacy in my "brother Glynn's whole argument, when he "makes the question to be, Whether the "House have acted according to their right or "not? Can any good man think of involving "the judges in a contest with either House of "parliament, or with one another? And yet

like kind; and amongst the Committee were named, solicitor general Finch, afterwards lord chancellor Nottingham, Mr. Serjeant Maynard, Mr. Vaughan, afterwards lord chief justice, and Mr. Prynne; and the three later were desired to take special care in the business. What was the precise nature of this case of Mr. Fitton, is not stated in the Journal of the Commons, or in the printed account of the debate. But from various entries in the Journal of the Lords the substance of the case appears on the whole to have been to this effect. Mr. Fitton and three others had been formerly proceeded against by the Lords for contriving and publishing a libel upon lord Gerrard of Brandon; and the Lords in July 1663 had sentenced Fitton in a fine of 500*l.* to imprisonment in the King's-Bench prison till he should produce Abraham Granger, whose name was to the libel, and to find securities for good behaviour during life, with direction to the chief justice of the King's-Bench to take such securities. Under this sentence in a case at least mixed with privilege, Fitton, notwithstanding a prorogation of parliament, which confessedly terminates imprisonment by the House of Commons in privilege cases, still continued in prison; and one William Carr, on his owning the same libel and his having dispersed it, had been recently adjudged by the Lords to pay a fine of 1,000*l.* and to imprisonment in the Fleet during the king's pleasure, and to the pillory. Being both thus imprisoned by the Lords, Fitton and Carr resorted by several petitions to the Commons for relief. A Committee was appointed upon Carr's petition as well as upon Fitton's. However no report appears to have been ever made upon the petition of Carr, and what became of his case is not mentioned, except that three years afterwards he published a relation of it and of his sufferings, with a plea against the jurisdiction of the House of Lords. But Fitton's petition was reported upon as fit for solemn argument at the bar of the House of Commons as to the jurisdiction of the House of Lords, and was ordered to be argued accordingly in the manner before mentioned. It appears also, that the case was argued at the bar of the Commons by Fitton's counsel Mr. Offley, who said some strong things against the jurisdiction of the Lords, but is reproached with having so closely borrowed from a prior argument of the solicitor general Finch, afterwards lord chancellor Nottingham, at the bar of the Lords, though in what case is not mentioned, as to have induced the latter to leave th When the argument was over, the debate adjourned for a week. But the Journal of the Commons is silent as to any further proceeding upon the case. Probably this case became absorbed in the consideration of the great case, which almost immediately followed, and brought the two Houses to a direct issue on one great branch of the jurisdiction claimed by the Lords but denied by the Commons: or perhaps the Commons thought this case of Fitton and that of Carr too much mixed with contempt and breach of privilege to be convenient cases to make their stand upon. However these two cases should not be forgotten. Either they were cases of breach of privilege and contempt, or they were not. If they were, the continuance of imprisonment after the prorogation of parliament, the fining, and every other part of the sentence in both cases, became disputable: for it may be asked, how on breach of privilege are the Lords warranted to do more than can be done by the Commons in a like case? On the other hand, if they were not cases of privilege and contempt, then the proceedings of the Lords against Fitton and Carr were open to the objection of an exercise by the Lords of an original jurisdiction over crime, of having adjudged a commoner for misdemeanor without impeachment of the Commons or the verdict of jury, and of having so expressed the imprisonment part of their sentence in both cases as to make it imprisonment for life, that is, in Fitton's unless they should interpose to declare it terminated, and in Carr's unless the king should please to determine it. To some of these objections Mr. Offley did in effect advert in arguing Fitton's case. In remarking also upon the consequence of such an exercise of criminal jurisdiction by the peers, he pointedly said, 'the 'jurisdiction of the Star-Chamber is now trans-'formed into the House of Lords, but some-'what in a nobler way.' It did not occur to him to add, that the jurisdiction of the Star-Chamber, though justly odious both for the mode of trial and the excessive punishments it had inflicted, and therefore wisely abolished, was in some degree sanctioned by the statutes of the realm: but that it remained to explain, how the House of Lords had obtained the like or any other sufficient sanction for exercising the same jurisdiction; and how it could be proper to tolerate that in an hereditary kind of Star-Chamber, without the sanction of statute and without any other limitation than such as their own moderation should prescribe, which the legislature had so indignantly abolished, in the case of a court sanctioned by statute and not pretending to adjudge crimes of a higher order than misdemeanor."

It may be questioned, whether in answer to what has been stated, it will be thought sufficient to alledge, in support of Mr. Justice Blackstone's assertion, that the moderation, the uprightness, the integrity, the regard to justice and to rational liberty, which now characterise the proceedings of our Houses of Parliament and of our Courts afford us security that similar proceedings will not hereafter occur. What has

"this manner of putting the question would "produce such a contest. The House of "Commons is the only judge of its own pro-"ceedings: Holt differed from the other

been, may be. Laws are provided, all the institutions of society are established, not upon confidence of the good which we hope men will do, but upon apprehension of the evil, which we know men may do. True it is, there is no immediate cause for apprehension that men will be set upon the pillory and condemned to hard labour for life in a gaol, for counterfeiting a Lord's protection; but that most powerful advocate for legitimate constitutional government, Mr. Burke (Thoughts on the Causes of the Present Discontents), has left us most wholesome warning, "That public liberty will be among us, as among our ancestors, obnoxious to some person or other; and that opportunities will be furnished, for attempting at least, some alteration to the prejudice of our constitution. These attempts will naturally vary in their mode, according to times and circumstances. For ambition, though it has ever the same general views, has not at all times the same means, nor the same particular objects. A great deal of the furniture of ancient tyranny is worn to rags; the rest is entirely out of fashion. Besides, there are few statesmen so very clumsy and awkward in their business as to fall into the identical snare which has proved fatal to their predecessors.

"When an arbitrary imposition is attempted upon the subject, undoubtedly it will not bear on its forehead the name of Ship-money. There is no danger that an extension of the forest laws should be the chosen mode of oppression in this age. And when we hear any instance of ministerial rapacity, to the prejudice of the rights of private life, it will certainly not be the exaction of two hundred pullets from a woman of fashion, for leave to lie with her own husband." [Uxor Hugonis de Nevil dat Domino Regi ducentas gallinas eo quòd possit jacere unâ nocte cum Domino suo Hugone de Nevill. Plegii, Thomas de Sanford de centum gallinis et ipse Hugo de centum gallinis reddendis infra caput Quadragesimæ: et si quæ illarum fuerint ad tunc reddenda, reddantur ad proximum. Pasch. Rot. fin. 6. J. m 8. dorso.]

"Every age has it own manners and its politics dependent upon them; and the same attempts will not be made against a constitution fully formed and matured, that were used to destroy it in the cradle, or to resist its growth during its infancy.

"Against the being of parliament I am satisfied no designs have been ever entertained since the revolution. Every one must perceive that it is strongly the interest of the court to have some second cause interposed between the ministers and the people. The gentlemen of the House of Commons have an interest equally strong in sustaining the part of that intermediate cause. However they may hire out the usufruct of their voices, they never will part with the fee and inheritance.

"judges in this point, but we must be governed "by the eleven, and not by the single one. "It is a right inherent in all supreme courts; "the House of Commons have always exer-"cised it. Little nice objections of particular "words, and forms and ceremonies of execu-"tion, are not to be regarded in the acts of the "House of Commons; it is our duty to pre-"sume the orders of that House, and their exe-"cution, are according to law. The Habeas "Corpus in Murray's Case was at common "law. I concur entirely with my Lord Chief "Justice."

1771.—Oliver's Case.

And in Mr. Alderman Oliver's Case, argued in the Court of Exchequer on the 27th of April 1771, the four judges, Chief Baron Parker, Mr. Baron Smythe, Mr. Baron Adams, and Mr. Baron Perrot, unanimously acknowledged in like manner the right of the House of Commons to commit.*

1799.—Durnford and East's Reports, K. B. Book 8, p. 314.

Flower's Case.†

In the case of Flower, committed by the House of Lords, for a libel on the bishop of Landaff, on his being brought up to the King's-Bench upon Habeas Corpus.

Lord Kenyon, Chief Justice, said—"If we "entertained any doubts upon this subject, it "would be unbecoming in us to rush to a "speedy decision without looking through all "the cases cited by the defendant's counsel; "but not having any doubts, I think it best to "dispose of the case at once. The cases that "have been referred to are all collected in lord "Hale's Treatise on the Jurisdiction of the "lords' House of parliament, and that valua-"ble Preface to it published by Mr. Hargrave; "but in the whole of that publication the de-"fendant's counsel has not found one case ap-"plicable to the present. This is one of the "plainest questions that ever was discussed in "a court of law. Some things, however, have "dropped from the learned counsel, that re-"quire an answer:—First, it is said that the

"Accordingly those who have been of the most known devotion to the will and pleasure, of the court, have at the same time been the most forward in asserting an high authority in the House of Commons. When they knew who were to use that authority, and how it was to be employed, they thought it never could be carried too far. It must be always the wish of an unconstitutional statesman, that an House of Commons who are entirely dependant upon him, should have every right of the people dependant upon their pleasure."

* See Mr. Hargrave's observations on this case, 1 Jurid. Arg. and Coll. 17.

† See this Case hereafter in this Collection.

"House of Lords is not a court of record: that "the House of Lords when exercising a legislative capacity is not a court of record is undoubtedly true; but when sitting in a judicial capacity, as in the present case, it is a "court of record. Then it was objected, that "the defendant was condemned without being "heard in his defence: but the warrant of "commitment furnishes an answer to that; "by that it appears, that 'he was informed of "'the complaint made against him,' &c. and "having been heard as to what he had to say "in answer to the said complaint, &c. he was "adjudged 'guilty of a high breach of the "'privileges of the House,' &c. so that it "clearly appears that he was heard in his defence, and had the same opportunity of calling witnesses, that every other defendant has "in a court of justice. Then insinuations are "thrown out against the encroachments by the "House of Lords on the liberties of the subject: but the good subjects of this country "feel themselves protected in their liberties by "both Houses of parliament. Government "rests in a great degree on public opinion; "and if ever the time shall come, when factious men will overturn the government of "the country, they will begin their work by "calumniating the courts of justice and both "Houses of parliament.

"The ground of this proceeding is, that the "defendant has been guilty of a breach of privileges of the House, and a contempt of the "House. This claim of right to punish by "fine and imprisonment for such an offence, is "not peculiar to the House of Lords; it is frequently exercised by this and other courts of "record, and that not merely for contempts "committed in the presence of the court: One "instance of which was that of Mr. Beardmore,* under sheriff of Middlesex, for a contempt of the court in not executing part of "the sentence pronounced on Dr. Shebbeare. "And that case answers another objection, "strongly insisted on by the defendant's counsel here, that if the party accused can be punished in any other manner, this mode of "trial cannot be resorted to; for there Mr. "Beardmore might have been indicted, but "yet he was attached, examined upon interrogatories, and fined and imprisoned. Again "it is objected, that the House of Lords cannot "impose a fine for such an offence: but this "and other courts of record have the power of "fining in this summary manner; and why "should not the House of Lords have the same "power of imposing a fine for a contempt of "their privileges? Then several instances were "alluded to, where the House did not choose "to exercise this privilege, but directed prosecutions to be instituted in the courts of law. "The same observations might equally be "made on the proceedings of this court, who "have sometimes directed indictments to be "preferred. We are not therefore to conclude "that the House of Lords has not the power "of inflicting this punishment, from the circumstance of its not exercising it on all occasions. When lord Shaftesbury's Case came "on, there were some persons who wished to "abridge the privileges of the House of Lords: "but Mr. Serjeant Maynard was one of those "who argued in support of their privileges; "and he surely was not capable of concurring "in any attempt to infringe the liberties of the "people. It has been said, however, that "though many instances are to be found in "which the House of Lords has in point of "fact exercised this power, whenever that "power has been resisted it has been resisted "with effect; from whence it is inferred, that "the House of Lords has not the authority "which it assumes: but in this case I may "avail myself of the same argument in favour "of its jurisdiction, for no case has been found "where it has been holden to be illegal in the "House of Lords to fine and imprison a person "guilty of a breach of privilege. We were "bound to grant this Habeas Corpus; but "having seen the return to it, we are bound to "remand the defendant to prison; because the "subject belongs to 'aliud examen.' There is "nothing unconstitutional in the House of "Lords proceeding in this mode for a breach "of privilege; and unless we wish to assist in "the attempt that is made to overset the Law "of Parliament and the constitution, we must "remand the defendant."

Grose, J.—"This question is not new; it "has frequently been considered in courts of "law; and the principles discussed to-day, "and the cases cited, were examined not many "years ago; and the result is very ably stated "by Lord Chief Justice De Grey, in 3 Wils. "199. 'When the House of Commons (and "'the same may be said of the House of "'Lords) adjudge any thing to be a contempt "'or a breach of privilege, their adjudication "'is a conviction, and their commitment in "'consequence, is execution; and no other "'court can discharge or bail a person that is in "'execution by the judgment of any other "'court.' In another passage he said 'Every "'court must be sole judge of its own contempts.' And again, 'The counsel at the "'bar have not cited one case where any court "'of this Hall ever determined a matter of "'privilege which did not come immediately "'before them.'

"Having stated this, I think I need not add "more in the present case."

Per Curiam.†

Let the defendant be remanded.

* Vide 2 Burr. 792.

† Mr. Justice Lawrence was not in court, being indisposed; and Mr. Justice Le Blanc, having attended at the Guildhall sittings for lord Kenyon, and not returning till the argument was closed; gave no opinion.

APPENDIX (E.)

CASES of Commitments for Contempt by Courts of Justice.

ANALOGY.

In Michaelmas Term, 18 Edward 3.

John De Northampton, an attorney of the Court of King's-bench, confessing himself guilty of writing a letter respecting the judges and court of King's-bench, which letter was adjudged by the court to contain no truth in it, and to be calculated to excite the king's indignation against the court and the judges, to the scandal of the said court and judges, was committed to the marshal, and ordered to find securities for his good behaviour.—3 Inst. 174.

Hilary Term, 11 Ann.

A Writ of Attachment was issued against Thomas Lawson, for speaking disrespectful words of the Courts of Queen's-bench, upon his being served with a rule of that Court.

Hilary, 12 Ann.

A Writ of Attachment was granted against Edward Hendale, for speaking disrespectful words of the Lord Chief Justice of the Court of Queen's-bench, and his warrant.

Trinity Term, 5 Geo. 1.

A Writ of Attachment against ——— Jones, for treating the process of the Court of King's-bench contemptuously; and, there being an intimation that he relied on the assistance of his fellow-workmen to rescue him, the Court sent for the sheriff of Middlesex into Court, and ordered him to take a sufficient force.—1 Strange 185.

Michaelmas Term, 6 Geo. 1.

A Writ of Attachment was granted to Richard Lamb, for contemptuous words concerning a warrant from a judge of the Court of King's-bench.

Easter Term, 6 Geo. 1.

——— Wilkins having confessed himself guilty of publishing a libel upon the Court of King's-bench, the Court made a rule committing him to the marshal.

The next term Wilkin having made an affidavit charging doctor Colebatch with being the author of the libel, was sentenced to pay a fine of 5*l.* and to give security for his good behaviour for a year.

Hilary Term, 7 Geo. 1.

An Attachment was granted against John Barber, esq. for contemptuous words of the Court of King's-bench, in a speech to the common council of London.—1 Strange, 443.

Hilary Term, 9 Geo. 1.

Doctor Colebatch having been examined upon interrogatories, for contempt in publishing a libel; the interrogatories and answer were referred to the king's coroner and attorney; and

In Easter Term, 9 Geo. 1.

Dr. Colebatch, being in the custody of the marshal, was brought into Court, and was sentenced to pay a fine of 50*l.* and to give security for his good behaviour for a year, and was committed to the marshal in execution.

Michaelmas Term, 9 Geo. 1.

A Writ of Attachment was granted against John Bolton, clerk, for contemptuous words respecting the warrants of the Lord Chief Justice of the Court of King's-bench, at a meeting of his parishioners in the Church-yard.

Easter Term, 9 Geo. 1.

John Wyatt, a bookseller in St. Paul's Church-yard, publishing a pamphlet, written by Dr. Conyers Middleton, in the dedication of which to the vice-chancellor of Cambridge, were some passages reflecting upon a proceeding of the Court of King's-bench; the Court granted a rule against Wyatt, to shew cause why a Writ of Attachment should not issue against him for his contempt; and Wyatt having made an affidavit that Cornelius Cr field had employed him to sell the and he having charged Dr. Conyers] with being the author of it, Crowntield was discharged upon payment of the costs, and a Writ of Attachment was granted against Dr. Conyers Middleton, who, in the next term, gave bail to answer the contempt; he was afterwards examined upon interrogatories, and upon the report of the king's coroner and attorney he was adjudged to be in contempt, and was committed to the marshal in execution quousque, &c. and it was referred to the master to tax the prosecutor's costs.

It is stated in Fortescue's reports that Dr. Middleton was sentenced to pay a fine of 50*l.* and to give security for a year; but no rule for such sentence has at present been found; and Dr. Colebatch having received such a sentence, for a similar offence, in the preceding term, it is possible that this sentence may, by mistake, have been applied to Dr. Middleton.

Michaelmas Term, 5 Geo. 2.

The Court granted a Writ of Attachment against lady Lawley, for a contempt in publishing a paper reflecting upon the proceedings of the Court; and she having been examined upon interrogatories, was in Easter Term following reported by the officer of the Court to be in contempt, and was committed to the marshal.

And in Trinity Term 6 Geo. 2, she was brought into Court, and a rule made, stating that "fecit submissionem suam petivit veniam "de curia;" and thereupon she was fined five marks and discharged.

Mark Halpenn, the husband of Lady Lawley, was also examined upon interrogatories, for publishing the same libel. 2 Barnardiston; K.'s B. 43.

Extract from Atkyns's Reports, Book 2, p. 469.

First Seal after Michaelmas Term, Dec. 3, 1742.

A motion against the printer of The Champion, and the printer of the St. James's Evening Post; that the former, who is already in the Fleet, may be committed close prisoner, and that the other, who is at large, may be

committed to the Fleet, for publishing a libel against Mr. Hall and Mr. Garden, executors of John Roach, esq. late major of the garrison of Fort St. George in the East Indies, and for reflecting likewise upon governor Mackay, governor Pitt, and others, taxing them with turning affidavit-men, &c. in the cause now depending in this court; and insisting that the publishing such a paper is a high contempt of this Court, for which they ought to be committed.

Lord Hardwicke, Lord Chancellor,

Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard.* It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced.

But to be sure Mr. Solicitor-General has put it upon the right footing, that notwithstanding this should be a libel, yet unless it is a contempt of the Court, I have no cognizance of it for whether it is a libel against the public, or private persons, the only method is to proceed at law.

The defendants' counsel have endeavoured two things—1st, to shew this paper does not contain defamatory matter; 2dly, if it does, yet there is no abuse upon the proceedings of this Court: and therefore there is no room for me to interpose.

Now take the whole together, though the letter is artfully penned, there can remain no doubt in every common reader at a coffee-house but this is a defamatory libel.

It is plain therefore who is meant; and as a jury, if this fact was before them, could make no doubt, so, as I am a judge of facts as well as law, I can make none.

I might mention several strong cases, where even feigned names have been construed a libel upon those persons who were really meant to be libelled.

Upon the whole, as to the libellous part, if so far there should remain any doubt whether the executors are meant, it is clear beyond all contradiction upon the last paragraph, in which are these words: "This case ought to be a "warning to all fathers to take care with "whom they trust their children and their fortunes, lest their own characters, their widows "and their children be aspersed, and their fortunes squandered away in law-suits."

And likewise, though not in so strong a degree, the words "turned affidavit-men," is a libel against those gentlemen who have made them.

There are three different sorts of contempt:

One kind of contempt is, scandalizing the Court itself.

There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here.

There may also be a contempt of this Court, in prejudicing mankind against persons before the cause is heard.

There cannot be any thing of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters.

The case of Raikes, the printer of the Gloucester Journal, who published a libel in one of the Journals against the commissioners of Charitable Uses at Burford, calling his advertisement, A Hue and Cry after a Commission of Charitable Uses, was of the same kind as this, and the Court in that case committed him.

There are several other cases of this kind: one strong instance, where there was nothing reflecting upon the court, in the case of captain Perry, who printed his brief before the cause came on; the offence did not consist in the printing, for any man may give a printed brief as well as a written one to counsel; but the contempt of this Court was prejudicing the world with regard to the merits of the cause before it was heard.

Upon the whole, there is no doubt but this is a contempt of the Court.

With regard to Mrs. Read, the publisher of Saint James's Evening Post, by way of alleviation, it is said, that she did not know the nature of the paper; and that printing papers and pamphlets is a trade, and what she gets her livelihood by.

But though it is true it is a trade, yet they must take care to do it with prudence and caution; for if they print any thing that is libellous, it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous: and so is the rule of law, and I will always adhere to the strict rules of law in these cases.

Therefore Mrs. Read must be committed to the Fleet according to the common order of the court upon contempts.

But as to Mr. Huggonson, who is already a prisoner in the Fleet, I do not think this any motive for compassion; because these persons generally take the advantage of their being prisoners, to print any libellous or defamatory matter which is brought to them, without scruple or hesitation.

If these printers had disclosed the name of the person who brought this paper to them, there might have been something said in mitigation of their offence; but as they think proper to conceal it, I must order Mrs. Read to be committed to the Fleet, and Huggonson to be taken into close custody of the warden of the Fleet.

13th Vesey, jun. page 237.—Lord Erskine, Lord Chancellor. Dec. 20, 23, 1806.—Exparte Jones.

The object of this petition was to remove the committee of a lunatic, and to bring before the

* Vide Baker v. Hart, post. 488. Mrs. Farley's Case, 2 Ves. 520.

Lord Chancellor an alleged contempt by the committee and his wife and other persons, as the authors printers and publishers of a pamphlet, with an address to the Lord Chancellor by way of dedication, reflecting upon the conduct of the petitioner and others acting in the management of the affairs of the lunatic under orders made in pursuance of the trusts of a will, the affidavit representing the conduct of the committee and his wife intruding into the master's office, and interrupting him, not only in the business of this particular lunacy, but all other business. The wife of the committee avowed herself to be the author of the pamphlet alleging the innocence of her husband.

The Solicitor-General (Sir Samuel Romilly and Mr. Hart, in support of the petition, were stopped by the Lord Chancellor, who called on the counsel against it.

Mr. Plowden resisted the petition, contending that the petitioners had a remedy at law.

Lord *Erskine*: (The Lord Chancellor.) As to remedy at law, the subject of this application is not the libel against the petitioner.—The case of Roach v. Garvan [2 Atk. 469] and another, there mentioned, were cases of constructive contempt, depending upon the inference of an intention to obstruct the course of justice. In this instance, that is not left to conjecture; and whatever may be said as to a constructive contempt through the medium of a libel against persons engaged in controversy in the court, it never has been nor can be denied, that a publication not only with an obvious tendency but with the design to obstruct the ordinary course of justice, is a very high contempt.—Lord Hardwicke considered persons concerned in the business of the court as being under the protection of the court, and not to be driven to other remedies against libels upon them in that respect.—But without considering whether this is or is not a libel upon the petitioner, what excuse can be alleged for the whole tenor of this book, and introduced by this declaration of the purpose which the author intended it to answer? It might be sufficient to say of the book itself, stripped of the dedication, that it could be published with no other intention than to obstruct the duties cast upon the petitioner, and to bring into contempt the orders that had been made. But upon the dedication this is not a constructive contempt. It is not left to inference. In this dedication the object is avowed, by defaming the proceedings of the court standing upon its rules and orders, and interesting the public, prejudiced in favour of the author by her own partial representation, to procure a different species of judgment from that which would be administered in the ordinary course, and by flattering the judge, to taint the source of justice.—This pamphlet has been sent to me.

As to the printers, lord Hardwicke observes, it is no excuse that the printer was ignorant of the contents. Their intention may have been innocent; but, as lord Mansfield had said, the fact whence the illegal motive is inferred must be traversed, and the party admitting the act cannot deny the motive.—The maxim, '*Actus* ' *non facit reum, nisi mens sit rea*,' cannot be made applicable to this subject in the ordinary administrations of justice, as the effect would be that the ends of justice would be defeated by contrivance.—But upon the satisfactory account given by three of these printers, though undoubtedly under a criminal proceeding, they would be in mercy in a case of contempt. Though I have the jurisdiction, I shall not use it.—The other printer appears upon the affidavits under different circumstances. Having made the observation, that this pamphlet ought not to be printed, being totally uninteresting to the public, yet he does print it; and though the *locus pœnitentiæ* was afforded to him, and he was called upon not to print any more, he proceeded until he had notice of this petition.

Let the Committee, and his wife, and the printer to whom I have last alluded, be committed to the Fleet Prison. Dismiss the Committee from that office; and direct a reference to the master, as to the appointment of another Committee.

Extracts from Sir Eardley Wilmot's Opinions* and Judgments; p. 253.

Hilary Term, 5 Geo. 3. 1765.

The KING *v.* ALMON.

"It has been argued that the mode of proceeding by attachment is an invasion upon the ancient simplicity of the law; that it took its rise from the statute of Westminster, ch. 2; and Gilbert's History of the Practice of the Court of Common Pleas, p. 20, in the first edition, is cited to prove that position. And it is said, that act only applies to persons resisting process; and though this mode of proceeding is very proper to remove obstructions to the execution of process, or to any contumelious treatment of it, or to any contempt to the authority of the court, yet that papers reflecting merely upon the qualities of judges themselves, are not the proper objects of an attachment; that judges have proper remedies to recover a satisfaction for such reflections, by actions of Scandalum Magnatum;" and that in the case of a peer, the House of Lords may be applied to for a breach of privilege: That such libellers may be brought to punishment by in-

* This opinion was not delivered in court, the prosecution having been dropped in consequence, it is supposed, of the resignation of the then Attorney General; but after the death of this eminent and very learned Chief Justice, was found in his own hand-writing among his papers by his son, who published it in Memoirs of his Life, p. 243. The occasion of it was a motion in the Court of King's-Bench, for an attachment against Mr. Almon, for a contempt in publishing a libel upon the Court, and upon the Chief Justice.

dictment or information,* that there are but few instances of this sort upon libels on courts or judges; that the Common Pleas lately refused to do it; that libels of this kind have been prosecuted by actions and indictment; and that attachments ought not to be extended to libels of this nature, because judges would be determining in their own cause; and that it is more proper for a jury to determine *quo animo* such libels were published.

"As to the origin of attachments, I think they did not take their rise from the statute of Westminster, ch. 2; the passage out of Gilbert does not prove it; but he only says, "the "origin of commitments for contempt, 'seems' "to be derived from this statute;" but read the paragraph through, the end contradicts the 'seeming' mentioned in the beginning of it; and shews, that it was a part of the law of the land to commit for contempt, confirmed by this statute.† And indeed when that act of Parliament is read, it is impossible to draw the commencement of such a proceeding out of it; it empowers the sheriff to imprison persons resisting process, but has no more to do with

* Thus Mich. 8 Eliz. Rot. 1, Walsh was indicted for scandalising one sir Robert Catling, and the Court of Queen's-Bench, by saying "My Lord Chief Justice is incensed against me; I cannot have justice, nor can I be heard, for it is made a court of conscience." See the Attorney General's Argument in the Case of the City of London, *Quo Warranto*, A. D. 1683, *infra*.

† On this subject the following passage taken from Mr. Evans's letter to sir Samuel Romilly is deserving attention:

"As a great deal has been urged in favour of the privilege of the Commons to imprison for a Libel, by way of analogy to the practice of Courts of Justice, which, it is said, may commit for contempts, I shall beg leave to add a few words on that part of the subject. Lord Chief Baron Gilbert has stated, that, 'It is 'one part of the law of the land to commit for 'contempts, and confirmed by the stat. Westm. '2, c. 39." (Hist. of Com. Pleas, p. 25). Now, I must declare, that after looking into that statute, I cannot find any thing to warrant his assertion. All that the statute says, is, that many great men (who in those days had castles, fortresses, and liberties, wherein they used to secure themselves) had resisted the Sheriff in executing the King's writs; which, creating great inconvenience, the Sheriff is ordered to remove all obstructions to the execution of the process. The act, therefore, only applies to persons resisting the King's writs, and does not say a word about any other contempt. I must confess, that I cannot understand how Courts of Justice can imprison for a libel, without infringing upon Magna Charta. All that they can do, in a constitutional manner; is, in my opinion, to imprison such persons as commit contempts in *facie curiæ*; or, in other words, who occasion an immediate obstruction to the administration of justice, and, as such, are disturbers of the peace. But, even in those cases, I conceive that the Courts cannot constitutionally imprison during their pleasure, but that the offender must afterwards be brought in, to answer by due process of law, and receive sentence of punishment from a jury. For, though the stat. Westm. 2, c. 39, declares, That such person as shall be convicted of resisting the Sheriff, shall be punished at the king's pleasure, yet my lord Coke, in his exposition of these words, says, 'That is, according to that which shall be, upon due proceeding, adjudged *coram rege* in the King's 'Court of Justice; for no man can be punished by absolute power, but *secundum legem, et consuetudinem Angliæ*, as hath been said before, in the exposition of Magna Charta, and 'elsewhere hath been often said.' (2 Inst. 454.) If a Judge could imprison for a libel, he must necessarily become what our law never warrants, that is, a Judge in his own cause; and if he could imprison during his pleasure, he would be possessed of an absolute power, which our constitution does not allow. The fact is, that great and good men have, at all times, been very tender of the liberty of the subject. Chief Baron Gilbert says, that "When the Common Pleas proceeded on Clausum fregit, the defendant was under the same 'disadvantages as when he was arrested on 'a Latitat." Upon which the annotator (who was well acquainted with the laws and constitution of his country,) observes—'Here the 'Chief Baron candidly allows, that the arrest 'by Clausum fregit in the Common Pleas, and 'by the Latitat in the King's Bench, did lay 'the defendant under disadvantages. If the 'Chief Baron had said, 'under unwarrantable ''oppressions in open violation of King John's ''Great Charter, not only by subverting and ''perverting the ancient process of the law in "'trespass, but also by an arbitrary and barbarous abuse of special bail: If the Chief ''Baron had stigmatized this process by Latitat ''with the seemingly harsh, but richly merited ''terms above mentioned, as sir Orlando ''Bridgeman, Chief Justice of the Common ''Pleas did, when the Latitat was first introduced into the King's Bench, he would perhaps have done no more than an honest indignation, at the innovation, would warrant.'' (Hist. of Com. Pleas, 3d. ed. p. 183.) As for discretion, I am for investing the Judges with as little as possible. We know, that some men view matters in a different light from that in which they are seen by others. 'The 'discretion of the Judge,' (says Mr. Gibbon very truly) 'is the first engine of tyranny; 'the laws of a free people should foresee and 'determine every question that may probably 'arise in the exercise of power and the transactions of industry.' (Decline and Fall, &c. v. 8. p. 111.)"

To this I will add the memorable words which were used by lord Camden in the case

giving courts of justice a power to vindicate their own dignity, than any other chapter in that act of Parliament.

"The power which the courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it, 1 Vent. 1, and the issuing of attachments by the supreme courts of justice in Westminster Hall, for contempts out of court, stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the "Lex Terræ," and within the exception of Magna Charta, as the issuing any other legal process whatever.*

"I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none; it is as ancient as any other part of the Common Law; there

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of Hindson and Kersey, in the Court of Common Pleas, when he was Chief Justice of that Court; 'The discretion of 'a Judge is the law of tyrants: It is always unknown: It is different in different 'men: It is casual, and depends upon constitution, temper, passion.—In the best it is oftentimes caprice: In the worst it is every vice, 'folly, and passion, to which human nature is 'liable.'

Mr. Burke in his 'Thoughts on the present Discontents' goes so far as to assert that "All men possessed of an uncontrouled discretionary power leading to aggrandizement and profit of their own body have always abused it."

* Lord Coke, commenting upon the words, "Legem Terræ," in Magna Charta, says:

"Against this antient and fundamental law, and in the face thereof, I find an act of parliament [11 H. 7, c. 3.] made, that as well justices of assize, as justices of peace (without any finding or presentment by the verdict of twelve men) upon a bare information for the king before them made, should have full power and authority by their discretions to hear and determine all offences, and contempts committed, or done by any person, or persons against the form, ordinance, and effect of any statute made, and not repealed, &c. By colour of which act, shaking this fundamental law, it is not credible what horrible oppressions and exactions, to the undoing of infinite numbers of people, were committed by sir Richard Empson, knight, and Edmund Dudley, being justices of peace, throughout England; and upon this unjust and injurious act (as commonly in like cases it falleth out) a new office was erected, and they made masters of the king's forfeitures.

"But at the Parliament, holden in the first year of H. 8, this act of 11 H. 7, is recited, and made void, and repealed, and the reason thereof is yielded, for that by force of the said act, it was manifestly known, that many sinister, and crafty, feigned, and forged informations, had been pursued against divers of the king's subjects, to their great damage and wrongful vexation: and the ill success hereof, and the fearful ends of these two oppressors, should deter others from committing the like; and should admonish Parliaments, that instead of this ordinary and precious trial, *per legem terræ*, they bring not in absolute, and partial trials by discretion." 2 Inst. 51.

In commenting on the Statute of Marlebridge, 52 H. 3, lord Coke says:

"The preamble shews the mischiefs, which were four.

"1. That in the time of the late troubles, great men and others refused to be justified by the king and his court, as they ought, for here it is said, 'multi magnates et alii indignati 'fuerint recipere justitiam per dominum regem, 'et curiam suam.'

"2. 'Sed graves ultiones fecerint,' That they (refusing the course of the king's laws) took upon them to be their own judges in their own causes, and to take such revenges as they thought fit, until they had ransoms at their pleasures. 'Aliquis non debet esse judex in 'sua propria causa.'

"3. That some of them would not be justified by the king's officers."

"The body of the act consisteth of divers branches.

"First, a remedy in general for all the said mischiefs.

"(1). 'Provisum est, concordatum, et con'cessum, quod tam majores quam minores, 'justitiam habeant et recipiant in curia domini 'regis.'] This is the golden metewand, that the law hath appointed to measure the cases of all and singular persons, high and low, to have and receive justice in the king's courts; for the king hath distributed his judicial power to several courts of justice, and courts of justice ought to determine all causes, and that all private revenges be avoided.

"Upon this general law, four conclusions do follow.

"1. That all men, high and low, must be justified, that is, have and receive justice in the king's courts of justice.

"2. That no private revenge be taken, nor any man by his own arm or power revenge himself: and this article is grounded upon the law of God, 'vindicta est mihi et ego retri'buam,' saith Almighty God. All revenge must come from God, or from his lieutenant the king, in some of his courts of justice.

"3. That all the subjects of the realm ought to be justified, that is, submit themselves to the king's officers of justice according to law."

See also Mr. Selden's Argument for sir Edmund Hampden, *ante*, vol. 3, p. 16, *et seq.* See, too, pp. 79, 123, 152, 153, 154, and the 4th and 5th clauses of the Petition of Right, pp. 222, 223, of the same volume; and a passage from Roger North, inserted in a Note to the Case of Fitzharris, A. D. 1681, *infra.*

is no priority or posteriority to be discovered about it, and therefore cannot be said to invade the common law, but to act in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say, that the mode of proceeding by attachment stands upon the very same foundation and basis as trials by jury do, immemorial usage and practice; it is a constitutional remedy in particular cases; and the judges in those cases are as much bound to give an activity to this part of the law, as to any other part of it. Indeed it is admitted, that attachments are very properly granted for resistance of process, or a contumelious treatment of it, or any violence or abuse of the ministers or others employed to execute it. But it is said that the courts of justice in those cases is obstructed, and the obstruction must be instantly removed; that there is no such necessity in the case of libels upon courts or judges, which may wait for the ordinary method of prosecution, without any inconvenience whatsoever. But where the nature of the offence of libelling judges for what they do in their judicial capacities, either in court or out of court, comes to be considered, it does, in my opinion, become more proper for an attachment than any other case whatsoever.

"By our constitution, the king is the fountain of every species of justice which is administered in this kingdom, 12 Co. 25. The king is 'de jure' to distribute justice to all his subjects; and because he cannot do it himself to all persons, he delegates his power to his judges, who have the custody and guard of the king's oath, and sit in the seat of the king 'concerning his justice.'

"The arraignment of the justice of the judges is arraigning the king's justice; it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the mind of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever mens allegiance to the laws is so fundamentally shaken, it is the most fatal and the most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges, as private individuals, but because they are the channels by which the king's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open and uninterrupted current, which it has for many ages found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.

"In the moral estimation of the offence, and in every public consequence arising from it, what an infinite disproportion is there between speaking contumelious words of the rules of the court, for which attachments are granted constantly, and coolly and deliberately printing the most virulent and malignant scandal which fancy could suggest upon the judges themselves. It seems to be material to fix the ideas of the words "authority" and "contempt of the court," to speak with precision upon the question.

"The trial by jury is one part of that system, the punishing contempts of the court by attachments is another: we must not confound the modes of proceeding, and try contempts by juries, and murders by attachment; we must give that energy to each which the constitution prescribes. In many cases, we may not see the correspondence and dependance which one part of the system has and bears to another; but we must pay that deference to the wisdom of many ages as to presume it. And I am sure it wants no great intuition to see, that trials by juries will be buried in the same grave with the authority of the courts who are to preside over them."

Trinity Term, 8 Geo. 3.

Writs of attachment were granted against Staples Steare, John Williams, and John Pridden, for contempt, in publishing the North Briton Extraordinary, No. 4, containing a letter addressed to lord Mansfield, Lord Chief Justice, containing gross reflections on his lordship.

They were all examined upon interrogatories, and reported in contempt.

And Michas. Term, 9 Geo. 3. Steare was sentenced to be imprisoned three calender months.

[*End of the Reports of the House of Commons*, 1810, *in the Case of Sir Francis Burdett.*]

MR. WYNN in his learned 'Argument' has cited other authorities in support of the uncontrolled power of the House of Commons, to commit. There are also three Reports of Precedents of punishment for contempt in the Journal of the House of Lords, viz.

Dec. 19, 1699.

Ordered, That the committee appointed to inspect the Journals of this House, in relation to the punishing of persons, whose books or writings have been censured by this House, as scandalous libels) be revived; to meet presently. Then the House was adjourned during pleasure. The House was resumed.

And the marquis of Normanby reported from the said committee the precedents following;

March 23, 1623, Thomas Morley.
March 22, 1623, Waterhouse.
July 9, 1625, Ralph Brooke.
April 16, 1628, Anthony Lamplugh.
March 29, 1642, John Bond.
July 9, 1663, Fitton.
March 8, 1689, Downing.
November 18, 1693, Pollard.
December 18, 1667, William Care.

November 25, 1724.

The lord Delawar acquainted the House "That the lords committees appointed to search precedents, as to what punishments have been inflicted, or methods taken to vindicate the honour of this House, in cases of any breach of their lordships privilege, or contempts to this House, had inspected precedents accordingly; and had prepared a Report; which he was ready to make, when their lordships will please to receive the same."

Ordered, That the said Report be now received.

Accordingly his lordship reported from the said committee, as follows:

"That the committee have inspected the Journals of this House, in relation to the matters to them referred; and think proper to offer to your lordships consideration the following instances; viz.

"February 27, 1620. Richard Reynolds and Robert Wright, for arresting a servant to the earl of Oxford, were ordered to be set on horseback, near Westminster Hall; neither of them to have cloak or hat; but to have on their breasts and backs papers, expressing their fault; (viz.), '[For a contemptuous breach of 'the privileges of parliament, aggravated by 'contemptuous speeches;'] and so to pass to the Fleet, where they are to be left prisoners.

"Nov. 27, 1621. John Blunt, for counterfeiting the lord Strafford's seal to a protection, was ordered to stand on the pillory, at Westminster and in Cheapside, with papers on his head shewing his offence; and then to be carried to Bridewell, and there to remain during his life, and to work for his living.

"March 22, 1623. Thomas Morley, for publishing a printed petition, very scandalous against the lord keeper in particular, and by aspersion against the whole court of Star-chamber in general, and at the bar insolently using many insolent words of the lord-keeper, in presence of their lordships, was imprisoned in the Fleet, fined 1,000*l.* to the king; set with his neck in the pillory in Cheapside, with one of the petitions on his head; ordered to make submission, and acknowledgment of his fault, at the bar and in the Star-chamber. The next day one Waterhouse, who penned the first draught of Morley's petition, was adjudged to be a prisoner in the Fleet, and debarred pen, ink, and paper, during the pleasure of the House; fined 500*l.* to the king; to make submission, and acknowledgment of this his fault, at the bar, in the Star-chamber, and to the lord-keeper: and Bernard Alsop, the printer of the petition, imprisoned in the Fleet, admonished not to print any more petitions; and to make submission and acknowledgment.

"May 28, 1624. Upon a report from the committee of privileges, the fine on Morley was reduced to 500*l.* and he was discharged out of prison; and Waterhouse's punishment, upon his petition, was remitted.

"July 9, 1625. Ralph Brooke, Yorke Herald, for exhibiting a false and scandalous petition against the earl Marshal, was sentenced to make his submission to the said earl Marshal at the bar, to be imprisoned in the Tower during pleasure, and fined 1,000 marks.

"April 4, 1626. George Gardner, for buying and selling of counterfeited protections under the hand and seal of a peer in parliament, was ordered to be set on the pillory at Westminster, with a paper on his head, declaring his offence; and afterwards to be carried down to Norwich, and there to stand on the pillory, with the like paper.

"13th June following, The same Gardner, for scandalizing the justice of this House, and for unjustly slandering the lord keeper, was ordered to stand in the pillory at Westminster, with a paper on his head, declaring his offence; and to ride backward with the same paper to the cross in Cheapside, and to stand on the pillory there, and so to ride back to the Fleet: and though the lord keeper did earnestly desire this punishment might be forgiven Gardner, yet the House denied it.

"April 16, 1628. Anthony Lamplugh, for exhibiting an unjust and scandalous petition against the lord keeper and lord bishop of Lincoln, was sentenced to stand committed to the Fleet; to acknowledge here, at the bar, 'That the said petition is unjust and scandalous, 'and that he is sorry for it;' and to ask their lordships forgiveness; and to be brought to the chancery bar, and there to make the like acknowledgment.

"The next day, he having asked forgiveness at the bar, the remainder of the censure was forgiven.

"June 12, 1628. Ensign Reynde, for ignominious speeches uttered by him against the lord viscount Say and Seale, and for his contempt of this high court of Parliament, was adjudged never to bear arms hereafter, but accounted unworthy to be a soldier; to be imprisoned during pleasure; to stand under the pillory, with papers on his head shewing his offence, at Cheapside, and at Banbury; to be fined at 200*l.* to the king; and to ask forgiveness.

"And as to the precedent last mentioned, the committee think proper to observe to the House, That it appears by the Journal, that their lordships utmost endeavours were used, to apprehend and bring the said Reynde in person, before them, to justice; but he absconded, so that he could not be taken; notwithstanding which, the House, in his absence, proceeded to the censure above-mentioned; and directed the court of Star-Chamber, to put the sentence against him in execution, if he should happen to be apprehended after the ending of the session, and out of time of Parliament.

"Jan. 13, 1640. James Faucet, for insolent and abusive speeches against the earl of Newport, was sentenced to stand committed to the Fleet; to make his humble submission to the said earl, and to pay him 500*l.* for damages.

"March 29th, 1642, *post meridiem*. John Bond, for being the author and contriver of a false and scandalous letter, pretended to be sent from the queen in Holland to his majesty at York, was sentenced to stand on the pillory at Westminster Hall door, and in Cheapside, with a paper on his head, written, 'A Contriver of 'False and Scandalous Libels;' the said letters to be called in, and burnt near him as he stands; and he to be committed to the house of correction.

"April 28, 1642. Sir William San Ravy, knight, for false, scandalous and malicious reports and speeches against the earl of Danby, was fined, to the king, in the sum of 100*l.*; ordered to pay the said earl, by way of damages, 500*l.*; to make a submission at the bar, and to be imprisoned in the Fleet.

"July 9, 1663. Alexander Fitton, for contriving and publishing an infamous libel against the lord Gerrard of Brandon, fined 500*l.* to his majesty, committed to the King's Bench, and to find sureties for his behaviour during life.

"December 18, 1667. William Carr, for dispersing scandalous and seditious printed papers against the lord Gerrard of Brandon, fined 1,000*l.* to the king, to stand thrice in the pillory, to be imprisoned in the Fleet, and the papers to be burnt.

"March 1, 1676. Dr. Cary was fined 1,000*l.* for refusing to discover his knowledge of a libel; and to be committed to the Tower till he pays the same.

"March 8, 1688-9. William Downing, for printing a paper reflecting on the lord Grey of Warke, was committed to the Gatehouse, and fined 1,000*l.* to the king.

"June 11, 1689. Percy's petition, claiming the earldom of Northumberland, containing several reflections, was dismissed the House; and the said Percy was ordered to be brought before the four courts in Westminster Hall, wearing a paper upon his breast, in which these words shall be written, 'The False and 'Impudent Pretender to the Earldom of Nor-'thumberland.'

"April 11, 1690. Thomas Garston, for counterfeiting protections, to stand twice in the pillory, and be committed to the Gatehouse till he pays his fees.

"Feb. 22, 1695. The House was informed, That there was a paper delivered at the door, reflecting on the House, by Robert Crosfield:" Whereupon he was called in, and owned the paper; but, refusing to give the House an account who printed it, he was ordered into custody.

"March 17, 1697. A libel, intituled, 'Mr. Bertie's Case, &c. with some Remarks on the Judgment given therein,' was voted false, malicious and scandalous, and ordered to be burnt; and a committee was appointed to consider of the said paper.

"March 18, 1697. Report was made from the committee, That the printer had confessed that Mr. Robert Bertie, a member of the House of Commons, had employed him to print it.

"26th of the same month. Consideration was had of the said paper; and the earl of Abingdon, in his place, declared, That he did, in the name of his son, ask pardon of the House and the Lord Chancellor; which the House accepted.

"May 7, 1716. James Mynde, a solicitor, was ordered into custody, for putting counsel's names to an appeal without their knowledge.

"12th of same May, Mynde was brought to the bar, and, by a petition, confessed himself guilty; and a committee was appointed, to inspect precedents of punishments inflicted.

"18th of that month, report was made from that committee; and Mynde fined 100*l.* to the king.

"June 4, 1716. He petitions to be discharged out of custody; and his petition was rejected.

"12th of the same month. He was ordered to cause his fine to be paid into the clerk's hands, in order to be estreated into the Exchequer, for the regular payment of the same.

"14th of the same month. The House being informed, That the clerk had received the said fine; Mynde was ordered to be brought to the bar, to be discharged; and the next day he was brought, reprimanded, and discharged accordingly, (paying his fees)."

March 3, 1764.

The earl of Marchmont reported from the Lords' committees appointed to search precedents, as to what punishments have been inflicted, or methods taken to vindicate the honour of this House, in cases of any breach of their lordships' privilege, or contempts to the House:

"That the committee have taken into consideration the matter to them referred, and have inspected the Journals in relation thereto; and find that a long report was made from a committee, to this House, the 25th of November, 1724, of precedents of punishments inflicted, or methods taken to vindicate the honour of the House, in cases of breaches of privilege or contempts; which report being entered in the Journal, the committee think it unnecessary to do more than to refer thereto. But they think it their duty to offer to the consideration of the House the following instances, which have occurred since the making of the said report;

"Feb. 4, 1724. Matthias Cater, for procuring and selling protections of the earl of Suffolk, and for an unlawful combination to charge certain persons falsely, was fined 20 nobles, ordered to be committed to Newgate for three months, and until he pay the said fine; and to be put twice in the pillory, for the space of an hour each time, with a paper over his head, signifying his offences.

"April 21, 1725. Thomas Tooke an attorney, for a breach of the earl of Strafford's privilege, was ordered into the custody of the gentleman usher of the black rod.

"Feb. 22, 1725. Upon a representation of the black rod against Tooke and others, for-

merly ordered into custody for breaches of privilege, they were all ordered again into custody

"Jan. 21, 1726, July 4, 1727. The said Tooke, not having made his submission, nor paid his fees, was again ordered into custody.

"May 23, 1728. The yeoman usher and one of the doorkeepers, being examined concerning the behaviour of the said Tooke when formerly in custody, the House adjudged that the said Tooke should pay a fine of 500*l.* to the king, for breach of privilege and contempt of the House: And the sheriffs of London and Middlesex were ordered to take him, and keep him in Newgate till he should pay the said fine, and the fees and charges to the usher of the black rod, and other officers of this House.

"Feb. 19, 1754. David Home, for forging and selling protections in the name of the earl of Breadalbane and earl of Crawford, was ordered to be committed to Newgate for one year, and to be put twice in the pillory for the space of an hour each time, with a paper over his head signifying his offence.

"December 10, 1755. George King, for being concerned in printing and publishing a spurious and forged printed paper, dispersed and publicly sold as his majesty's speech to both Houses of Parliament, was fined 50*l.* and committed to Newgate for six months, and until he pay the said fine:

"April 1, 1757. Upon his petition, expressing his abhorrence of his crime, and sorrow for the same, and humbly imploring forgiveness and mercy, he was ordered to be brought to the bar.

"April 4, 1757. He was brought to the bar accordingly; where he, on his knees, receiving a reprimand from the Speaker, his fine was remitted; and he was ordered to be discharged out of Newgate, paying his fees."

REPORT CONCERNING PRIVILEGE.

On the 30th of April, 1771, a Committee of the House of Commons which had been "appointed to examine into the several facts and circumstances relative to the late obstructions to the execution of the orders of the House," made a report in which, after having stated the evidence of the facts and circumstances relative to those obstructions, they stated that they had proceeded to the other part of what was given them in charge; namely, "to consider what 'further proceedings may be requisite to enforce a due obedience to the orders of the "House;" and, in order to form their Judgment upon that matter, they have made a diligent search in the Journals, to see what the proceedings of the House have been on similar occasions; or, if no cases strictly analogous should occur, at least to deduce, from the general practice of the House, such principles of parliamentary law as might be applicable to the present matter referred to their consideration.

And in this place the Committee beg leave to observe, that it appears to them that this House has, from the earliest times, asserted and exercised the power and authority of summoning before them any commoner, and of compelling his attendance;—and that this power and authority has ever extended as well to the city of London, without exception on account of charters from the crown, or any pretence of separate jurisdiction (instances of which appear in the cases (1) referred to in the margin) as to every other part of the realm.

And that the House have ever considered every branch of the civil authority of this government as bound (when required) to be aiding and assisting to carry into execution the warrants and orders of this House.

In order to lay before the House the result of their enquiry with tolerable brevity, and some degree of method, the Committee have reduced under three general heads the obstructions which have been given at different times to the orders of the House, and under each of these heads have ranged the different modes in which these breaches of privileges and contempts have been offered; and then submit to the consideration of the House the several methods of proceeding which the House hath opposed to these Offences, the proofs of which proceedings appear by cases referred to in the margin of this Report.

The three general Heads of breaches of privilege and contempts of this House are, namely, those arising from, First, Evasion. Secondly, Force. Thirdly, Colour of Law.

Offences under the First and Second of these heads have been committed—by the absconding of the parties summoned—by open resistance to the officers of the House—and by riots and tumults—by the refusal of civil officers to assist the serjeants or messengers of this House, or to release persons entitled to the privilege of this House when detained in their custody.

It appears also to your Committee, as well from searching the Journals of this House, as from other authentic evidence, that, in order to remedy the abuses, and to remove the obstructions above recited, this House has proceeded to support their privileges, and to enforce the execu-

(1) Ferrers' Case, in Crompton, fo. 9 & 10.—Stanman, 6 E. 6. 1st vol. p. 18.—Boswell, 2 and 3 P. and M. 1555.—Nov. 20, 1st vol. p. 44.—Corbet, 5 and 6 P. and M. 1557, Nov. 10, 1st vol. p. 51.—Six Servants of Sir H. Jones, 10 Feb. 1562, 1st vol. p. 65.—Wm. Jones, 29 Oct. 8 Eliz. 1566, 1st vol. p. 75.—Sir J. Shirley, March 22, 1608, 1st vol. p. 169.—Sterling, 1666, vol. viii. p. 355.—4 June 1675, vol. ix. p. 354, "'Tis not against the King's dignity for the House of Commons to punish, by imprisonment, a commoner that is guilty of violating their privileges, that being according to the known laws and custom of parliament, and the right of their privileges, declared by the king's royal Predecessors in former parliaments, and by himself in this." - 1 April 1697, vol. xi. p. 765, John Salusbury.—5 Jan. 1703, vol. xiv. p. 269, Tutchin, How, and Brag.—27 May 1721, vol. xix. p. 562, Mist.

tion of their orders, by the following methods; namely,

I. By addressing the crown to issue proclamations for apprehending those persons who thus stood in contempt of the House (2).

II. By renewing their orders against such persons, and committing them in a subsequent session of parliament (3).

III. By orders to mayors, bailiffs, and sheriffs, to assist the Serjeant or messenger for the apprehending of such persons; or to the Serjeant of this House, to call on the sheriffs of Middlesex, and the sheriffs of other counties, and all other magistrates and persons, for their assistance (4).

IV. By committing, for breach of privilege of this House, those officers of the peace who have refused their assistance to the Serjeant of this House when so called on (5).

V. By imprisoning those who refused to release persons entitled to the privilege of this House, and by increasing the severity of their restraint according to the nature of the offence, and in consequence of the contumacy of the offender (6).

With regard to the third head, namely, breaches of privilege, and contempts of this House, under colour and pretence of law; it appears to your Committee, that the same have been attempted, by discharging out of custody persons who have been committed by order of the House:

By impleading, in the courts of justice, persons intitled to the privilege of this House, in the cases there brought in question.

By prosecutions, before the said courts, for words or actions spoken or done under the protection of this House.

By accusations, tending to call in question, before the said courts, words or actions so spoken or done, under false or pretended denominations of offences, not entitled to the privilege of this House.

It appears also to your Committee, in searching the Journals, that in the above recited instances this House has proceeded,

1st, By taking again into custody persons discharged without order of the House (7).

2dly, By directing Mr. Speaker to write letters to the justices of assize, and other judges, to stay proceedings (8).

3dly, By resolutions of this House, That the suits and actions commenced and carried on in these cases should be discontinued and annulled, and should be deemed violations of the privileges of this House (9).

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(2) Sir Giles Mompesson, 28 Feb. and 3 March 1620, vol. i. p. 537.—Windebank, Dec. 10, 1640, vol. ii. p. 48.—Sir Basil Brook, April 24, 1641, vol. ii. p. 127.—Sir John Lloyd, &c. Jan. 8, 1680, vol. ix, p. 702.—Brent, Feb. 22, 1688, vol. x. p. 32.—Sir Adam Blair, June 15, 1689, vol. x. p. 182—Standish, March 12, 1694, vol. xi. p. 266.—Mackenzie, vol. xi. p. 416.—Grascomb, Nov. 30, 1696, vol. xi. p. 602.—Soranzie, April 11, 1700, vol. xiii. p. 321.—Jeffreys, Addy, and Clifton, March 25 and 26, 1701, vol. xiii. p. 427, 436, 437.—Colepeper and others, March 28, April 2, 1702, vol. xiii. p. 826.—Tutching, &c. Printers, Feb. 14, 1703, vol. xiv. p. 336.—Rioters, in Sacheverel's case, March 2d, 4th, and 6th, 1709, vol. xvi. p. 343, 346.—Rebels, 4 and 6 Feb. 1715, vol. xviii. p. 368.—Wilkinson, 9 June and 1 July 1721, vol. xix. p. 585.—Leveland, 6 March 1746, vol. xxv. p. 313.—A. Murray, 26 Nov. 1751. vol. xxvi. p. 309.—Reynolds, 11, 12, 15, 16, and 18th Feb. 1768, vol. xxxi. p. 603, 606, 610, 612, 618.

(3) Harvey and Martin, 22 April 1713, 17th vol. p. 298.—Inglefield, 29 Jan. 1725, 20th vol. p. 549.—Phillips and Barnes, 22 Jan. 1733, 22d vol. p. 210.—A. Murray, as above.

(4) Ratcliff, 14 Nov. 1640, vol. ii. p. 29.—Sir Basil Brook, Jan. 11. and 25, 1641, vol. ii. p. 371.—Nabbs and Thompson, 21 Dec. 1660, vol. viii. p. 228.—Dudley, 24 Jan. 1670, vol. ix. p. 193.—Topham, 4 June 1675, P. M. vol. ix. p. 353.

(5) Hastings and Crook, 19 May 1675, vol. ix. p. 341.—Topham, as above.—Blythe, 7 April 1679, vol. ix. p. 587.—Owen, 28 March 1702, vol. xiii. p. 826.

(6) Ferrers.—Sir T. Shirley and Sterling, as above.

(7) Pemberton and others, 2 June 1675, vol. ix. p. 351. Duncomb, March 22, 1697, vol. xii. p. 174; when the House Resolved, That no person committed by this House, can, during the same session, be discharged by any other authority whatsoever. Charles Duncombe having been committed by order of this House, and afterwards discharged by the order of the House of Lords, without the consent of this House; it was Resolved, That the said Charles Duncombe be taken into the custody of the Serjeant at arms attending this House.

(8) Strickland, 19 March 1605, vol. i. p. 287.—Potts, 2 Feb. 1606, vol. i. p. 331.—Harrison, 26 and 27 Feb. 1606, for stay of Trial, as in other like cases has been usual, vol. i. p. 342, 343. Sir R. Gargrave, Sir W. Kingswell, *eodem die et loco*. Bond, Feb. 28, 1606, vol. i. p. 345. Hyam, 5 March 1606, vol. i. p. 349.—Powlett, 5 May 1607, vol. i. p. 369. Bullingham, 13 May 1607, vol. i. p. 373. Bowes, 20 May 1607, vol. i. p. 375. Johnson, 10 June 1607, vol. i. p. 381. Stone, 20 June 1607, vol. i. p. 386. Pelham, 2 May 1610, vol. i. p. 423. —Sanders, 18 and 21 May 1610, vol. i. p. 429. —"General motion about letters to be written to the justices of assize, referred to the Committee of privileges, report this Resolution: Resolved, That the former course of writing letters to the justices of assize, according to precedents; and, if required, a warrant for inhibition to the party." 3 March 1620, vol. i. p. 537. Lord Bulkley, 28 April 1691, vol. x. p. 537.

(9) Sir Robert Howard, 17 Feb. 1625, vol. i. p. 820.—Sir William Williams, 7 Feb. 1688, vol. x. p. 21, 146, and 215.—Hollis and others,

4thly, By committing those judges who have proceeded to the trial of, or pronounced sentence upon, persons entitled to the privilege of this House, for words or actions spoken or done under the protection of the privilege of this House (10).

Your Committee have selected a few cases, from among the many referred to in the margin of this Report, which, from the nature of their circumstances, or the importance of the doctrine which they illustrate, or the consequences which they produced, seemed to your Committee fit to be more fully stated than the margin would admit; and are therefore added as an Appendix.

Your Committee beg leave to observe, that, in the diligent search they have made in the Journals, they have not been able to find an instance, that any court or magistrate has presumed to commit, during the sitting of parliament, an officer of the House, for executing the orders of the House.

They farther beg leave to observe, that they have not been able to find, that there has ever been an instance, wherein this House has suffered any person, committed by order of this House, to be discharged, during the same session, by any other authority whatsoever, without again committing such person.

And therefore, with regard to J. Miller, who was delivered from the custody of the messenger by the lord mayor, who for the said offence is now under the censure of the House; as it appears to your Committee, that it highly concerns the dignity and power of the House, to maintain its authority in this instance, by re-taking the said J. Miller; The Committee recommend to the consideration of the House,

Whether it may not be expedient, that the House should order, That the said J. Miller be taken into the custody of the Serjeant at Arms attending this House.

And that the Serjeant at Arms, his deputy or deputies, be strictly enjoined to call upon the magistrates, officers of the peace, and other persons, who, by the terms of the Speaker's Warrant, are required to be aiding and assisting to him in the execution thereof, for such assistance as the said Serjeant, his deputy or deputies, shall find necessary to enable him or them to take into custody the said J. Miller.

APPENDIX.

Crompton on Jurisdiction of Courts, fo. 9. 10.

"In the 34th of Henry 8th, one George Ferrers, a burgess for the town of Plymouth, was arrested in London, by a process out of the King's-bench, at the suit of one White; of which the House being informed, ordered the Serjeant to repair to the Compter in Bread-street, whither the said Ferrers was carried, and there to demand the delivery of the prisoner. The serjeant went to the Compter, and declared to the clerks there, what he had in commandment; but the clerks and other officers of the city, after many high words, forcibly resisted the serjeant. Whereupon ensued a fray, in which the serjeant's man was knocked down, and the serjeant was driven to defend himself with his mace of arms. During this fray, the sheriffs of London, called Rowland Hill and H. Suckley, came thither, to whom the serjeant complained of this injury, and required of them the delivery of the prisoner; but they took part with their officers, and gave no attention to his complaint, and contemptuously refused to deliver the prisoner. The serjeant returned to the House, and made his report of the above transaction; who thereupon would sit no longer without their burgess, but rose and repaired to the upper House, where the whole case was declared by the mouth of the Speaker, before the lord chancellor, and all the lords and judges there assembled, who, judging the contempt to be very great, referred the punishment thereof to the order of the House of Commons; who, being returned to their House, ordered the serjeant to repair immediately to the sheriffs of London, and to require the delivery of the prisoner, without any writ or warrant, though the lord chancellor offered to grant a writ, which the House of Commons refused, being clearly of opinion, that all commands, and other acts *proceeding from their House*, were to be done and executed by their serjeant, without writ, only by shew of his mace, which was his warrant.—The sheriffs, upon this second demand, delivered the prisoner; but the serjeant, in pursuance of his orders, charged the said sheriffs to appear before the House the following day, by eight of the clock in the morning, and to bring thither the clerks of the Compter, and such other of their officers as were parties to the fray.—The serjeant had also orders to take into custody the said White, who had procured the said arrest, in contempt of the privilege of parliament. The sheriffs, on the next day, with one of the clerks of the Compter, who was the chief occasion of the fray, together with the said White, appeared before the House; where the Speaker charging them with their contempt and misdemeanor aforesaid, they were compelled to make immediate answer, without being admitted to any counsel, although sir Robert Cholmley, then recorder of London, and other the counsel of the city there present, offered to speak in the cause, which were all put to silence, and none suffered to speak but the parties themselves: whereupon, in conclusion, the said sheriffs and White were committed to the Tower of London; and the said clerk, who was the occasion of the fray, to a place there called Little Ease, and the officers of London call Taylor, with four other officers, who had arrested Ferrers, were committed to Newgate.

"The king, being informed of this proceed-

6 July 1641, vol. ii. p. 202 and 203.—Jay and Topham, 4 June 1689, vol. x. p. 64, 210, 213, and 227.—Elford, 13 and 14 April 1716, vol. xviii. p. 420; and on the 16 April the clerk of the peace was ordered to erase the name at the table.

(10) Case of the Five Members, 18 Jan. 1641, vol. ii. p. 337.—Jay and Topham, as above.

ing, called before him the lord chancellor of England, and the judges, with the Speaker, and many others of the House of Commons, to whom he declared his opinion to this effect: He commended their wisdom in maintaining the privileges of their House; he, among other things, further declared, That he was informed by his judges, that he at no time stood so highly in his estate royal, as in the time of parliament, when he as head, and they as members, are conjoined and knit together, into one body politic; so as whatsoever offence or injury, during that time, is offered to the meanest member of the House, is to be judged as done against his royal person, and the whole court of parliament; which prerogative of the court is so great (as his learned counsel inform him) that all acts and processes coming out of any other inferior courts, must for the time cease, and give place to the highest.

"Whereupon sir Edward Montagu, then lord chief justice, declared his opinion, confirming by divers reasons what the king had said; which was assented to by all the rest, none speaking to the contrary."

This case is also referred to by sir Robert Atkyns, in his tract On the Power, Jurisdiction, and Privilege of Parliament, and in Dyer's Reports.

Sir ROBERT HOWARD'S CASE, February 17, 1625, vol. 1, p. 820.

"Motion made, where sir Robert Howard, during privilege of parliament, was excommunicated for not taking the oath *ex officio*.

"Resolved, upon question, to refer this to the examination of a select committee, Mr. Selden and others.

"This committee to take consideration of the restraint and excommunication of sir Robert Howard, and to make their report to the House of their proceedings and opinions therein," p. 821.

March 21, p. 839. "Mr. Selden reports from the committee, That sir Robert stood privileged by the House, when these proceedings were had against him.—That upon his appearance before the court, an oath was tendered him, to answer things objected against him; he answered, he was a burgess of parliament. They pressing him notwithstanding to answer, they at length committed him close prisoner to the Fleet. Having laid two days, he petitioned the lord keeper for a *corpus cum causa*; and upon Mr. Bembow's certificate that he was a parliament man, the lord keeper enlarged him by the 10th of March.—That day the court of high commission pressed him again to answer; he claimed the privilege of parliament again; they (the parliament approaching) gave him time of deliberation. On the 15th of March the parliament sat and adjourned. On the 17th of March they called him again; when he brought them the copy of the indenture of return under Bembow's hand, and the copy of the Habeas Corpus upon which he had been delivered. That, he being again pressed to answer, and he claiming privilege as before, they, because he shewed no record to prove him a parliament man, pronounced him Contumax, and excommunicated him; ordering him further, he should, before the 10th of March, attend one of the Commissioners, and be bound in 3,000*l.* to appear the Wednesday after, and stand to the order of the court.

"Resolved, upon question, That sir Robert Howard ought to have had privilege of parliament, *nem. con.*

"Secondly, Resolved, upon question, That sir Robert Howard claimed his privilege of parliament in due manner, *nem. con.*

"Resolved, upon question, That a day be assigned to the members of our House, and those other which are commoners, to answer in the House their proceedings against sir Robert Howard.—This to be done upon Friday next, nine o'clock.

"Those of our own members to be made acquainted with the day; for the other commoners, a warrant shall issue under Mr. Speaker his hand, for their appearance that day."

3rd May, p. 851. "Sir John Hayward called in about sir Robert Howard's business, and interrogated by Mr. Speaker, &c.

"Dr. Pope called in, and interrogated.

"Mr. Mottersey, the Register, called in, and interrogated.

"Upon question, all the proceedings in the high commission court against sir Robert Howard, from the 1st of February 22 James, at which time he ought to have had his privilege of parliament, declared to be void, and ought to be vacated and annihilated.

"Secondly, upon question, whether a letter to be written, by Mr. Speaker, to the lord of Canterbury and the rest of the Lords, and others of the high commissioners, for annulling of the said proceedings? the House divided. Carried for the negative.

Upon question, sir John Hayward, Dr. Pope, and the Register, called in; and the effect of the said order declared to them by Mr. Speaker; and that the House expecteth it to be done, and to hear by Monday next that this be done; and in the mean time, the House will respite any resolution concerning themselves; and that they attend the House again on Monday morning: And the like notice to be given to Mr. Comptroller and sir H. Martyn, by the serjeant: all which was done by Mr. Speaker accordingly."

10 June, p. 869. Sir George More informeth the House, That he was present at an high commission court, where seven bishops present; and knoweth, that then all the proceedings against sir Robert Howard, from the 1st of February, 22 Jac. were frustrated and made void. And sir H. Martyn affirmed, that the order of the House there read and allowed; and all ordered to be done there accordingly.

"Tuesday next, for full satisfaction to be given to this House, of the performance of the order concerning sir Ro. Howard."

On June 15th, the parliament was dissolved.

1661, 18 December, vol. 8, p 335. CASE of STERLING.

"Upon information given to this House, That alderman Sterling, one of the sheriffs of London, being served with an order, signed by Mr. Speaker, to discharge James Lyde, menial servant to sir Henry Herbert (who was arrested and imprisoned in the Poultry Compter) out of prison; the said sheriff refused to obey the said order, or discharge the said Lyde; but put the order up in his pocket, and said, he would answer it to the Speaker in the House.

Resolved, That the said sheriff Sterling be forthwith this morning sent for, in custody of the serjeant at arms, to this House, to answer his misdemeanor and breach of privilege."

Dec. 19. "Resolved, That sheriff Sterling be called to the bar of this House; and shall, upon his knees, receive the reprehension of Mr. Speaker, for his contempt and breach of the order of this House; and that he be continued in the custody of the serjeant at arms, till he do cause Lyde, servant to sir Henry Herbert, to be released out of prison, without any fees or charges.

"The sheriff being called in, and kneeling at the bar, Mr. Speaker gave him a grave reprehension; and told him, That some sheriffs of London, for a less offence, had been sent to the Tower; but, in regard of his loyal affections to his majesty, the House was pleased to remit his offence, upon the enlargement of the prisoner: but that he should remain in the serjeant's custody until the prisoner was released, as aforesaid."

4 June, 1675, p. m. vol. 9, p. 353. "Ordered, That Mr. Speaker do issue out a warrant to John Topham, esquire, serjeant at arms now attending this House, to authorize and require him, that, if any person or persons shall attempt or go about to arrest, imprison, or detain, him from executing his office, or from his attendance upon this House, to apprehend such persons, and bring them in custody to answer their breach of privilege; and to require and authorize all persons to be aiding and assisting to him therein."

4th June, 1689, vol. 10, p. 164. "A Petition of John Topham, esquire, was read; setting forth, That he, being a serjeant at arms, and attending the House, in the year 1679 and 1680, when several orders were made and directed to the Petitioner, for the taking into his custody the several persons of sir Charles Neal, &c. &c.

was over-ruled; the then judges ruling the Petitioner to plead in chief, and thereupon he pleaded the orders in bar to the actions; notwithstanding which plea and orders, the then judges gave judgment against him, &c."

5th July, p. 209. "Colonel Birch reports from the Committee of privileges and elections, to whom the petition of J. Topham was referred, &c.

"Whereupon the House Resolved, That this House doth agree with the committee, that the judgment given by the court of King's-bench, in Easter Term, 34 Car. 2. Regis, upon the plea of John Topham, at the suit of John Jay, to the jurisdiction of that court; and also the judgments given against the said Mr. Topham, at the suit of Samuel Verdon, &c. are illegal, and a violation of the privileges of parliament, and pernicious to the rights of parliament.

"Ordered, That sir Francis Pemberton, sir Thomas Jones, and sir Francis Wythens, do attend this House, on Wednesday morning next."

19 July, p. 227. "Sir Francis Pemberton and sir Thomas Jones attending, were called in; and having been heard in their defence, were committed to the Serjeant at Arms, for their breach of the privileges of this House, by giving judgment to over-rule the plea to the jurisdiction of the court of King's-bench, in the case between Jay and Topham."

The Case of sir William Williams; against whom, after the dissolution of the parliament held at Oxford, an information was brought, by the Attorney General, in the King's-bench, in Trin. Term, 36 Car. 2, for a misdemeanor for having printed the information against Thomas Dangerfield, which he had ordered to be printed, when he was Speaker, by order of the House. Judgment passed against him on this information in the second year of king James the Second. This proceeding the Convention Parliament deemed so great a grievance, and so high an infringement of the rights of parliament, that it appears to your committee to be the principal, if not the sole, object of the first part of the eighth head of the means used by king James to subvert the laws and liberties of this kingdom as set forth in the declaration of the two Houses; which will appear evident from the account given in the journal, 8th Feb. 1688, of the forming of that declaration, the eighth head of which was at first conceived in these words; viz. "By causing informations to be brought and prosecuted in the court of King's-bench, for matters and causes cog-

solved, the said persons, being ... the Petitioner, did, in Hilary Term the 33rd or 34th of king Charles , sue the Petitioner in the King's-bench, in several actions of trespass, battery, and false imprisonment, for taking and detaining them as aforesaid: To which actions the Petitioner pleaded to the jurisdiction of the court the said several orders; but such his plea

..., and gave for a reason, because they do not fully apprehend what is meant by it, nor what instances there have been of it; which therefore they desire may be explained, if the House shall think fit to insist further on it."

12 February 1688. "The House disagree with the Lords in their amendment in leaving

out the eighth article. But in respect of the liberty given by the Lords in explaining that matter:

"Resolved, That the words do stand in this manner:—By prosecutions in the court of King's-bench for matters and causes cognizable only in parliament, and by divers other arbitrary and illegal courses."

By which amendment, your committee observes, that the House adapted the article more correctly to the case they had in view; for the information was filed in king Charles the second's time; but the prosecution was carried on, and judgment obtained, in the second year of king James.

That the meaning of the House should be made more evident to the Lords; the House ordered, "That sir William Williams be added to the managers of the conference;" and sir William Williams the same day reports the conference with the Lords: and "That their lordships had adopted the article in the words as amended by the Commons." And corresponding to this article of grievance is the assertion of the right of the subject, in the ninth article of the declaratory part of the bill of Rights: viz. "That the freedom and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament."

To which may be added, the latter part of the Sixth Resolution of the Exceptions to be made in the bill of Indemnity, Journal, vol. 10, p. 146, wherein, after reciting the surrender of charters, and the violating the rights and freedoms of elections, &c. it proceeds in these words: "And the questioning the proceedings of parliament, out of parliament, by declarations, informations, or otherwise, are crimes for which some persons may be justly excepted out of the bill of Indemnity."

On the 11th of June 1689, p. 177. "The House ordered, That the records of the court of King's-bench, relating to the proceedings against William Williams, esq. now sir William Williams, knight and baronet, late Speaker of this House, be brought into this House, by the Custos Brevium of the said court, on Thursday morning next."

On the 12th of July, p. 215. "The record was read; and the House thereupon Resolved, That the judgment given in the court of King's-bench, in Easter Term, 2 Jac. 2, against William Williams, esq. Speaker of the House of Commons, in the parliament held at Westminster, 25 October 32 Car. 2, for matters done by order of the House of Commons, and as Speaker thereof, is an illegal judgment, and against the freedom of parliament.

"Resolved, That a bill be brought in, to reverse the said judgment."

This bill was twice read; but went no further in that session.

1691, 28 April, vol. 10, p. 537. "A complaint being made to the House, That Sam. Hughes and William Philipps, esquires, Walter Thornborough, an attorney at law, and Francis Meare, had, by a prosecution at law, in the last great session for the county of Pembroke, endeavoured to turn Richard viscount Bulkeley of the kingdom of Ireland, a member of this House, out of the possession of part of his estate;

"Ordered, That it be referred to Mr. Speaker, &c.

"Ordered, That Mr. Speaker do write a letter to the prothonotary that he do not make out, and to the sheriff of the county of Pembroke that he do not execute, any writ, whereby the lord Bulkeley's possession may be disturbed, until Mr. Speaker shall have examined and reported the matter to the House, and this House take further order therein."

1716, April 11, 15, 16, vol. 18, p. 426. "The House being acquainted that Jonathan Elford, esq. a member of this House, has been summoned, by John Metcalf and Alexander Ward, esquires, two justices of the peace for the county of Middlesex, to appear before them, to take the oaths appointed by the late act of parliament; which summons was delivered in at the clerk's table, and read:

"Ordered, That John Metcalf and Alexander Ward, esquires, do attend this House tomorrow morning."

April 11. "Were called in: They acknowleged they did issue a warrant for Mr. Elford to come and take the oaths; but that they did not know he was a member of the House, until they had made a return into the quarter sessions.

"Ordered, That the clerk of the peace for the county of Middlesex do attend, upon Monday morning next, with the return, &c.

April 16. "Ordered, nem. con. That the deputy clerk of the peace for the county of Middlesex be called in, and, at the table, erase the name of Jonathan Elford, esq. a member of this House, out of the return made by John Metcalf and Alexander Ward, esquires, two of the justices of the peace for the said county, of such persons as have been summoned by them to take the oaths, and who have neglected and refused so to do.

"And Mr. Hardesty was called in; and, at the table, erased out the name of Jonathan Elford accordingly."

14 Nov. 1640, 2 vol. p. 29. "Ordered, That a warrant shall issue, under Mr. Speaker's hand, to all mayors, justices of peace, bailiffs, sheriffs, constables, and other his majesty's officers of this kingdom, requiring them to be assistant to the bearer or bearers of the warrant of this House, for the bringing in safe custody, sir G. Radcliffe to this House, for the better and more effectual execution of his or their said warrant."

January 11th 1641, vol. 2, p. 371. "Ordered, That, in the execution of the warrant of this House for the apprehending of sir Bazil Brooke, the Serjeant at Arms attending this House, his deputy or deputies, do require the assistance of all sheriffs, justices of peace, constables, and other officers, for the apprehending

of the said sir Bazil Brooke; and to use all possible diligence herein."

21 December 1660, vol. 8, p. 222. "This House having formerly issued an order for the Serjeant at Arms, &c. to send for in custody William Nabbs and Mr. Maurice Tompson, for violating the privilege of this House, in the case of sir Francis Lawley; and being informed that the said Nabbs withdraws himself; and that the serjeant's deputies, who had in charge the warrant as to Mr. Tompson, were denied admittance to him; and that slighting and contemptuous words were given touching the warrant; the said deputies were called in to the bar of this House, and examined; viz. Walter Curtis and Simon Lowen.

"Resolved, That Mr. Maurice Tompson be sent for, in custody, as a delinquent; and that the Serjeant at Arms be empowered to break open Mr. Tompson's house in case of resistance, and also to bring in custody all such as shall make opposition therein; and he is to call to his assistance the Sheriff of Middlesex, and all other officers as he shall see cause, who are required to assist him accordingly."

January 24, 1670, vol. 9, p. 193. "Information being given of a very high contempt and misdemeanor committed against the House, by assaulting and beating George Dudley, deputy to the Serjeant at Arms, and rescuing out of his custody Thomas Parsons, &c.

"Which misdemeanor and rescue, the said Dudley did testify, was committed by Mr. John Cox, under-sheriff of the county of Gloucester, and his bailiff and others.

"Resolved, That the Serjeant at Arms attending this House, or such deputy or deputies as he shall appoint, do apprehend and take into custody Mr. John Cox, under-sheriff of the county of Gloucester, William Forder, &c. &c.

"And the high sheriff of the county of Gloucester, and other officers concerned, are to be required, by warrant from Mr. Speaker, to be aiding and assisting in the execution of such warrant."

Vide also—Topham, as before, June 1, 1675

26 February 1701, vol. 13, p. 767. "Resolved, That to assert, the House of Commons have no power of commitment, but of their own members, tends to the subversion of the constitution of the House of Commons."

[*Reports from Committees of the House of Commons, vol. 3, p. 6.*]

The Committee consisted of the following persons:

The right hon. Welbore Ellis; Mr. Solicitor General, (Alexander Wedderburne, afterwards earl of Rosslyn and successively Lord Chief Justice of the Court of Common Pleas and Lord Chancellor); Mr. Attorney General, (Edward Thurlow, afterwards lord Thurlow and Lord Chancellor); Jeremiah Dyson, esq.; Rose Fuller, esq.; The right hon. sir Gilbert Elliot, bart.; Sir Henry Hoghton, bart.; Sir William Bagot, bart; The right hon. Hans Stanley; Sir Thomas Clavering, bart.; Robert Henley Ongley, esq.; Thomas De Grey, esq.; The right hon. lord John Cavendish; The right hon. lord George Sackville Germain; The hon. John Yorke; The hon. Charles Marsham; The Lord Advocate of Scotland; Doctor William Burrell; John Buller, of Exeter, esq.; Sir Roger Newdigate, bart.; Frederick Montagu, esq.

This report is said to have been prepared by the Attorney General and Solicitor General.

Thus it appears that there are abundance of precedents of punishment by the House of Commons for breach of privilege, and accordingly lord Hale (See 1 Hargrave, Juridical Arguments and Collections, p. 7.) says, "surely the right of criminal punishment of breaches of privilege of the members of the House of Commons by long and ancient usage belongs to the House of Commons, but not to give damages."

Precedents should not by any means be slighted. On the contrary in the law of England they are contemplated with very great respect, or as Mr. Justice Blackstone (1 Comm. 71.) expresses it, "the decisions of courts are held in the highest regard;" and this chiefly as being evidence of what the law is; but partly also, as it seems, for the preservation of uniformity and prevention of uncertainty, or, according to his phrase, "to keep the scale of justice even and steady, and not liable to waver with every new judges opinion." (1. Comm. 69.) But this regard and respect for precedents is not unlimited, for, as the same learned commentator instructs us, (vol. 1. p. 71.) "the law and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law." In truth, as bishop Burnet told sir William Jones (See vol. 6. p. 1421 of this Collection) "a precedent against reason may signify no more but that the like injustice has been done before." Accordingly the excellent Chief Justice Vaughan said in the Case concerning "Process out of the Courts at Westminster into Wales," (Vaugh. Rep. 419.) "Precedents are useful to decide questions; but in such cases as depend upon fundamental principles from which demonstrations may be drawn, millions of precedents are to no purpose." See too, upon the invalidity of the longest and most uniform succession of precedents, in contradiction to the plain unambiguous words of a statute, or in departure from them, whether by construction or otherwise, the powerful observations of Mr. Erskine at the Trial of John Horne Tooke, (A. D. 1794, *infra*), which observations were recognised and reasserted by his lordship in the House of Lords on the 7th of May in the present year 1810 [See Cobb. Parl. Deb. vol. xvi.]

That zealous, eloquent, and potent friend of establishments, Mr. Burke, has, indeed, in his anxiety to preserve the fabric of our admirable constitution, by the removal of whatever is likely to impair or indanger its foundations,

spoken of precedents with very little reverence. After introducing to the contempt of his hearers, those who "are proud of the antiquity of their House, and defend their errors as if they were defending their inheritance, afraid of derogating from their nobility, and carefully avoiding a sort of blot in their scutcheon, which they think would degrade them for ever;" he proceeds, "It was thus that the unfortunate Charles the first defended himself on the practice of the Stuarts" [I conjecture he meant the Stuart] "who went before him, and of all the Tudors. His partisans might have gone to the Plantagenets. They might have found bad examples enough both abroad and at home, that could have shewn an illustrious descent. But there is a time, when men will not suffer bad things, because their ancestors have suffered worse. There is a time when the hoary head of inveterate abuse will neither draw reverence nor obtain protection." Speech in the House of Commons, Feb. 11th 1780.

And it must be admitted that when consideration is had of the liability of the powerful to confound power with right* (a topic the theory of which pervades the compositions of moralists of every age, and of every description, poets, orators, philosophers; and the practice of which is proclaimed in almost every page of history) it may perhaps be not unreasonable to entertain the opinion that precedents of acts of power exercised by individuals or bodies of men, possessing or supposed to possess sufficient strength, physical or moral, to enforce the exercise of such acts of power, are not of equal validity with precedents of other kinds, as evidence of right. This opinion will derive much support from many parts of this Collection. See the early State Trials as referred to by Foster 284, the great Case of Impositions in this Collection, vol. 2, p. 37, and Mr. Hargrave's admirable Introduction to that Case; the History of the Proceedings out of which arose the Petition of Right; and the History of the Proceedings out of which arose the Revolution in the year 1688. See also the Case of Penn and Mead, vol. 6. p. 951, and the notes thereto; and Chief Justice Vaughan's argument in Bushell's Case, vol. 6, p. 999 of this Collection. See too the particulars of lord Loughborough's attempt at the Summer Assizes 1789 to exact a fine of five hundred pounds upon the county of Essex, for defects in their jail; as to which attempt the difference is to be noted between fines imposed upon counties by a judge, and amercements upon counties assessed by a jury of the body of the county. The law relating to this last Case has been very profoundly investigated by Mr. Hargrave, and it is to be hoped that he will make public the result of his valuable lucubrations on the subject.

The Case of Trewynniard has been much noticed in the late discussions concerning privilege of parliament. It is given as follows by Mr. Baron Maseres in his "Collection of Cases and Records concerning Privilege of Parliament," p. 53.

TREWYNNIARD'S CASE. Easter, 36 and 37 Hen. 8, A. D. 1544, in B. K. Vide Dyer, fol. 59, b.

"In the King's-bench the case was this. One William Trewynniard was imprisoned upon a writ of Exigent that issued upon a Capias ad Satisfaciendum at the suit of one Skewis; and he being thereupon taken in execution, a writ of the privilege of parliament issued to Robert Chamond, at that time sheriff of the county of Cornwall, reciting that Trewynniard was a burgess of parliament, and likewise reciting the custom of privilege of parliament. The sheriff in obedience to this writ, during the last session of the last parliament held in the 35th year of the king that now is, let Trewynniard go at large. Hereupon the executors of Skewis bring an action of debt against the said Chamond; and they demurred in law upon this matter.

"In this case there are three things to be considered:

"1st. Whether the privilege of parliament lay in this case for a burgess of the parliament arrested upon a writ of execution.

"2ndly. Supposing the privilege lay in this case, whether the party, upon his being enlarged in consequence of it, shall by such enlargement be absolutely discharged from all execution to be had against him by the other party at any time hereafter, or only during the time of parliament.

"3rdly. Whether, if privilege should be held not to lie at all in this case, the having acted in obedience to this writ, as the king's warrant to him proceeding from the parliament, shall not be a sufficient excuse for the sheriff's conduct, and discharge him from being answerable to the plaintiff for the debt.

"With respect to the first point, it seemeth that privilege is to be allowed in this case. For the proof of this it is necessary to consider the estate of parliament, which consists of three parts, namely, the king as the chief head, the lords chief and principal members of the body, and the commons, to wit, the knights, citizens, and burgesses, as the inferior members; and all together constitute the body of the parliament. It is also proper to consider the elections of these members, with what care and solemnity they are elected, the manner of performing which elections appears in the statutes made concerning them. And when they are chosen and returned to parliament, it is understood by all men they are the wisest and most discreet men in the kingdom, and the fittest to debate upon the good of the commonwealth; and accordingly the writ of summons to parliament directs that they be chosen 'de gravioribus et 'discretioribus viris,' &c. And after they are

* "Judges," says lord Hale, (Jurisdiction of Lords House or Parliament, p. 93.) "commonly chuse rather to amplify, if it may be, than to abridge their own jurisdiction."

thus returned, their personal attendance in the parliament is so necessary that they ought not for any business whatsoever to be absent, and not one person can be well spared because he is a necessary member; and for this reason, if any member dies during the parliament, a new one is to be chosen in his stead, to the end that the whole number may be kept up undiminished. And from hence it follows that the person of every such member ought to be privileged from being arrested at the suit of any private person during the time that he is busied about the affairs of the king and kingdom. And this privilege has always been granted by the king to his Commons at the request of the Speaker of the parliament the first day, &c. Therefore common reason directs that, inasmuch as the king and all his kingdom have an interest in the person of each of the said members, the private convenience of any particular man ought not to be regarded: for it is a maxim in the law, 'Quod magis dignum trahit ad se minus dignum;' as in the case in the 6th year of Edw. 4, p. 11, that if a man is condemned in trespass or redisseisin, and is in execution for the fine to the king, if he is outlawed for felony, his body shall not be imprisoned at the suit of the party, because the king has an interest in his body, upon which account, &c. It may therefore be concluded that this court of parliament is the highest of all courts, and has more privileges than any other court of the kingdom; for which reason it seemeth that in every case, without any exception, every burgess is intitled to privilege when the arrest is only at the suit of a subject; and the present case is stronger than the common ones, because the execution was sued during the time of parliament, and the plaintiff had his election whether he would sue out execution against his body or against his lands and goods. And further, every privilege is founded on prescription; and every prescription that promotes the public welfare is good, although it may be a prejudice to some private person: thus, in the time of Edw. 4, a prescription to dig in another man's ground adjoining to the sea, in order to erect bulwarks against the king's enemies, was held to be good.

With respect to the 2d point, it seemeth that the party is not discharged from execution for ever, but only for a certain time: for it is not absurd or unreasonable that a judgment should be at one time executed, and at another executory; as when a fine is levied with a remainder over, and after the death of the tenant a stranger abates, and he in remainder recovers by scire facias, and afterwards the recovery is reversed for ever, he or his heir shall have a new scire facias notwithstanding it was once executed; for the cause will then cease: and for the like reason the person of a man may be privileged for a certain time, and yet he may afterwards be put in prison; as if a villain comes and lives in antient demesne for a year, his lord cannot afterwards lay hands upon him; the law is the same where the presence of the king is a sanctuary to him; and yet formerly the lord might have seized upon him afterwards: by the same reason, &c. And there is a difference to be made where the body of a man that is in execution is set at large by the authority of the law, and where it is done without authority by the sheriff's own will and boldness: for the law will save all rights; as in the cases of villains above-mentioned, they are by the law privileged 'pro tempore;' but if the lord himself infranchises them by manumission indeed or law for an hour, this infranchisement is good for ever, 'favorum libertatis.' Also the law by a particular statute directs that 'cestuy a que use' may enter and make a feoffment, and this shall bind his feoffees; yet if a 'cestuy a que in use' tail makes a feoffment, this is no discontinuance. Also the law directs that, if a bishop presents to a benefice by lapse upon default of the right patron, yet his presentation, which is made by authority of the law, shall not prejudice the right patrons. For these reasons in the present case this enlargement by writ is only a privilege of the burgess 'pro tempore,' and not a discharge 'in perpetuum;' as in the case mentioned above that happened in 6 Edw. 4. the execution of the party to have the body in prison was suspended 'pro tempore' until the king had pardoned him the felony, but afterwards is revived, 'prout adjudicatur ibidem,' by which it seemeth, &c. It therefore follows that no action is given against the sheriff for the escape, unless in respect that the principal debtor is discharged, there being no reason that the plaintiff should be twice satisfied for the same debt, for which, &c.

And as to the third point, it seemeth that the sheriff is not answerable: For if no default, or laches, can be ascribed to the sheriff, there can be no reason to charge him with the debt; and there seems to have been no default in him. For the office of sheriff consists chiefly in the execution and serving of writs and processes of the law: And to perform these he is the immediate officer, and he is sworn that he will perform them. And for this reason he is bound by his office and oath to make a just return. And the law supposes him to be a lay person, and not to have knowledge of the science of the law; and he is therefore unable to argue or dispute whether any writ that he receives comes to him with or without sufficient authority: and upon this ground, if a capias comes to him without any original writ, and he serves it, he will be excused for so doing in an action of false imprisonment. The law is the same if a capias or an exigent comes to the sheriff against a duke or an earl, against whom it does notice. And, to prove that the sheriff is not bound to to take notice of the law, the writ 'de homine replegiando' directs that the sheriff shall make deliverance of the body, unless the man was taken into custody by the special commandment of the king 'vel capitalis justificarii, 'vel pro morte hominis, vel pro forestâ, vel pro 'aliquo alio recto quare secundûm consuetudinem Angliæ non est replegiabilis.' And further by the statute of Marlbridge, cap. 8, the sheriff shall be amerced if he delivers a prisoner

for redisseisin without special precept. And also the statute of Westm. 2, c. 11, 'de servi-'entibus et ballivis,' ordains that, if any man is condemned in arcearages before auditors and committed to the next gaol, the sheriff or gaoler shall not deliver him by a writ 'de homine re-'plegiando, nec aliter,' without the consent of his master. And yet if the party sues by his friends and obtains a writ of Ex parte talis returnable in the Exchequer, ho may let him go at large: and, notwithstanding that he is once discharged, if it appears upon the examination of his accounts that he was in arrears and duly committed to prison, he shall be remanded to prison quousque, &c. And let us suppose that the sheriff in the present case had disobeyed this writ; what damage must he not have suffered? He would have been in danger of perjury, and also of imprisonment of his body, and ransom at the king's will: and this was done in this same parliament against Hill and Suckley the sheriffs of London, who were committed to the Tower for their contempt because they would not let George Ferris, who was arrested upon an execution, go at large when the serjeant at arms came to demand him, though without a writ. And it is probable this precedent was a terror to Chamond, and made him fearful of disobeying the writ of parliament which is the highest court of the kingdom. And it appears plainly by the writ that they were clearly of opinion in the parliament that the party ought to have his privilege in this case; for otherwise the writ would only have been an Habeas Corpus cum causâ, which writ is oftentimes granted before the justices are agreed whether privilege lies in the case or no; and if they find that privilege does not lie in the case before them, they remand the matter with a procedendo &c. And therefore, although the parliament should have acted erroneously in grantin gthe writ, yet their act cannot be revised by any other court: and therefore there is no default in the sheriff.

The following accounts of the sentiments of two great men on matters connected with this subject are very well worth preserving.

MR. ERSKINE'S *Opinion of the Proceedings of the Court of King's-Bench in Ireland, by Attachment, written to a Gentleman of high Reputation at the Bar in Dublin.**

SIR; *Bath, Jan. 13, 1785.*

I feel myself very much honoured by your application to me, on an occasion so important to the public freedom; and I only lament, that neither my age nor experience are such as to give my opinion any authority with the court in which you practise; but wherever I have no doubt, I am always ready to say what I think, and you are, therefore, very welcome to my most public sentiments, if any use can be made of them.

You have very properly confined your questions to the particular case, furnished me by the affidavit which you have transmitted to me; and my answers therefore need involve in them no general discussions upon the principles of civil government, which in the mere abstract are not often useful, nor always intelligible. The propositions, to which my answers are meant strictly to apply, are;

First, Whether the facts charged by the affidavit, on which your court of King's-bench is proceeding against the magistrates of Leitrim, are sufficient to warrant any criminal prosecution for a misdemeanor whatsoever?

Secondly, Whether, supposing them sufficient to warrant a prosecution by information or indictment, the court has any jurisdiction to proceed by attachment?

As you are pushed in point of time, I can venture to answer both these questions at Bath, without the assistance of my books, because they would throw no light upon the first from its singularity, and the last is much too clear to require any from them.

As to the first—The facts charged by the affidavit do of themselves neither establish nor exclude guilt in the defendants. In one state of society such proceedings might be highly criminal; and, in another, truly virtuous and legal.

To create a national delegation amongst a free people, already governed by representation, can never be, under all circumstances, a crime: the objects of such delegation, and the purposes of those who seek to effect it, can alone determine the quality of the act, and the guilt or innocence of the actors.

If it points (no matter upon what necessity) to supersede or to controul the existing government, it is self evident, that it cannot be tolerated by its laws. It may be a glorious revolution, but it is rebellion against the government which it changes.

If, on the other hand, it extends no further than, to speak with certainty, the united voice of the nation to its representatives, without any derogation of their legislative authority and discretion; it is a legal proceeding, which ought not indeed to be lightly entertained, but which many national conjunctures may render wise and necessary.

The Attorney General might, undoubtedly, convert the facts, contained in the affidavit, into a legal charge of a high misdemeanor; which, when properly put into the form of an information, the defendants could demur to: but he could not accomplish this, without putting upon the record averments of their criminal purposes and intentions; the truth of which averments are facts which he must establish at the trial, or fail in his prosecution. It is the province of the jury, who are the best judges of the state of the nation, and the most deeply interested in the preservation of its tranquillity, to say, by their verdict, whether the defendants acted from principles of public spirit, and for the support of good government, or sought seditiously to

* Published in the Morning Chronicle newspaper, 1810.

disturb it.—The one or the other of these objects would be collected at the trial, from the conduct of the defendants in summoning the meeting, and the purposes of it when met.

If the jury saw reason from the evidence to think that its objects, however coloured by expressions the most guarded and legal, were in effect, and intended to be, subversive of government and order, or calculated to stir up discontent, without adequate objects to vindicate the active attention of the public, they would be bound in conscience and in law to convict them: but if, on the other hand, their conduct appeared to be vindicated by public danger or necessity, directed to legal objects of reformation, and animated by a laudable zeal for the honour and prosperity of the nation; then no departure from accustomed forms in the manner of assembling; nor any incorrect expressions in the description of their object, would bind, or even justify, a jury to convict them as libellers of the government, or disturbers of the peace.

To constitute a legal charge of either of these offences, the crown (as I before observed) must aver the criminal intention, which is the essence of every crime; and these averments must be either proved at the trial, or, if to be inferred, *prima facie*, from the facts themselves, may be rebutted by evidence of the defendants innocent purposes. If the criminal intent charged by the information be not established to the satisfaction of the jury, the information, which charges it, is not true; and they are bound to say so by a verdict of acquittal. I am therefore of opinion (in answer to the first question), that the defendants are liable to be prosecuted by information; but that the success of such prosecution ought to depend upon the opinion which the people of Ireland, forming a jury, shall entertain of their intention in summoning the meeting, and the real *bona fide* objects of the assembly when met.

It is unnecessary to enlarge upon these principles, because their notoriety has no doubt suggested this novel attempt to proceed by attachment, where they have no place; and I cannot help remarking, that the prosecutor (if his prosecution be founded in policy or justice) has acted with great indiscretion, by shewing that he is afraid to trust the people with that decision upon it, which belongs to them by the constitution; and which they are more likely to give with impartial justice, than the judges whom he desires to decide upon it at the expence of their oaths and of the law.

This is a strong expression, which perhaps, I should not have used in answering the same case in the ordinary course of business; but writing to you as a gentleman, I have no scruple in saying, that the judges of the court of King's-bench cannot entertain a jurisdiction by attachment over the matter contained in the affidavit which you have sent me, without such a gross usurpation and abuse of power, as would make me think it my duty, were I a member of the Irish parliament, to call them to account for it by impeachment.

The rights of the superior courts to proceed by attachment, and the limitations imposed upon that right, are established upon principles too plain to be misunderstood.

Every court must have power to enforce its own process, and to vindicate contempts of its authority; otherwise the laws would be despised, and this obvious necessity at once produces and limits the process of attachment.

Wherever any act is done by a court which the subject is bound to obey, obedience may be enforced, and disobedience punished, by that summary proceeding.—Upon this principle attachments issue against officers for contempts, in not obeying the process of courts directed to them, as the ministerial servants of the law and the parties on whom such process is served, may, in like manner, be attached for disobedience.

Many other cases might be put, in which it is a legal proceeding, since every act which goes directly to frustrate the mandates of a court of justice, is a contempt of its authority. But I may, venture to lay down this distinct and absolute limitation of such process, viz.—That it can only issue in cases where the court, which issues it, has awarded some process—given some judgment—made some legal order—or done some act, which the party against whom it issues, or others on whom it is binding, have either neglected to obey, contumaciously refused to submit to: excited others, to defeat by artifice or force, or treated with terms of contumely and disrespect.

But no crime however enormous, even open treason and rebellion, which carries with them a *contempt* of all law, and the authority of all courts, can possibly be considered as a contempt of any particular court, so as to be punishable by attachment, unless the act, which is the object of that punishment, be in direct violation or obstruction of something previously done by the court which issues it, and which the party attached was bound, by some antecedent proceeding of it, to make the rule of his conduct. A constructive extension of contempt beyond the limits of this plain principle would evidently involve every misdemeanor, and deprive the subject of the trial by jury, in all cases where the punishment does not extend to touch his life.

The peculiar excellence of the English government consists in the right of being judged by the country in every criminal case, and not by fixed magistrates appointed by the crown. In the higher order of crimes the people alone can accuse, and without their leave, distinctly expressed by an indictment found before them, no man can be capitally arraigned; and in all the lesser misdemeanors, which either the crown or individuals borrowing its authority, may prosecute, the safety of individuals and the public freedom absolutely depend upon the well known immemorial right of every defendant to throw himself upon his country for deliverance by the general plea of—Not Guilty. By that plea, which in no such case can be demurred to

by the crown, or questioned by its judges, the whole charge comes before the jury on the general issue, who have a jurisdiction co-extensive with the accusation, the exercise of which, in every instance, the authority of the court can neither limit, supersede, controul, or punish.

Whenever this ceases to be the law of England, the English constitution is at an end, and its period in Ireland is arrived already, if the court of King's-bench can convert every crime by construction, into a contempt of its authority, in order to punish by attachment.

By this proceeding the party offended is the judge; creates the offence without any previous promulgation; avoids the doubtful and tedious ceremony of proof, by forcing the defendant to accuse himself; and inflicts an arbitrary punishment, which, if not submitted to and reverenced by the nation as law, is to be the parent of new contempts, to be punished like the former.

As I live in England, I leave it to the parliament and people of Ireland to consider what is their duty, if such authority is assumed and exercised by their judges; if it ever happen, in this country, I shall give my opinion.

It is sufficient for me to have given you my judgment as a lawyer upon both your questions; yet, as topics of policy can never be misplaced when magistrates are to exercise a discretionary authority, I cannot help concluding with an observation, which both the crown, and its courts would do well to attend to upon every occasion.

The great objects of criminal justice are reformation and example; but neither of them are to be produced by punishments which the laws will not warrant: on the contrary, they convert the offender into a suffering patriot; and that crime which would have been abhorred for its malignity, and the contagion of which would have been extinguished by a legal prosecution, unites an injured nation under the banners of the criminal, to protect the great rights of the community, which in his person have been endangered.

These, sir, are my sentiments, and you may make what use of them you please. I am a zealous friend to a reform of the representation of the people in the parliaments of both kingdoms, and a sincere admirer of that spirit and perseverance which in these days, when every important consideration is swallowed up in luxury and corruption, has so eminently distinguished the people of your country. The interests of both nations are in my opinion the same; and I sincerely hope that neither ill-timed severity on the part of government, nor precipitate measures on the part of the people of Ireland may disturb that harmony between the remaining parts of the empire, which ought to be held more sacred, from a reflection on what has been lost. T. ERSKINE.

In 1798, Mr. Perry addressed to the hon. C. J. Fox certain Queries; of which the following account is extracted from the Morning Chronicle, 1810.

QUESTION as to the Practice exercised by the two Houses of Parliament of construing Libel into Contempt, and punishing it by their own Order.

We have stated what in the general opinion is the true and only justification of the exercise of the right of commitment for a contempt arising out of libel, namely, that the misdemeanor is likely to have such an instantaneous effect as an obstruction, or of such a violent character in point of force as to make it dangerous to wait for the slow remedy of the law; and therefore the necessity of the case warrants the summary proceeding. But where the ordinary tribunals are in full jurisdiction—and where the constructive contempt of libel is committed out of doors at a distance from the House of Parliament, a mere animadversion or censure on their proceedings, accompanied by no outrage, distributed by no mob at the doors nor placarded within the precinct—the misdemeanor, however palpably criminal, ought to be left to the Courts of Justice. In the memorable Debate, on the motion of Constantine Phipps, afterwards Lord Mulgrave, in 1771, for taking away from the king's Attorney General the dangerous power of filing criminal informations ex-officio, as well as in the great debate which grew out of it, on the motion of Mr. Serjeant Glynne, the opinion of all the most considerable men was, that though the right of removing obstruction by commitment must be maintained for their own security, yet it was a right that ought only to be used in extreme cases; when exerted in ordinary instances, the public mind must revolt at the harshness of unnecessarily depriving the subject of his indubitable right to trial by Jury. This was held by Mr. Dunning, Mr. Wedderburne, sir George Savile, Mr. Burke, &c. &c.; and indeed it has been the sentiment of every constitutional man. It has been recently recognized in the courts. When Mr. Stockdale was sent by the House of Commons to trial in the court of King's Bench for a libel, which they called a breach of privilege, the counsel for the Defendant asked why the House had not punished the delinquent themselves? To this the then Attorney General replied in these words—

"My Learned Friend says—Why don't 'the House of Commons themselves punish 'it?—Is that an argument to be used in the 'mouth of one who recommends clemency?—'Does he recommend this iron hand of power 'coming down upon a man of this sort;' and "not temperately, wisely, judiciously, bow to "the common law of this country; and say "let him be dealt with according to that common law? There he will have a scrupulously "impartial trial: there he will have every advantage that the meanest subject is entitled "to." Trial of John Stockdale, p. 88.

This has ever been recommended by every considerate man also, because it is well known, that this boasted privilege can only be exercised without controul against their own members or against their own constituents. The more dangerous case of a contempt by libel committed

by a peer they could not punish by summary commitment. Nay, as has been proved, they would be without remedy—if their order was opposed by the spirit of a court of justice; for if they were to send their mace for a judge, as the House of Lords did in the instance of judge Berkeley in 1640, would he come when they called?

In 1798 we accumulated a volume of materials on this great constitutional question.

Among others we submitted the following queries on the case to Mr. Fox, whose knowledge of the law and usage of parliament will be admitted by all; and when his high notions on this subject are remembered, his opinion will be read with a lively interest:

Query 1. Though the House of Lords, as well as every court of justice, have the power of protecting their proceedings from unlawful obstruction, can this right extend to the commitment for the misdemeanour of libel?

2. Has the House of Lords, either in its judicial or legislative capacity, any power of commitment beyond that of the House of Commons, the latter never committing for a time certain, nor imposing a fine?

3. Has the House of Lords, in fact, any greater power over contempt, or breach of privilege in the exercise of its judicial functions, than in its legislative capacity?

4. Does not the principle of your bill, by which it is declared that in matter of libel, the whole case shall be left to the jury, who shall pronounce a verdict of Guilty or Not Guilty thereon, extend to the Houses of Parliament as well as to courts—so as to do away all summary proceeding on libel, under the construction of its being a contempt?

5. Can the power of summary commitment be legally exercised, or at least justly and agreeably to precedent, against an individual, upon the mere proof of his being the proprietor of a newspaper, but without any proof of his knowledge of the matter complained of?

6. Supposing the right of commitment to exist, can the House of Lords commit an individual for any cause, as for breach of privilege, for a term certain, and adjudge him to pay a fine?

7. What mode of redress would, in your opinion, be the constitutional course for me to pursue in this case of commitment by the House of Lords, on the constructive contempt of a libel?

To which Mr. Fox sent the following Answer:

"Dear Sir,

"I should be extremely glad to be in any way serviceable to you upon the present occasion, but I cannot think my opinion on a case of this sort, as of any value in comparison with that of professional men; especially as redress, if any, must be had in courts of law; for, I presume you cannot think that in the present state of things there is any chance, even the smallest, of either House of Parliament listening to any thing that can be offered on the subject. However, I will endeavour to answer your Queries—

"1. There can be no right of committing but for contempt, but an act which comes properly under the description of a contempt is not the less a contempt for being also a misdemeanor. Indeed it is difficult to conceive a contempt which would not be a misdemeanor.

"2. I do not think the House of Lords in any capacity has powers of commitment beyond the House of Commons; but, I believe, such powers of commitment have been exercised by it, and I fear without the reproof which such exercise ought to have drawn from the House of Commons.

"3. I should think the House of Lords has no more power in its judicial than in its legislative character, in respect to breaches of privilege and contempts, if in truth it can be properly said to have two distinct characters, which I doubt.

"4. My libel bill has nothing to do with the jurisdiction of the Houses of Parliament. Its principle, however may be urged as an argument to induce a court to be cautious of judging libel without the assistance of a jury, except in cases of great urgency.

"5. I should think the question of a proprietor of a newspaper being criminally responsible for its contents, a very doubtful one, and indeed I should strongly incline to the negative; if the point had not, as I conceive, been often determined and acquiesced in.

"6. I believe the right of the House of Lords to fine, stands solely upon practice, and I have little doubt of its being an usurpation; as to its right for committing for a term, I have given my opinion in my answer to Query 2.

"7. The proper channel for redress against the House of Lords, is a petition to the House of Commons; but that in the present state of things cannot be thought of. Whether or not there can be a civil action against the gaoler for false imprisonment, is a question for professional lawyers; and upon this a good deal of the old dispute on the case of Ashby and White would come in play; with this material difference, that the objection, which was urged in that case to the possibility of the House of Lords, in case of appeal, becoming judge of the privilege of the Commons, would lie here as strongly (though in a different view) to the House of Lords becoming by appeal judge of their own act.

"I have now answered your Queries as well as I can. The conduct of the House of Lords seems to have been very harsh, especially as the paragraph in question, I understand (for I have not seen it) to be of that sort from which your paper is of all others the most free. But harsh as it is, I do not know that it is contrary to precedent, or otherwise illegal, than with respect to the term and the fine, and I do not know that my opinion upon these heads is that of any other person, much less the general one. Every court appears to me to have usurped powers in cases of contempt beyond the ne-

cessity of the case, and the House of Lords more than any other, possibly, because there is no appeal from it, except to parliament, of which they make a part. By the way it is observable, that the House of Commons, which of all courts has been the most moderate in exercise of power of this sort, is the court whose power and right has oftenest been called in question. Mr. Erskine's whole letter seems to relate more to ordinary courts of justice than to the Houses of Parliament; but even in the case of such courts, if a man were to write contumaciously of the manner in which a judge gave judgment, I suspect he would certainly be attached for a contempt; though this case is not mentioned by Mr. Erskine, nor does it come, perhaps, strictly within the line of his argument. Now if this be so, it is clearly a contempt of the House of Lords to animadvert contumaciously on the speeches of its members, and perhaps more clearly than in the other case, inasmuch as to print the speeches at all is a breach of Privilege. In compliance with your wishes, I have given you my opinion at large, which, however, I consider of very little value, and indeed all the questions of particular and detailed usurpations and abuses appear to me to become of little moment, at a time when the whole constitution is in such a deplorable state. The proceedings against you, I suspect to be only a beginning of a persecution against the liberty of the press in general, and a part of that system of terror which our rulers are so fond of. C. J. FOX."

For more respecting this matter, see the Cases of Barnardiston and Soame, *ante*, vol. 6, 1163; of Shirley and Fagg, *ante*, vol. 6, p. 1121, and the other cases there mentioned.

In the Lords' Journal, under date March 23, p. 1680, it appears that a Committee of Privileges reported their opinion that the Privilege of the House extended to exempt a peer's servant being a householder from service of parochial offices, but the House did not agree with the Committee.

This Case may be found to be not immaterial in the consideration of Privilege of Parliament, and of the comusability elsewhere of questions respecting such alleged Privilege.

Mem. In archbishop Secker's Report, (inserted in Cobb. Parl. Hist.) of the debate in the House of Lords, May 25, 1742, upon the second reading of the bill for indemnifying persons who should make discoveries concerning the earl of Orford's conduct, it is related that lord Hardwicke, chancellor, mentioned the following Case, which I do not recollect to have seen in print:

"In Chancery, in the Case of Sacheverel and Pool, a man published an advertisement that he would give 100*l.* to any man that could give evidence in relation to such a marriage. The other side moved the court upon this as a contempt of the court; the gentleman who advertised was committed, and all Westminster-hall were satisfied that this was right."

* As to the commitment of Mr. Perry see Mr. Hargrave's opinion in the second volume of his Juridical Arguments and Collections.

PROCEEDINGS IN THE HOUSE OF COMMONS CONCERNING FLOYDE.*

[*From the Oxford Debates.*]

Monday, April 30, 1621.

There is delivered into the House, a Paper or Note of the said scandalous Speeches, used against the Palsgrave, and the lady Elizabeth; in which it is set down, that one Edward Floid, a gentleman and prisoner in the Fleet, talking with Dr. Pennington concerning the loss of Prague, did say, in a scornful and malicious manner, 'That Goodman and Goodwife Palsgrave were now turned out of doors;' or to that purpose; with other disgraceful speeches, as that he, the said Floid, had as much right to the kingdom of Bohemia, as the Palsgrave had.

This is testified by one Willis to be spoken by the said Edward Floid, a Papist.

Sir *Edwin Sandys* saith, That we will not meddle with the words that were spoken of the Palsgrave's right to the kingdom of Bohemia; but only with the scandalous speeches and disgraceful words used by Floid against the person of the Palsgrave and his lady.

Edward Floid examined, denieth, That he ever had any speech with any of the parties who are alledged as witnesses against him, viz. one Willet, Coale, or Dr. Pennington, concerning the Palsgrave or his lady; and saith, That there was one Williams and a woman present at the time, when Dr. Pennington saith this examinant should speak those disgraceful words.

May 1.

Dr. *Pennington*, a doctor of physic, examined saith, That he and Mr. Edward Floid having a conference in his chamber, the said Floid told this examinant, that he heard that Prague was taken by the emperor, and that Goodman Palsgrave had taken his heels, and

* Among the Harleian manuscripts, there is a collection of the proceedings in this remarkable case, by sir Harbottle Grimston. The MS. appears to have belonged to Robert Harley, afterwards Lord Treasurer and earl of Oxford; who, in the first page, has written his censure of these proceedings, as follows.

At the top of the Title:

'The following collection is an instance how 'far a zeal against Popery and for one branch 'of the royal family, which was supposed to 'be neglected by king James, and consequent'ly in opposition to him, will carry people 'against common justice and humanity.

July 14, 1702. 'R. H.'

At the bottom:

'For the honour of Englishmen and indeed 'of human nature, it were to be hoped, these 'debates were not truly taken, there being so 'many motions contrary to the laws of the 'land, the laws of Parliament, and public jus'tice. R. HARLEY.' *July* 14, 1702.

was run away, and that Goody Palsgrave was taken prisoner; and, this examinant wishing that himself and all other able men were bound to go thither, and not to return till they had redeemed her, the said Floid said, this examinant was a fool. He saith, that these words were spoken in the hearing of Mrs. Broughton, an attorney's wife of this town. He saith, that when these words were spoken, Mr. Floid and this examinant were good friends, and that he went at that time to Floid's chamber, as one prisoner to visit another: That he told the Warden of the Fleet of these words the next day in his dining chamber, in the presence of Mr. Pinchback and Mr. Willett; and that six days after the Warden came to this examinant's bed-side, and desired him to tell him all the speeches that were spoken by the said Floid concerning the Palsgrave. He saith, that Floid spake these words with a joyful countenance.

The *Warden of the Fleet*, examined, saith, That he first moved Dr. Pennington to know the truth of these speeches used by Floid, having understood of it from a servant of his; and that Dr. Pennington did never acquaint this examinant with the said speeches of Floid, till he had first moved him of it: That his servant Lettice Harris, his niece, was the first that ever told him of it, and that Dr. Pennington did tell this examinant, he had written a letter of this business.

Dr. *Pennington* examined, saith, That he did borrow a Chronicle of the Warden of the Fleet, to see whether Voltiger was a Saxon or a British king; which he desired to know, because of a conference held between Floid and him: and that he, this examinant, did then write to Floid of his error in that discourse, and that, at the time when he borrowed the Chronicle, he acquainted the Warden of the Fleet with the speeches made by the said Floid.

Sir *Edward Cooke* saith, That he hath known this Floid long; and that he is a pernicious Papist, and a barrister, but a wicked fellow.

Mr. *Thomas Crewe* saith, That, if we are careful to punish such as speak scandalous speeches of foreign princes, then ought we much more to be severe to those who speak contemptuous words of our own princes.

Dr. *Willis* examined, saith, That Dr. Pennington told this examinant of those speeches of Floid's, and then told this examinant also, that he had told the Warden of the Fleet of the same words; and that one Francis Allured and one Jo. Broughton and his wife can say much of Floid's rejoicing at the ill fortune of the Palsgrave and his lady; and that one Handman will testify, that Floid hath been very merry, and drinking of healths, whenever any ill news hath come from Prague.

Mr. *Coale*, bachelor of divinity, examined, saith, That Floid told this examinant, that himself, or any nobleman of England had as much right to be king of Wales, as the Palsgrave to be king of Bohemia. And this examinant saith, he told the Warden of the Fleet of these words, and also of the speeches that were spoken to Dr. Pennington by Floid: the time when he told the Warden of it was (as he remembereth) about the 13th of January last.

May 1. p. m. Sir *Arthur Ingram* saith, That the committee appointed to search Floid's trunks and pockets, found in his pockets beads to pray on; and they have found divers popish books and beads in his trunk, and other popish books hidden in his bed:—That Broughton, a prisoner in the Fleet, saith, that Dr. Pennington did tell him, since Christmas, that Floid had spoken the said disgraceful words of the Palsgrave:—That Mrs. Broughton said, that she heard Floid speak of the Palsgrave, but doth not remember what he said, because she was then looking out of the window to see some play at bowls: That one Hardiman, a poor man that was wont to help Floid, make his bed and do him such like service, did hear Floid laugh heartily, when one called Fryer told him, that Prague was taken by the emperor's forces; and that then Floid said to Fryer, What will the lad do now? now Bess must come home again to her father. And that the said Hardiman said, he also heard the said Floid speak those disgraceful words of Goodman Palsgrave and Goody Palsgrave, when the said Fryer was with him.

Ed. Floid, being on his knee at the bar examined, and charged with all the proofs beforementioned, saith, That he knoweth not Hardiman by his name; and saith, that no man ever used to make his bed in the Fleet, but only a poor woman. He saith also, that there is one Dr. Fryer that useth sometimes to come to him, but denieth all the words wherewith he is charged.

Mr. *Hackwell* saith, That Lettice Harris saith, that she did hear Floid speak those words within this half year, viz. Goodman Palsgrave and Goody Palsgrave; but saith, that she did never tell the warden of the Fleet of it.

Sir *Robert Phillips* saith, there are in this business three things to be considered; 1. The offence; 2. The persons offended; 3. The punishment to be inflicted on the offender. For the first that Floid hath spoken derogatory words of the king's children, in deriding them by the name of Goodman and Goody Palsgrave: For the second, that we should remember and consider in our sentence, that the persons, whom he thus derogated and vilified, are the hopeful children of our prince; a lady hardly to be equalled, not to be excelled: The third consideration is the punishment; wherein he would have us not to forget that the party to be punished is a constant knave (for so he hath been known to be by many members of this House this many years) and a constant and malicious papist: That, since his offence hath been without limitation, his punishment might likewise be without proportion;—That he would have him ride, with

his face to a horse's tail, from Westminster to the Tower, with a paper in his hat, wherein should be written, "A Popish Wretch that hath "maliciously scandalized his majesty's chil- "dren;" and that at the Tower he should be lodged in little ease, with as much pain as he shall be able to endure, without loss or danger of his life.

Sir *Tho. Rowe* moveth, that, since he was committed to the Fleet by the Lords of the Council, he would have us send to the Lords, and confer with them touching the punishment of him.

Sir *Dudley Digs* would have us first to acquaint the Lords with this business, and make them sharers in the honour of punishing so vile and undutiful a subject.

Sir *George Moore* saith, that on extraordinary causes we may enlarge and make precedents; but desireth, that, by extending our power in this, we take heed that we do not prejudice that of the Lords. He would have Floid whipped from hence to the place whence he came, and would have him so left to the Lords for farther punishment.

Mr. *Ravenscroft* would have him fined 1,000*l.* and ... his corporal punishment to be spared.

Sir *Francis Seymour* would have us punish him as far as the power of our House will extend; for he would have us now, if we would at any time, stand on the privilege and power of our House. He would have him go from hence to the Tower at a cart's tail, with his doublet off, his beads about his neck, and that he should have so many lashes as he hath beads.

Mr. *Salter* would have him ride on a horse (with his face to the horse's tail) to the Tower, and be whipt, and there put in little ease.

Sir *Edward Giles* would have him stand in the pillory here at Westminster, two or three hours, then to be here whipt with as many lashes as he hath beads, and to be so likewise whipt at the court gate, and at the Temple, and would have him recommitted to the Fleet, for he would not wish any man to come into a worse prison.

Sir *Thomas Posthumus Hobby* moveth, that we should recommit him to the Fleet, there to be kept in strait prison; and that we would peruse the papers before we proceed to censure him.

Sir *Francis Darcy* would have a hole burnt through his tongue, since that was the member that offended.

Sir *Jeremy Horsey* would have his tongue slit or cut out; but, before we do censure him, he would have us to peruse the papers, for they may discover more matter against him.

Sir *Ed. Cecil* saith, that we should make a difference between the scandalizing of a prince, and the scandalizing of a subject. He would not have us yet to peruse the papers, nor mix the punishment of his offence against those princes with whatsoever fault may be in those papers. He would have him burnt in the forehead with a T or a D, a hole burnt also in his tongue, and agreeth with sir Robert Phillips and sir Francis Seymour for the rest of his punishment.

Sir *George Goring* would have his nose, ears, and tongue cut off,* to be whipt at as many stages as he hath beads, and to ride to every stage with his face to the horse's tail, and the tail in his hand, and at every stage to swallow a bead; and thus to be whipt to the Tower, and there to be hanged.

Sir *Jo. Jephson* saith, he would have moved, that a committee might be appointed to consider of the heaviest punishments that have been spoken of; but, because he perceiveth the House is inclined to mercy, he would have him whipt more than twice as far as those who offended against the ambassador, and that can be no less than to the Tower; and would have him have a paper written in his hat, declaring his offence.

Mr. *Jo. Finch* saith, that, since we have no testimony on oath against him, he would not have us put any corporal punishment on him, but all the ignominious punishment that may be.

Sir *John Strangewayes* saith, that there was never a precedent made, but there was a reason for it, and he hopeth no man doubteth, that is a sufficient reason for us to create a precedent; and therefore would have him whipt and burnt through the tongue, and the other punishments as before.

Sir *Jo. Walters* saith, that cruelty belongeth to our adversaries, and therefore he would not have us punish him with burning in the tongue; but would have all his lands and goods given to the Palsgrave, for to help to raise a force to recover the Palatinate; and that Floid should be whipt for laughing at the loss of Prague, thereby to make him shed tears: That he should endure all the ignominy of pillory or otherwise for his scandalizing of so noble princes.

Mr. *Alford* would not have him whipt, because he hath land to pay a fine: That he will go as far for the punishment of him as any precedents will warrant, but no further. He agreeth with sir Jo. Walters in all points of his censure, saving whipping.

Sir *Edwin Sandys* saith, that the sentence which shall be given here will be censured in all Christendom: the cause of Floid's offence is the ground of all the differences in Christendom, which is difference of religion. He would not have us interrupt the business of the Lords, who are now full of business, by sending of Floid thither; nor in the consideration of his punishment to touch his religion, for that were to make him a martyr. He agreeth with sir Jo. Walters in all points of his sentence, saving his whipping; for that is a punishment improper for a gentleman, from which unless he were degraded, he would not have him whipt.

Sir *Francis Goodwin* would have his whipping counted for a fine.

The *Master of the Wards* would not have us meddle with his religion in the punishment of him.

Sir *Ed. Mountague* saith, he thinketh we must not remove the king's prisoner to another prison, and this Floid being by the Lords of the council committed to the Fleet, we may not remove him to the Tower.

It is ordered and adjudged, That Ed. Floid shall be returned this night to the Fleet, there to lie in Bolton's ward, and to-morrow morning to ride to Westminster bare ridged on a horse's back, with his face to the horse's tail, and the tail in his hand, and to stand at Westminster on the pillory, from 9 to 11 of the clock; then to ride in the same manner to the Old Exchange, and there to stand two hours more in the pillory; and on Friday to ride in the same manner to Cheapside, and there to stand in the pillory from 10 of the clock in the morning till 12, and then to ride back thence in the same manner to the Fleet; to have a paper in his hat at every one of these places, and another paper on the pillory, the inscription whereof shall be these words, 'For false, malicious, and despiteful 'Speeches against the king's daughter and her 'husband;' to be fined 1,000*l.* to the king. That his sentence shall be seen to be executed by the sheriffs of London and Middlesex, and that the former committee shall draw a warrant to this purpose, which shall be subscribed by the Speaker.

Sir *Francis Kenniston* moveth, that, in respect that Floid's son hath married a gentleman's daughter of worth, that his grandchildren may not feel the weight of the fine.

Lord *Clifford* would have the Warden of the Fleet to lead the horse, as Floid rideth.

Sir *Thomas Wentworth* desireth, that a committee may be appointed to collect the reasons of this our censure (because there will be many malevolent eyes on the same) that it may remain clear to posterity.

It is ordered, and a committee appointed to collect all the proofs, testimonies, causes, and reasons of this Censure, and to present it to the House.

When this Sentence was thus agreed on, the said Floid was called into the House, and on his knee at the bar heard Judgment pronounced by the Speaker.

The Warden of the Fleet is commanded by the House to put Floid in Bolton's ward, and to deliver and attend him to the sheriffs of London and Middlesex, till the sentence be accordingly executed on him.

May 2.

Mr. Chancellor of the Exchequer delivereth a Message from his majesty; who hath taken care and notice of what was done here yesterday, and saith, That he gives this House thanks in the likeness of a king and of a father; and as a father doth desire, that our zeal to him doth not transport us to inconveniencies:—That he would have us first query, whether the liberty of this House can warrant us or give us power to sentence one who is no member, nor offender against this House, nor any member of it; secondly query, whether we can or will sentence a denying party, other than on oath. —That the Lords did desire sir Henry Yelverton, because he was the king's prisoner, and would not meddle with him till his majesty had commanded him to be delivered to them; and his majesty would have us to consider whether we will not shew the like respect to his majesty, Floyd being his prisoner, as standing committed by his council. He would have us leave this to him, and he will be careful to punish Floyd according to the greatness of his fault.

The Master of the Wards delivereth a record from the king, which his majesty commanded him to acquaint this House withal; and saith, that the king saith, that he will, on view, confirm what Privileges we have, and would have us rest assured of it.

The record sent by the king goes somewhat to this purpose.

'Rotulum parliamenti 1 H. 4. Que les 'Commons ne soyent point parties aux jugements; que le jugement appartient seulement 'aux seigneurs, ou seulement au roy mesme, 'excepte ou le roy leur donne specialement 'authorite.'

Mr. *Alford* desireth, that, since our ship hath touched on a rock, we may come off clear: That there are precedents where the king hath pardoned the party, whom the Houses of parliament have judged; and that he wisheth his majesty would do so in this; for that it is expected that otherwise our sentence should be executed.

Mr. *Noye* saith, that there is no doubt, but that the king may stay execution of judgment given in any court: That, in the case of Latimer, the king did pardon the offender after judgment given by the court of parliament. He would that we should send a Supersedeas for the stay of judgment, with this reason in it, because it hath pleased the king to spare the execution of the judgment we gave. He saith, that we may judge our members, or one that offends against this House, or a member of it; but in other cases, and of other persons, he thinketh it belongeth to the Lords; and shall be of that opinion, till he seeth some precedent to the contrary: That, since we have given judgment, he would have us appoint a committee to see, whether we have done it justly or no.

Sir *Henry Poole* saith, that he hath heard, that we and the Lords did sit all in one house together, and then we did give judgment with them. He desireth a committee may be appointed to seek forth precedents for the same; for if we were once joined with the Lords, and have given judgment with them, then he would have us seek how we parted with that power.

Mr. *Hackwell* would not have a committee appointed to examine what we have done; for he hath been a diligent searcher for precedents in this kind, and can find none; but he would have us send to the sheriffs presently, by an order of this House, that we will, that, for causes best known to ourselves, they should forbear the execution of that judgment till they hear further from us.

Ed. Sandys would have present answer to the Sheriffs, as Mr. Hackwell spake; that in the afternoon we should acquaint Lords with what we have done.

Sir *Edw. Cooke* wisheth, that his tongue may cleave to the roof of his mouth, that saith, this House is no court of record; and he that saith this House hath no power of judicature, understands not himself: for, though we have not such power in all things, yet have we power of judicature in some things, and therefore it is a court of record. The King's-bench can meddle with no real actions, nor the Common Pleas with any business concerning the crown, and yet are they courts of record: That no liberty can be taken from any court, but by act of parliament; and this record sent hither by the king is no act of parliament, and therefore cannot prejudice our liberty: 'Multi 'multa, nemo omnia norit:' That he knoweth that this is a court of record, or else all the power and liberty of this House were overthrown. He would have no *supersedeas* to be sent to the sheriff, because he hath no warrant for to see the execution of the sentence on Floid; but would have a message sent by word of mouth, that we will spare the sheriff's attendance till another time, when they shall have further warning.

It is ordered accordingly, and a Message by word of mouth is sent to the sheriffs by our usher or serjeant, that we discharge their attendance, till we shall give them further warning.

Sir *Robert Phillips* moveth that since we have given testimony of our duties to the king more than any precedent doth shew of the like to any king, he thinketh it good that we beseech his majesty, on so good an occasion, to give us leave to create this precedent, that our judgment and sentence may not be scandalized.

Sir *Ed. Montague* would not have us to go to the Lords: It is no prejudice for us to stay an execution; and therefore he would have us (in defence of what we have done, and to maintain our judgment and sentence) to frame a bill to this effect, and to dispatch the same with all expedition.

Mr. *Crewe* saith, that we decline from what we have done, if we strengthen it by a bill.

Mr. *Solicitor* would have us go to the king with thanks for his care, and to let his majesty be acquainted with the reasons of our judgment, and to desire his majesty to confirm it. He liketh well of having a bill, but thinks it will be too tedious.

Mr. *Finch* saith, that it hath been resolved in the King's Bench, that a Habeas Corpus cannot be granted to remove a prisoner committed by the lords of the council. He would have us to beseech his majesty to corroborate our power in this business, that our judgment and sentence may be put in execution, since the same proceeded out of our zeal to his majesty and his children.

Sir *Dudley Digs* saith, that the Sentence is given and known abroad, and now to take away any part of it would but lay a stain on the judgment of the House; and therefore he would have us send to the king, and desire, that since we have been a dutiful Parliament, he would be pleased to confirm the Sentence we have given.

May 2, p. m.

It is agreed, by question, that the Speaker, accompanied with some of this House, shall go to the king with a Message concerning this business of Floid.

Mr. *Noye* would, that we should give his majesty full Answer to the Record: That we should signify to his majesty, what we have done in this particular; but, for the general of his majesty's queries, touching the Privileges of this House, to acquaint his majesty, that, the Sentence being executed, we will, with all convenient speed, labour to satisfy his majesty, by precedents, in all the rest of the queries.

Sir *Edward Mountague* saith, that by the ancient course of Parliament we may not appoint what number shall go in a Message to the king, nor when, nor to what place; for those things always stand in his majesty's pleasure to appoint.

It is ordered, That all those of the Council, who are in our House, shall go to the king, to signify to his majesty, that we desire, that all this House with the Speaker may attend his majesty; or, if not all of us, then so many as his majesty will appoint, and at the time and place his majesty shall set down.

The *Master of the Wards* would have the Message, which we send by the Speaker to the king, to be, that our love and zeal were the ground of our judgment; and therefore to desire his majesty to deal with us as a father herein; but he would have us first of all answer to that Paper or Record that he sent us.

It is ordered, and a Committee appointed to go presently to draw the Message which the Speaker shall deliver to the king.

Mr. *Secretary* reporteth the king's answer to the Message, that the king is graciously pleased, that all the House, accompanied with the Speaker, shall come to speak with him tomorrow, touching the Censure given by this House on Floid, in the afternoon at two o'clock, in the hall at Whitehall.

May 3.

The substance of the Message to be delivered by the Speaker, from this House to the king. To present to his majesty, first, our humble thanks for his gracious expressing and understanding of our disposition and affection in the Sentence which was by this House given on Floid, the malicious reviler of his majesty's children: To shew his majesty, that it was not the intent of the House to exceed precedents, nor to win any further power to ourselves; and though we will not dispute the juridical power of this House, yet we humbly shew, that that precedent (which his majesty sent to us) doth not bind us now, because it is no act of Parlia-

ment: To desire humbly, that his majesty will be pleased to strengthen and countenance this Sentence, since the ground and cause of it was our fervent desire to express our humble and hearty affections to his majesty and his children.

Mr. *Secretary* saith, that the king hath in this particular made a question of the power of our House; and for us to stand upon this power of ours, he holdeth it unfit, unless we were better provided with precedents than he thinketh we can have; for, if the king should deny it, we are for ever barred.

The *Master of the Wards* saith, that in this business we have to deal with the Lords as well as the king; for this Sentence of ours doth concern their lordships and the privileges of that House: That our desire to have our Sentence confirmed, is in a manner to desire to make a new precedent: He would have us to take such a care to satisfy all, as that the Lords may not claim that their privileges are interested in this business, which, they may perhaps say, appertained to them.

Mr. *Hackwell* saith, that the precedent sent to us by his majesty doth not bind us any more than it doth the Lords; for in it is expressed, that the Lords could not judge alone, which the succeeding practice since sheweth to be otherwise; but we cannot shew any practice that we have alone given judgment in the like case to this of Floid.

Sir *Ed. Mountague* saith, that the intention of the Committee, who penned this Message, was rather to rely on the king's favour, than to stand on a justification of what we have done.

Sir *Edward Cooke* saith, that, by the Paper sent to us by the king, it is set down, that we have no power of judicature; but every man knoweth, that we have judged those of our own House, and others also for a contempt or offence against this House, or any member hereof.

May 3, p. m.

The Speaker delivereth our Message to the king, our whole House being present.

The Speaker's speech vid. fol. 158; with this also, that we think the Record sent us by his majesty is no other than an Answer to a petition exhibited by the Commons "That we beseech, that the execution of the Judgment given by us on Floid may not to be deferred, to the discomfort of his majesty's Commons, and the discouragement of that House."

The King answereth; That he ever speaketh from his heart: That he will shew at all times to us a fatherly love and a fatherly care: that he would have us to proceed with businesses in a right course. He knoweth, that what we have done proceedeth out of love to him and his children, but out of too great a zeal comes heresy; and saith, that we have proceeded with too much celerity and alacrity: that the lawyers who were present are not to be excused. If that Floid be guilty, (as his majesty believeth) he deserves a greater punishment: if our precedents be good, and done in a peaceable time, they are lawful; his reason (whereby we say we will shew that we have power to judge the said cause) hath so great a latitude, as he knoweth not how to answer it; for it is both his opinion and ours, if judges go to reason, and leave point of law, they wander. He would have us seek forth precedents to shew the same: that his majesty even now received a Petition from Floid, who confesseth the deed, but yet would not have us condemn a denying man, but by witnesses on oath. In the mean time (till we have presented to his majesty a Petition of what we desire) his majesty will see such punishment inflicted on him as we shall think enough.

May 4.

Mr. Secretary delivereth a Message from his majesty. That his majesty, as soon as we were yesterday parted from him, gave order to his learned council, to see whether Floid had confessed the fault (for which this House sentenced him) or no; and the Petition which was delivered yesterday to the king, (and which his majesty yesterday mentioned) was not from Floid himself, but from Floid's son: but Floid himself absolutely denieth the words, and therefore his majesty will send it and him to the Lords to-morrow, that the witnesses against him may be there examined on their oaths, and that Floid may be punished as severely, or more, than we adjudged him to be: that his majesty expects our Answer, touching our sending him a petition, and concerning our meddling with Floid, he being his majesty's prisoner.

Mr. *Solicitor* saith, that he and Mr. Attorney did, by the king's command, examine Floid, who denieth absolutely the words for which he is here sentenced; and the said Floid doth also deny another business which Mr. Attorney did put him in mind of, and had under the said Floid's own hand: that the king said he did the less believe Floid for his denying that other business; and that his majesty said, that, if we can find out a better way for this business of Floid than to go to the Lords, he shall like well of it, but would not have us condemn a denying man without witnesses on oath.

Sir *Robert Phillips* saith, that we censured Floid out of our duty and respect to the king and his children, wherein we shewed our love and our duty; but we are unfortunate.

Mr. *Alford* saith, he will never consent that we should send this to the Lords, for that would be a scandal to our judgment; and that, if we sit down that the Lords may have it out of our hands, we are unworthy of being parliament men. He saith, he must say thus much, though he never speak more.

Sir *Dudley Digs* saith, that we have done herein our best; and, though we have not done such as may be executed, we have yet shewn ourselves good subjects; and therefore he would have us go on with what may be good for the commonwealth.

Mr. *Mallet* saith, that he would have this business thus rest; for we have discharged our consciences.

Sir *George Moore* saith, that he conceiveth, that what we did in Floid's business was justice and done justly: that the civil law saith, that in *rebus dubiis et obscuris* judgment shall be given on oath; but, where the matter is clear, judgment may be justly given without oath: and these words were clearly proved to us, by the concurrency of divers witnesses; and therefore what we have done is done justly. He would not have us to go to the Lords, but saith, we have discharged our consciences: and, if that which we have done may not be executed, he would not have us to hinder our other businesses by further dispute hereof.

Sir *Thomas Rowe* saith, he thinketh the liberty of our House is hereby shaken: he thinketh our judgment was rightly given, and therefore would have it stand on record as our claim. He saith, he hath heard, that the Lords cannot take notice of a grievance but from us; and, if by this means the king send this business to the Lords, we shall then exclude ourselves, and the Lords will henceforth deal in such business without us, and so we shall lose that privilege.

Sir *Henry Poole* saith, he thinketh nothing can be done herein without prejudice, if we are not parties to it: he thinketh therefore, that a bill is the best course.

The *Master of the Wards* saith, that we have herein appealed to the king, and we can go no higher, neither would wish that we should go any lower: he would have us petition the king to deal with us as a father herein, and to take it into his own hands, without preferring it to the Lords.

Sir *Samuel Sandes* saith, that a kingdom or family being divided cannot stand. It is a maxim in this House that a member of this House may not speak against what is here done: that he thinketh, that which was here done against Floid was out of our love to his majesty and his children, and with justice; and, if this sentence be erroneously given, let the party adjudged appeal. He saith, that we are a court of record, and every court of record hath power to give an oath; and want of use taketh not away the jurisdiction of a court. He would have our judgment entered, and, if our love to his majesty and his children hath herein corrupted us with too much zeal, let him be the judge of it, for whose sake we were so corrupted. He saith, that the ceremony of taking an oath on a book is *de puisne temps*; and this was a court of Record before that ceremony was used in the giving of an oath. He desireth again, that our judgment may be entered, and then, if the party adjudged appeal, let him take his course; we have discharged our consciences.

Mr. *Smith* saith, that, if the lady Elizabeth had been present, and complained to the earls marshal, they would have punished Floid without ministering an oath to the witnesses, for they can give no oath: that he knoweth that the earls marshal have punished and imprisoned without oath in his own case; and shall we, who are the representative body of the whole commonwealth, doubt whether a judgment given by us without oath shall be of less force than that of the earls marshal, who do this only by the king's edict.

Sir *Edward Cooke* saith, that, when a Judgment is ready to be given which concerns the king, as all criminal matters do, there are two acts of parliament that judgment shall not be stayed, though a command come from the king under the great or privy seal: but it is otherwise, when the judgment is to be given for felony or treason; for therein the king is an immediate party, and he may desist to have it prosecuted, as well as an ordinary party may let fall his own suit.

Mr. *Soucitor* saith, that the Message that was sent this morning from his majesty first drew this business into question; and he now leaveth it to the consideration of this House, whether we will enter this judgment, the king demanding precedents of us, whereby he might see our power to give such a judgment. He feareth, if we do enter this judgment, it will be displeasing to the king.

Sir *Edward Sackville* saith, that the Journals in the Lords' House of Parliament are recorded every day in rolls of parchment, and therefore he would have ours so done too.

It is ordered, that the Journals of this House shall be reviewed, and recorded on rolls of parchment.

It was thought fit on this long debate of Ed. Floid's business, that a committee should proceed to draw up the Reasons and ground of our Judgment given against Floid, and that the Judgment itself should be set down to be entered in due form; which being accordingly done by a committee, it was accordingly, by order on the question, entered into the Journal of this House.

May 5.

A Message from the Lords signifying, That they have had, during this parliament, much contentment in the correspondency between us and them; and that they, having heard of the censure given by this House against Floid, do desire a conference with this House, for the accommodating of that business in such sort as may be without prejudice to the Privileges of either House; the number to be the whole House, the time three o'clock in the afternoon, place the painted chamber; and power to be given to the committees of both Houses to confer and debate freely, that we may the better understand each other's reasons.

Sir *Ed. Cecil* saith, that it is a rule amongst great personages and princes, that, if they would give a respectful answer, they send it not but by their own ambassador or servant.

Answer is given to the Message from the Lords, That this House receiveth their lordships' message with a great deal of comfort

and contentment, and that we will (sitting the House) send their lordships further answer to the same, by some members of our own House.

Sir *Samuel Sandes* would not have diversity of opinion thought to proceed from diversity of affection; for perhaps he must differ in opinion from others in this House more worthy. He saith, if we send to the Lords that we will first hear them and then answer, we then deny a Conference; and he would not have us to make that sour, which we perceive is sweet in them, that is, their conceit of us. He would have us to reason with them from the grounds of the reason of the law: it is human to err, and we see the highest Courts of the kingdom have their Writs of Error; but to persevere in that error is belluine, or unworthy a man.

Mr *Alford* saith, we have given a judgment judicially, and caused it to be entered: he would not have us to refuse a conference on it, but, if they break out into matter which may tend further, that then we may desire of their lordships further time to answer it.

It is ordered, that the Master of the Wards shall carry our Answer to the Message from the Lords, and that the effect of it shall be an expression of our joy and contentment in the good correspondency that hath been between both Houses during all the time of this parliament; and that, for our parts, we will endeavour the continuance of the same as far as in us lieth; and that we will meet for the conference, as is desired.

Sir *George Moore* saith, that there are three things in this business to be considered of and debated: 1. That we are a court of record, and that, he thinketh, will not be opposed. 2. How we took cognizance of this business. 3. The reason which we had to judge and sentence Flood without oath; and it is no more than we do to sheriffs for making of false returns, and other abuses against this House.

Sir *Samuel Sandes* saith, that the question whereon we are to confer with the Lords, is a particular, and not a general question of all our jurisdiction; and therefore he would not have us at the conference debate of any thing that tends not to this particular question. And one question will be, whether this court having the effect of a court of record, be not a court of record; and the other point questionable will be, that we have sentenced without oath; but it was never seen that a judgment was overthrown for want of oath.

Dr. *Googe* saith, that we may proceed by oath; for this Court hath jurisdiction, and the giving of an oath is a substantial part incident to a jurisdiction: that to have to give an oath is incident to all jurisdiction, for there is no place of judicature but hath this power: that all judgment that may be reversed hath one of these defects, nullity or injustice: nay, we have proceeded on oath, for the witnesses did protest and swear on their salvations, that what they witnessed and said was true; and there wanted nothing but the form of laying of their hand on the book, to make such oath an oath without question, which ceremony is not always used in all places, when oath is given; for anciently men swore by laying their hand under the thigh, as did Abraham's servant, others by holding up the finger.

Sir *Ed. Sandys* saith, that the end of this Conference with the Lords is for the accommodating of this business: there is a precedent in Edward the third's time, that the Lords did censure without an oath: the question will be chiefly, whether this business of Flood be within our cognizance or no. This business came to us accidentally by the examination of the business against the warden of the Fleet; and when we heard of these foul speeches, though we wanted custom to give an oath, yet reason (which is not flying and disputable reason, which the king calls opinion) which is the ground of the law, told us, that we might censure him. He would have us to declare the truth hereof to the Lords.

Mr *Hackwell* saith, that this House is a court of record; the king himself did 1. of his reign acknowledge, that this House is a court and judge of record in sir Francis Goodwin's case, 6 Hen. 8, cap. 16, it is there, that the clerk of this House his book is a record. We have power to give an oath; for it appears in the Journals of this House, that one coming into this House, who was no member hereof, had here in the House the oath of supremacy given him, and also of secrecy. If a man deny that here at the bar, which after he confesseth on oath to the Lords, we may here censure him and send him to the Tower: that the judgment given by the Lords and king, 15 Ed. 2, against the two Spencers, was reversed in Ed. 3, time, because it was *sans accusement*; and in the reversing of the judgment the Commons had a voice.

Mr *Alford* moveth that all the parts of this business may be distributed; as the points of law and precedent, to some of the lawyers of this House; the points of reason to be the part of sir Edwin Sandys, sir Samuel Sandes and sir Dudley Diggs; and would have us hold to that point of their message, which was, that nothing should be meddled with that is prejudicial to the privileges of this House.

Sir *Dudley Digs* would have us stand with the Lords on the accommodating of this business, and would have us shew precedents, that this is a court of record, and hath power of judicature; and that then the reasons should be shewn why we did proceed herein.

The *Master of the Wards* saith, that, since we have caused the judgment to be entered, he would not have us stand on it, or say, that we intended not to make it a precedent; for he would have our word and actions agree.

Sir *Samuel Sandes* would have them to assign us our error, and that we should not go to shew our reasons till their lordships had first shewn us their exceptions, and then we should give answer to them.

May 5, p. m.

At a Conference with the Lords.

archbishop of *Canterbury* saith, that ... ips' purpose is not to give any par... on or defence to Floid or his offence, but only to confer of the manner of Floid's punishment; for their lordships say not but that he hath deserved as great a punishment as we have censured him, and perhaps more. That he is happy who shall bring any thing that may conduce to the seeking forth of the truth of this offence: that their lordships seek not, nor purpose to question any power hereby.

Sir *Samuel Sandes* saith that our House doth with all respect and thankfulness acknowledge their lordships' favour, in the good correspondency that hath been during this parliament between the two Houses. That we are free from any intent to make any irruption into their lordships court, but, having such an occasion offered, we thought we might without offence or prejudice, extend our jurisdiction; which yet we have not done farther than, we conceive, reason did lead us. That this complaint was first brought to us, as a fault against the Warden of the Fleet, (who stands charged with many foul crimes before us) for that he (having heard of these scandalous speeches spoken by Floid his prisoner) concealed the same. That, when we understood hereof, out of our zeal to his majesty and his children, we presently sent for this Floid who spake those vile and malicious words, and on searching of him we found in his pocket a scandalous libel against a noble member of this House; (sir Edw. Coke,) but we thought it not seemly to join that offence with so great a one against so noble a lady and her husband, and so proceeded to an unanimous judgment against him. That we hope, as we are careful not to touch the hem or skirts of their lordships privileges, so their lordships will not press too hard on ours, we having herein done nothing, but what some lawyers of our House (he hopeth) will shew, that by law we may and are warranted to do.

The *Lord Treasurer* saith, that the Lords do conceive, that all those offences, which concern not the lower House or some member of it, do properly belong to be judged by the upper House, as by long practice and many precedents is shewn and manifest.

Sir *Edward Coke* saith, that we hope their lordships will deal with us, as Abraham did with Lot, who, having chose the left hand, gave him the right, and bad him go whither he list. He saith, that the House of Commons hath, in many things, a free liberty of judicature: he desireth their lordships to remember, that they were gentlemen before they were lords; and therefore we hope, their lordships will make a favourable construction, and not press too hard on us, if we have (as we believe, and hope we have not) gone beyond precedents. He desireth their lordships will be pleased to consider, that our House is a court of record; for that court, which hath power to imprison and set fines, is a court of record; and that our House hath power to fine and imprison, he desireth their lordships to remember that in 10 Ed. 3. an archbishop for causing a member of our House to be served with a subpœna was grievously fined; that by the statute of 5 Hen. 4. all menial and other servants of a member of our House are free from all arrest. It is manifest and known to all, that whosoever hath a court of record may incidentally examine on oath. In 3 Jac. the warden of the Fleet was examined at the bar in the House of Commons on oath. That these words were spoken against the members of our House; for 'filia est pars patris,' and the king is ever intended to be resident in our House.

The *Lord Treasurer* saith, that the Lords expected, that we would have shewn precedents that this business was censurable by our House: That their lordships do acknowledge that what concerneth the House of Commons, any member, or the servant of any member of that House, doth lie within the compass of our power to judge of.

Sir *Ed. Sandys* saith, that we did not intend to extend our power beyond the privileges of our House:—That in this particular (whereof we hope there will here never be the like again) we thought we might refer it to the reason of our other judgments, for we may judge of things done against this House, or a member thereof; and we take this to be against the king, who is as resident with us as any member: And we thought delay would have extenuated our judgment and his offence; and, though we have not used to judge in such a case, yet 'deficiente 'consuetudine referendum ad rationem generalem.'

The *Lord Treasurer* saith, that the Lords do free us from any intent in us hereby to invade their lordships' privileges: That they will be ready to do us right, so we take a right way without prejudice to their privileges; but, now we have shewed our zeal, they will shew theirs.

May 8.

Conference with the Lords, touching the Judgment given on Floid.

The Archbishop of *Canterbury* saith, that the Lords were the first that did suffer in this business, and the Lords were the first that did send in it: That the Lords do strive to exceed us in nobleness, and seek not superiority but verity: That they seek not to abridge our liberties, nor would have us make irruption on their privileges: That their lordships ever had such causes judged by them, and do pray, that we will leave their lordships where we found them.

The *Master of the Wards* saith, that we do so much embrace the good correspondency and amity that is between the Houses, that we came rather for an accommodation than a disputation.

The Archbishop of *Canterbury* saith, that their lordships will kindly embrace an accommodation which is worthily propounded, and like ourselves: That their lordships desire

(since we crave an accommodation in general) that we would propound the manner, how we would that this difference should be accommodated.

The *Master of the Wards* saith, that, as their lordships first sent to us touching the accommodating of this business, so we desire their lordships would first propound, how they would have it accommodated.

The Archbishop of *Canterbury* saith, that insomuch as their lordships have had an irruption on their liberties by a judgment given by us, they would that we should meet them half way at the least for the accommodating of it.

The *Master of the Wards* saith, that our House hath had to-day some speeches of a sub-committee; and, if it please their lordships, we will go now again to the House to confer of a sub-committee, touching the accommodating of this business.

Hereon it was agreed of all sides, that we should acquaint our House with this; and, in the mean time, their lordships went into their House to consider of a sub-committee, and the power and number of the sub-committee.

At our House, the Speaker sitting, after the Conference with the Lords.

Mr. *Glanvile* saith, that he would have this business so accommodated, as by this precedent we prejudice not ourselves; and that this should not hereafter bind, nor be alleged against them or us: and he wisheth the business be so accommodated, as the delinquent's punishment may not be extenuated.

A Message is sent to their lordships, to desire that there may be a sub-committee of both Houses appointed to accommodate this business of Floid; wherein we leave the nomination both of the time and number to their lordships.

Dr. *Googe* saith, that it is a maxim, that 'Par in parem non habet Imperium,' so as the Lords may not question us, nor are we to account to them, for any thing which themselves cannot do. The sentencing of Floid lieth not in their power without us; and therefore by right we are not to account to their lordships for the judgment we have given herein.

A Committee of sixteen of the Upper House is appointed by the Lords, and twice as many by us, for the accommodating of this business; and they are to meet on Friday next.

May 11.

Sir Edward Cooke's Report concerning the conference with the Lords, touching the business of Floid: That the Committee agreed on what shall be delivered to the Lords for the accommodating of that business, and hath divided it into two parts: first, the inducement; secondly, the nature and matter of this accommodation. For the first, that we never meant to meddle with their lordships power, that we gave sentence because of the notoriousness of the fact, for the zeal of our duties, for the honour of the king and his children, and our House; and that the sentence being thus given, the Committee thought fit, that we should not advise nor contradict their lordships, if they will give further sentence on Floid, but only desire their lordships to take into their consideration the heinousness of the offence, and to do it with expedition: and, for the second part, to offer unto their lordships, that our precedent shall not be drawn in consequence against the privileges of their or our House, and that there shall be here (if their lordships desire it) a protestation in this House, that this precedent shall be no prejudice to the privileges of either House, and that then we will desire there may be the like protestation in their House.

May 12.

Sir Edward Cooke's Report of the last Conference with the Committee of the Lords, concerning the business of Edw. Floid. He saith, that he divided his speech into two parts: first, the inducement; wherein he laid down our confidence and resolution to maintain the good correspondency with the Lords, by means whereof this parliament hath reduced great abuses to a good order, by punishing of great offenders:—That what we did was far from any intent in us to gain a precedent, or to invade their lordships liberties or privileges: That the judgment was given out of our zeal to his majesty. The second part was, for the accommodation, that we relied on their lordships kind messages, and that we desired, that this judgment might be so accommodated, as it might be without prejudice to either of the Houses: That we leave it to their lordships; if they would proceed to a judgment and censure of Floid, that we desire they would then do it according to Floid's demerits, and that the execution might be done with speed; and that we would make and enter a protestation that this precedent should not be prejudicial to either House: That hereupon the Lords did (after a private consideration) present to the sub-committee a Protestation *in hæc verba*:—"A Protestation to be entered in the House of the Lords, by the consent of the House of Commons, that the proceedings lately past in that House, on the Judgment of Edward Floid, be not at any time hereafter drawn or used as a precedent to the prejudice of either House; but that the privileges of both Houses do remain and abide as before."

Sir *Nath. Rich* moveth, that the Committee may have power to conclude on the Protestation which the Lords offer; but would have added, that neither the proceedings by us, nor any other proceedings which are or shall be in this business, may be to the prejudice of the privileges of either House hereafter.

The *Master of the Wards* complaineth, that he, seeking at the Conference with the Lords to repair or explain a mistaking of sir Edward Cooke in the delivery of the message at the Conference at the Committee, was told by sir Edward Cooke, that there was the spirit of contradiction amongst our Committee, pointing at him; and adding withal, that he, who should

seek to sow sedition in the House, was not worthy of his head.

Edward Cooke protesteth, that he spake ___ally; and meant not the Master of the Wards; but said, that the like contradictions, at the last convention, were the overthrow of the parliament: That the words which he spake at the time were as the clothes in Birchin Lane; if the Master of the Wards did apply the same to himself, it was more than he meant to him; for, when he spake those words, he took not measure of the Master of the Wards' body.

On sir Edward Cooke's protestation in the House, that he meant not the Master of the Wards, in any of those words which the Master of the Wards did except against, the Master of the Wards, in the House, openly said, he was well satisfied with sir Edward Cooke's protestation.

Sir *Edward Sackville* would have us send to the Lords, to know, if their lordships in their House have confirmed the protestation they offered at the Committee; and, if they have, that then he would have us consent to it.

It is ordered by question, That a Message shall be sent to the Lords on Monday morning, to know, whether they do allow of the Protestation offered at the Conference by the Committee or no.

May 18.

A Message from the Lords, That, since we referred the Judgment of Floid to their lordships, they, understanding that we have a trunk of writings of the said Floid's, wherein may be something to aggravate his fault, do desire that we will send the same to the clerk of their House to be opened, that the writings therein may be looked into.

By reason the messengers from the Lords said (contrary to the agreement between us and their lordships, on the Protestation entered in both Houses), That we had referred the Judgment of Floid to their lordships, we returned Answer, that we would send Answer to their lordships' message by some members of this House.

Whilst we were in debate what Answer to send to their lordships message, another Message came from the Lords, by the same messengers they first sent, that their lordships taking notice of the first part of the Message they last sent us, do now (to take away all scruple) send to acquaint us, that the said first part of the said message was mistaken; and the effect of their lordship's desire is, to have the said Floid's trunk, that they may look into the writings in it.

Answer to this second Message is given, That the trunk shall be sent up to the Lords (as their lordships desire) to be disposed of as their lordships shall please. And accordingly the trunk and key were both sent to their lordships by the Serjeant of our House.

The Lords of the upper House of Parliament did, this 26th day of May 1621, censure Ed. Floid, whom before we of the lower House had censured; but their lordships called not us to demand Judgment (as in other censures, on businesses whereof we have informed them, they used to do) because we had before given Judgment on the said Floid: and, whereas many thought the Judgment and Sentence we gave on him was too great, their lordships have laid on him a heavier, viz. "That he shall be degraded from his gentility, ride on Monday next from the Fleet to Cheapside on horseback without a saddle, with his face to the horse's tail, and the tail in his hand, and there to stand two hours in the pillory, and then to be there branded in the forehead with the letter K:—That on Friday following he shall ride from the aforesaid place in the same manner to Westminster, and there stand two hours more in the pillory, with words in a paper in his hat shewing his offence:—To pay for a fine to the king the sum of 5,000*l.* and to be a prisoner in Newgate during his life."

June 1.

I saw this day, after our House was risen, Floid stand in the pillory; the words or inscription of his offence being altered of that they were appointed by our House; and are now, "For ignominious and despiteful words, and "malicious and scornful behaviour against the "Count Palatine, and the king's only daughter, "and their children." This was pinned to his breast and back, and he stood two hours in the pillory, and did ride according to the sentence of the upper House.

The following Heads of the Debates which took place in the House of Commons respecting Floyde are taken from the printed Journals.

1 *Commons Journals*, 601.

May 1, *p. m.*

Sir *H. Manwaring*. That hath heard the lord Warden say, that, when he was president of Wales, Floyde questioned for speaking against the Bible: and now is questioned for speaking against the noble king and queen of Bohemia. Therefore, sithence he hath spoken against God and man, moveth, that neither for God or man's sake he may have mercy.

Floyde, at the bar, charged by Mr. Speaker with speaking the scandalous words beforementioned, against the prince Palatine, or his lady, and with his denying thereof: persisteth in his denial thereof.

Pennington, confronting Floyde, repeateth his former speech; that knoweth not, just at what time these words spoken, knoweth no such man as Fryer, except Dr. Frye.

Mr. *Hackwyll*. That, in the examination of Lettice Harrys, he observeth, that she heard, that she denieth, she ever acquainted the warden of the Fleet; but that she acquainted one Williams with it because she—

Sir *Ro. Phillipps*. Came with a resolution to speak freely in this parliament. Wisheth a better occasion to shew his affection to this noble lady, the king's daughter. 1st. The offence: 2dly, against whom committed: 3dly, the punishment. The offence: scornful con-

tumelious, and spiteful against the king and queen of Bohemia. The persons, against whom . the hopeful issue of our great master. Of the king saith, because he endeavoured to be happy, God made him unhappy. For her: equal in virtue and honour to any. Floyde a knave from his original: a popish knave, the most dangerous of all other. For his punishment: To have him carried from Westminster gate, with his face to an horse tail, a paper upon him, in great letters; "A popish wretch for dishonouring the king's children:" to the Tower; and there to lie in Little Ease.

Sir *Tho. Row.* Because a prisoner committed from the Lords of the Council, to go to the Lords, to let them know, we desire to have him whipped through London.

Sir *D. Digges.* As sir Tho. Row.

Sir *Francis Kinnaston.* That Floyde put into the commission of the peace

Sir *Geo. Moore.* No punishment too great for this offence Precedents have a beginning. To whip him back to the Fleet.

Mr. *Whitson* voucheth a precedent of the * in Spain.

Mr. *Raynescrofte.* 1,000*l.* fine, to be employed in the wars of the Palatinate; and to spare his whipping.

Mr. *Noyle.* To carry him in a disgraceful manner to the Tower; and he there to remain, till further directed by the Lords.

Sir *Francis Seymour.* To go from Westminster at a cart's tail, with his doublet off, to the Tower, the beads about his neck, and as many lashes by the way, as beads.

Mr. *Salter.* To punish first here, then may be punished by the Lords. To send him to the Tower. Whipping: beads: Tower: Little Ease Then further punishment by the Lords.

Sir *Edw. Giles.* Sorry, so unworthy a wretch should bear the name of an Englishman; yet might evade, and say, he were a Welshman. Pillory here, with a paper of his head, containing his vile words: whipped; his beads and crucifixes, and especially his friar's girdle, about him: if these can defend him from good whipping, well: so many more at the court gate; and so at the Temple, and Cheapside. Then to return him to the Fleet: for cannot put him into a worse prison.

Sir *Ralph Hopton.* To suspend our judgment till his papers examined for may aggravate his offence.

Sir *J. Perrott.* To the Tower at first: then to send to the Lords about it.

Sir *Geo. Hobby.* To leave out none of these punishments. The doubt, because committed by the desire To suspend our judgment, till his papers examined.

Mr *Mallory.* Not to defer it, nor to put it off to the Lords. Consenteth to the punishment, spoken of by sir Ro. Philippes: and pillory at Powle's cross.

Sir *Francis Darcy* addeth, boring through his tongue

Sir *J. Horsey.* To have his tongue cut out, or slit at least. Doubteth, he an intelligencer; which may be discovered by his papers. To suspend our sentence.

Sir *Edw. Cecill.* To make this greater, than hath been, in like cases, been for subjects scandals. To bore him through the tongue; and a B. in his forehead.

Sir *Geo. Gering.* Now called up. To have him set upon an ass: 12 stages, as 12 beads: at every one to swallow a bead; and 12 jerks to make him —

Mr. *Salusbury.* Sorry, hath any Welsh blood in him: yet but half, for half English. Agreeth with the most severe punishment.

Mr. *Price.* A paper: pillory: riding upon an horse backward: and 200*l.* fine.

Sir *Ro. Bevell.* Agreeth with the greatest punishment, but blood; and would not have the beads, &c. pon him, lest should be thought to be for his religion. To defer the fine, for search of the papers, for his greater punishment.

Sir *Jo. Jephson.* To punish it presently. To whip him to the Tower; viz. as far again, as those for the Spanish ambassador: and a good fine.

Sir *Rich. Gravenor.* Not to defer his punishment. Whipping to the Tower: Papers: Beads with him: Out of the commission of the peace: Unbarristered.

Mr. *Finch.* Desireth all these punishments; yet no corporal punishment, because no proof upon oath against him. Pillory.

Sir *Tho. Weyneman.* To carry him to the Fleet, and whip him. And hopeth, upon search of his papers, to find matters to hang him.

Sir *Jo. Strangeways.* To make a precedent in this case, if none before. Whipping: boring his tongue, at Cheapside: and then to return him to the Fleet.

Sir *Edw. Wardor.* To make a precedent, if none before. To return him now to the dungeon in the Fleet. Whipping: as many lashes, as the prince and princess old: boring in the tongue.

Sir *Guy Palmes.* No blood. Tower, &c.

Mr. *Angell.* A gag in his mouth, to keep him from crying, and procuring pity.

Mr. *Treverson.* To have him stand upon the pillory at the exchange, that the strange merchants may know it, and publish it abroad.

Sir *Jo. Walter.* To avoid cruelty in his punishment. To vilify him, as he hath done these noble princes. To ride backward on an horse: A fine that may go to the Palsgrave; because asked, whither the lad would go: pillory: beads &c. to be hanged about him, to shew, from what root this grew. That he laughed at the loss of Prague; therefore to make him cry by whipping.

Mr. *Mallett.* Tower, presently. Whipping &c. to be respited, till the papers perused.

Mr. *Glanvylle* secondeth sir Jo. Walter's motion. Not to be disputed, but we may do that, which we are about to do. To do this, and leave further punishment to the Lords.

Mr. *Alford* concurreth with sir Jo. Walter

in all, but whipping. To fine him, instead of whipping.

Mr *H. Anderson* concurreth with sir Ro. Phillippes. Not satisfied, to take him out of the prison, whereunto the lords of the council have committed him. Paper: branded: ride backwards: beads about him.

Sir *Edw. Sands* Much difficulty in this cause. To be well advised. That our sentence will be censured in a great part of the Christian world. The root from ill affection to religion, and so to our state. That only two eminent persons, viz. Ed. 6. and Queen Jane, escaped the virulent tongues of opposites in religion. This lady the third. Praised by all her enemies. Would join with the Lords, but for the great business, we have, and shall bring them. Not to meddle with his religion, but his offence in tongue. That will make him be canonized. Commendeth sir Jo. Walter's censure: differeth only in one point, viz. whipping; which the punishment of a slave; where he a gentleman, except first degraded. This degrading not in our power, but in the earls marshal. To punish him, wherein he hath offended. Goodman, and Goodwife, words of contempt, not of slander. To punish him with as much contempt as may be: riding backward: paper: pillory in divers eminent places: imprisonment in a dungeon for some moderate time: fine.

Mr. *Pymme*. To whip him, except within some reasonable time he pay 1000*l*. fine.

Sir *Fr. Goodwyn*. No whipping; but fine instead of that. Tower, because that our prison.

Master of the Wards. To give punishment for the fault committed. If make a precedent, let it be without exception.—Not to give such a sentence, as shall hurt the king's children. Though his religion the ground of his evil affection, yet not questioned here for it. Sorry, we so uncertain in the power of this House. More puzzled this parliament than ever before. Told, in the beginning of this parliament, we an absolute court: That, in some cases, we to judge alone; in others, with the Lords; in others, the Lords alone.

Sir *Edw. Mountagew*. That not in our power to remove him, because the king's prisoner in the Fleet.

Mr. *Mallory*. As we have power to send for him hither, we have power to send him to the Tower.

Sir *Wm. Strowde*, contra.

Sir *Rich. Worseley*. The Fleet not a fit prison.

Upon question, Floyde to be returned prisoner to the Fleet this night, and to lie in Bolton's ward there: to be brought hither again tomorrow morning, and to be set on the pillory here at Westminster, two hours, from nine till eleven: to ride from Westminster to the Exchange, and there to stand upon the pillory two hours: to ride backward upon an horse without a saddle, his face backward to the horse tail, and the tail in his hand, and papers on his head: the inscription, on the papers and pillory to be, "For false, malicious and despiteful "speeches, against the king's daughter, and "her husband": to stand upon pillory, in like manner, in Cheapside, on Friday, from ten till twelve, and ride thither in like manner, and ride back as before: fined at 1,000*l*. The former Committee to survey and examine the papers in the trunk.

Sir *Tho. Wentworth* moveth for a select Committee, to consider of the accusations, testimonies, and particulars of our judgment. This to be done by the same Committee: Sir Edw. Sands, sir Tho. Wentworth, sir George Moore, and Mr. Sherfield added. This to be done with all speed, and to be reduced into writing. The Sentence to be executed by the sheriffs of London and Middlesex; and a warrant, for that purpose, to issue under Mr. Speaker's hand; and that warrant to be drawn by the former Committee.

Floyde called in to the bar, and kneeling, Mr. Speaker pronounced his judgment.

The warden of the Fleet commanded to lodge Floyde this night in Bolton's ward, and to bring Floyde hither to Westminster palace, by eight of the clock, and to deliver him from time to time.

May 2, p. m.

Mr. *Price*. All this day in a labyrinth Divers threads put into our hands, to wind us out of it. No way, but by the king; either by his grace, or power.

Sir *Tho. Wentworth*. The king's eldest daughter respected, in some things, by act of parliament, more than any other daughter. Not to go to the Lords, nor petition the king: Not fit, if our judgment *coram non judice*. To proceed by a law. Though not so speedy, yet more safe and firm, especially for his fine.

Sir *Edw. Cecill*. This parliament expected to be the happiest, that ever * * may be so, if could get a precedent. By Mr. Speaker, and some select committee, to attend him, to petion * * to be respectful of his subjects. Grieveth him, that a popish knave should, in the face of this House, * a cross, and think now, that this had preserved him from our judgment.

Sir *Tho. Jermyn*. Findeth no justification, by any, of our judgment. The king sendeth us only a query: Condemneth us not. To Mr. Speaker go to the king, to tell him, we not yet prepared to answer his queries; Therefore to give us longer time for search of precedents.

Serjeant *Davys*. To end this business this day, if possible: To present it at the majesty with expedition. That we have power of judicature in this case, if in any. We happy, that have the noblest king born, that is in Europe: The queen of Bohemia therefore, his daughter, of the same nobility. This a contempt offered to the king's person, who our head; and therefore we, the body, are to be sensible, and take notice. To make this lady no gentlewoman! Goodwife! The king pre-

sent in person here. If any speak against this House abroad, we send for him.—No question, but, upon his confession, we might, for the reason aforesaid, punish him; and may do it here, without oath, if the House satisfied *viis et modis*.

Sir *Geor. Moore*. To acknowledge no error in our judgment, nor to contest with the king. To pass a bill.

Upon question, to address ourselves, in this case, to his majesty.

Master of the Wards. That the Speaker, with the whole House, may present our request to his majesty. So Mr. Wandesford.

Sir *Nath. Rich*. Because nothing crosseth our judgment, but the precedent 1 H. 4, which an excellent record for us, made in that parliament, wherein the most prodigious fact done, that ever in parliament; which this House then disavowed: which made the king and Lords, in indignation, seclude them from judgment in those cases. The fact was upon king Richard the 2d.

Mr. *Carvyle*. If any foreigner offend, justly, any member of this House, in words, we may convent and punish him.

Sir *Jo. Chamberlayne*. Feareth, this going to the king will procure a distaste between the Lords and us.

Mr. *Noye*. Well resolved to go to the king. To give him full satisfaction in some things. Have stayed any execution of our judgment. For the queries made; if any man of the House had beaten Floyd, the king would not have been offended: Much less our judgment. Not to contest with the king, of our right. To set down our reasons, moving us, in this particular cause, to proceed as we have done: For the general; not to disclaim our right, but to take time to search precedents.

Sir *Francis Seymor*. To have only ten or twelve to attend the Speaker to the King. No debate with the king. To search precedents afterwards.

Sir *Wm. Strowde*. To leave it to the king, whether the whole House, or a select number, to attend the Speaker to the king.

Sir *Francis Fane*. Accordant.

Sir *Tho. Jermyn*. A committee, to withdraw themselves presently, to set down in writing, what shall be presented to the king by the Speaker.

Sir *Edw. Mountagew*. Not in our power to appoint, whether the whole House, or fewer, shall come to the king. To leave that to him. Mr. Secretary, Chancellor Exchequer, Master of the Wards, presently to signify to his majesty the desire of the House.

Master of the Wards. To take especial care of sir Nath. Riche's motion, to answer the record of 1 H. 4. Neither to accuse, or excuse ourselves. To shew our judgment to have been hastened by our zeal. To desire, the king will deal with us, as a father.

May 4.

Mr. *Secretary*. That the king hath commanded him to let the House know his care about Floyde. Thanks to the House, for their love to him, and his children. That the king hath given order, upon Floyd's petition, to his learned counsel, to examine Floyd. That the petition was delivered by Richard Floyde, where the king thought it had been Edward Floyd himself. That Floyd now examined by Mr. Attorney and sollicitor denieth it. Will, to morrow, give order, to have this examined by the Lords, upon oath; and, if it shall be proved there, will punish it, according to our desire; conceiving us to have no power of an oath. That for the precedent 1 H. 4. the king (whereto Mr. Speaker replied) was prepared to have given an answer; but did forbear, in respect many there were no members of this House.

Mr. *Sollicitor*. That the King, as soon as Mr. Speaker and the House gone, the king committed the examination of Floyd to the attorney and him. Floyd denied it. That the attorney told him, he had denied his scandalizing of sir Francis Evers, till he shewed him his hand-writing; which he again now absolutely denied. That the king, upon this denial, the more desirous to punish him: And therefore leaveth it to the judgment of the House, whether to insist further upon their right, of judging this business here, or to go to the Lords in this, as we have done in all other business this session.

Sir *J. Perrott*. To have it considered, whether we be a court of record, and whether we have not power to give an oath.

Sir *W. Strowde*. This no seasonable motion now. To go to the Lords. That examination will be long, and will defer his punishment. To go about that now, which may best advance the good of our countries.

Sir *Ro. Phillippes*. In our judgment as much love to the king, and his, as ever from any House of Commons; and as much duty, in desiring the execution, as ever from any. To sit down, and meddle no more in this business.

Mr. *Alford*. This House never so shaken in Judgment, as now. Our judgment generally known. That done by us, in one case, for the king's issue.

Sir *D. Diggs* concordat with sir Robert Phillippes.

Sir *Tho. Jermyn*, accordant. If any could maintain what we have done, would never sit down. If that true, which we have heard here, this the greatest court of England, and the least power.

Sir *Wm. Herberte*. We have given our judgment: The king may stay the execution: We cannot help that.

Mr. *Mallet*. This a court; where law, and discretion. The best discretion, to leave this matter now.

Sir *Edw. Sackvyle*. While Floid not punished, we all suffer. No loss of privilege, for the Lords do concur with us in the sentence, not to confirm ours.

Sir *Geor. Moor*. Thinketh yet, they gave

this judgment *juste*, as well as *justum* For done upon good reason An oath not requisite in all causes The matter not obscure, but plain Not to go to the Lords To rest here For that his majesty may stay the execution.

Sir *Edw. Cecill* We the sinews of the commonwealth To regard our loyalty, and the honour of this House Not to go to the Lords, to move them to patch up our faults

Sir *Tho. Lee* The liberties of this House much shaken now Thinketh our judgment rightly given and may stand upon record here, as our claim That this cannot now come to the Lords either with us, or without us Not with us without our degree, nor without us, because ... take notice of any public grievance (... this) without complaint thereof from hence

Mr *Lewis*. Not moved or intended, we should not carry this to the Lords, or consent to it, but leave the course thereof to the king, and speak no more of it

Mr *Secretary* accordant

Sir *H. Withrington* Thinketh not, but we have power to give an oath, And, for precedents every precedent had a beginning

Sir *H. Poole* To proceed in this by way of bill

Sir *Edw. Giles* Not to wave our right Thinketh in his conscience, we have done well and judicially Not to go to the Lords in this course To leave it to the king, and with the king

Master of the Wards Sorry, we driven to this strait, not much election, Cannot go back from our judgment We have appealed to the king Can go no higher To go no lower To go once again to the king, and to let him know what we have done, hath been out of our zeal and love to him, and his children To desire him, once again, to do with us, as a father, and not to put us over to the Lords, but himself to end

Sir *Sam. Sands* No member of this House ought to ... a question, to question the power of this House That the judgment given out of a great zeal and love to his majesty To let the world know no pique between the king and his people Not erroneous, nor *coram non judice* A court of record Therefore may give an oath. Disuse loseth no privilege How long have the Lords disused to give judgments in parliament? The king, as head, present here, and in all his courts We punish here abuses to the members of our House, yea, to their servants, much more to the king's blood To enter the judgment Let him bring his Writ of Error No corruption in us, but by our love to the king We judge many things, without oath Sheriffs, &c pass bills That we were a court before ever swearing upon a book introduced These did ... and protest, as deeply, and credibly, here, as could be by swearing upon a book

Sir *Francis Seymor*, and sir *Francis Vane* To put it to the question, whether the judgment shall be entered, or not So sir William Spencer

Mr *Smyth* That the earls marshal, in this case, upon complaint would have punished it; yet examine not upon oath Knoweth this in his own case

Sir *Tho. Wentworth* That the judgment rightly given execution may be stayed by the king So hath been, of judgment given by the Lords

Sir *Edw. Coke* Judgment not to be stayed, for Great Seal, &c yet where felony or treason the king may stay the proceeding This judgment given for the king For his blood. Any man may stay his own suit Not to question the judgment Every man, though absent, involved in the judgment, yea the judgment his, though he of a contrary opinion *Con... discordia* The judgment the ... entered ... king may stay the execution, where he only party In appeal, not to stay, in indictment otherwise

Sir *Tho. Wentworth* First to enter the judgment.

Mr *Sellden* Will not go about to dissuade them from this Not to do it this unseasonably That this question grew by a message from the king

Sir Edw. Coke Sir Ro Phillippes Mr Noy, Mr Alford sir Sam Sands, Master of the Wards, sir Nath Rich, sir Edw. Cecill, presently to retire into the committee chamber, and to set down in writing, the judgment

Sir *Edw. Sackvyl* That all our proceedings may be entered here, and kept as Records

The Report in Grey's Debates of the speeches made in the House of Commons in the progress of the Proceedings against Thompson is as follows

Upon reading the Report of the Committee appointed to examine the complaint against him (See p. ...)

Sir *Robert Markham* I would not send him to Rome, for fear that he is their chaplain already, but I would banish him to Geneva, for he says, 'They are worse than the devil that are Presbyterians" Put him into the bill of banishment of the papists

Sir *Francis Winnington* I take this business to be of great concernment When I speak against such men as these, I speak for the church Three things this report runs upon First, bold and impudent reflections on the king; and it is our duty to ... such men Next, I never heard ... fidently and impudently assert ... asserting of arbitrary power ... use, ... admirable preacher, and take ... sert those things." There ... lord Clarendon's head—He is restless in ... Arlington [See his ... in imposing these doctrines] Seymour and Os... his offence, that it was the earl of Danby and ... liament, in the boldness of who ... had all been ...

this man. I have heard of a precedent of sentencing such a person to ride through the city with his face to the horse's tail. If you banish him, it is the way to make him a cardinal; such company as you intend in your bill is preferment to him. Some men we see will struggle so hard to keep the protestants from being united, and I must believe that, at the bottom, they love popery better than the protestant religion. We may raise a dispute amongst the Lords; though the man seem too little to impeach, yet his crimes are great enough for the Commons of England to charge him upon, and let the bishops see what kind of cattle these are that scandalize the church. Therefore I would resolve upon some questions, viz. 'That he has impudently scandalized his majesty and the protestant religion;' and when you have put these to the vote upon him, the best way is to make him exemplary. I was thinking of a short bill to put a character of disability upon him; for really there are such a multitude of people in the plot (and that borders upon it) that you cannot well impeach him. Such sort of people as these absolutely endeavour to destroy the doctrine of the church, and to bring in popery, and such as those that foment dissentions amongst protestants.

Serjeant *Maynard*. This Thompson is as naughty a man as can be; he has scandalized religion, fallen upon the dead, that most excellent princess queen Elizabeth, and scandalized the protestants in the pulpit, besides prosecuting men for not coming to church when the church doors were shut. I wish you could punish him as he deserves. I think he that scandalized the queen of Bohemia had sentence by the parliament to ride with his face to the horse's tail. But I would not send him beyond sea, for there he will be favoured. I would fain see how the fathers of our church will look upon this man. I wonder that he has been suffered in the church so long. I would impeach him to the Lords, and then see whether you may mend their judgment against him, in a bill, which will be much more terrible.

Sir *Ro. Lee*. [illegible] that you take notice of this matter. This spiritual sword, which they all complain of, does the mischief. If the bishop of the proper diocese had done his duty, he had saved you this labour. Therefore I would pass a vote 'That he is a scandal to his own function, and that he has dishonoured the king;' and add what you will else to it.

[illegible] *Birch*. The great tendency of the [illegible] [illegible], 'That he defamed and cried down the [illegible] [illegible]' Pray put that in its proper place upon it.

[illegible] When one considers what men [illegible] them in [illegible] are against our liberties, and [illegible] tempt on his behalf [illegible] government both of church and 'protection of his own sort of protestants, who 'good pleasure, and [illegible] profession of the protestant 'own [illegible] at some protestant religion. And them [illegible] this Mr. Thompson do this, but in

* See Floyde's Case.

one of the most capital cities of the kingdom.* His punishment cannot be too great. He has not only defamed the king, but spoken reproachfully of the protestant religion, and of queen Elizabeth. No one protestant would do it, and he has cast the plot upon the protestants. Should you pass but a light censure upon this man, he would laugh at you. Therefore be sure that in your vote you hit upon every thing he is guilty of. Two or three gentlemen may withdraw, and word the question.

Upon proposing the Vote against him, (see p. 7, sup.)

Sir *William Jones*. You have made a just Vote, but if you do no more, he will come off too lightly. You may trust him now with this Vote in any judicature; but I would stop the mouths of his fellows, and in the face of all the world, I would publish the evidence against him, and let the church-men see what sort of sons they have. They who think him too little for impeachment, think him too big for a bill; but, to prepare the Lords and all men for his sentence, I would impeach him.

Colonel *Titus*. No man thinks that this Thompson deserves punishment, and a severe one, more than I do, but I am at a stand what it shall be. You are moved for 'Banishment with the most considerable papists.' I do think him a papist, and much more because he calls himself a Protestant. I do remember several persons you have impeached, an earl into a duke [Lauderdale,] and an earl, almost into a marquis [Halifax. He was soon after so created.] and some into being public ministers. The effects have been like thunder upon mushrooms, it does but make them grow, not blast them.* Dr. Manwaring was impeached by the Commons, and was brought to the bar on his knees in the Lords House, and he there recanted what he had written and preached. He was Dr. Manwaring† before you impeached him, and was lord bishop of

* The like happened here. See the note at the beginning of this case, p. 1.

† See his Case, vol. 3, p. 335, of this Collection, where it may be noticed that one part of the judgment pronounced against him was, 'That he should be for ever disabled to have any ecclesiastical dignity, or secular office.' On the 18th of April, 1640, in the next parliament that met after this transaction, the Lords took up this business again, and, having read the declaration of the Commons against the now bishop of St. David's, and the sentence of the Lords, they refer the whole to their Committee of Privileges, with leave to the bishop to allege any thing before the said Committee, on his part, either by pardon, licence, or otherwise. On the 21st of April, they order the records to be brought, that the House may determine this cause. But on the 28th of April, the king sends a message by the Lord Keeper, "That his majesty, understanding there was some question concerning Dr. Manwaring,

St. David's after. Some have moved, "That this Thompson should ride with his face to the horse's tail;" but that would be something severe to one of his coat; but seeing he has forgot his coat all his life, the Commons may forget it for one day. I would impeach him, that the bishops may see what their sons have done: 'Haec est doctrina filii vestri.' They have so countenanced this doctrine, and have been so far from punishing him, that they have preferred him; and therefore they are thought by ill people, great favourers of this man. Therefore I would impeach him before the Lords.

Sir *W. Jones.* I cannot tell when his impeachment will have an end, whether ever or no; therefore I would publish what is against him, as a warning to other church-men, and in justification of yourselves.

Sir *Fr. Winnington.* I look upon this charge against Thompson as a national business, and to be part of the plot; and such things as these are fit to be known to the world, that they may see what is libelled upon the king.

Mr. *Harbord.* Some of the clergy are so afraid that we should unite, that they are almost papists themselves; and as for the church of England that have endeavoured to asperse us, let the world see what sort of cattle they breed up.

now bishop of St. David's, had given command that the said Dr. Mainwaring shall not come and sit in parliament, nor send any proxy to the parliament." Thereupon it was ordered to be entered so. Lords Journal "I do not recollect," says Mr. Hatsell, "to have seen this last very extraordinary (and illegal) exercise of the king's authority taken notice of in any history." See further, Commons Journal, the 23d of Feb. 1640.—See, too, Sheridan's Case, A. D. 1680, 1681.

273. Case of JAMES SKENE, for treasonable Opinions and Declarations:* 32 CHARLES II. A. D. 1680. [Arnot's Collection and Abridgement of celebrated Criminal Trials in Scotland.]

THE prisoner, who was brother to the laird of Skene, was prosecuted at the instance of his majesty's advocate,† for high treason. He was charged in the indictment with being accessary to the rebellion headed by Balfour of Kinloch, and Hackston of Rathillet, at Air's Moss and Bothwellbridge; with having maintained the lawfulness of that rebellion, even in presence of the duke of York, and of the lords of privy council, and those of justiciary; with having justified the excommunication of the king, and having maintained it was lawful to kill him, &c.

The proof adduced against the prisoner was his own confession, emitted before the duke of York and privy council on the 13th November 1680, of which the tenor follows:

He said, he did not know who were rebels, but denied that he was present at the battles of Bothwellbridge and of Air's Moss. He thought the persons engaged in those insurrections were not rebels, for they were in defence of God's cause. He was not at the Torwood conventicle when the king was excommunicated, nor did he know who contrived it, but he thought the reasons of the excommunication just. He acknowledged the burning the acts of parliament, because they were against the Covenant; and would not admit the authority of the king or parliament in things that were against the Covenant. He did not know if any new insurrection was plotted; but he believed that God's people were always ready to take arms in defence of themselves and of the gospel; that he was one of God's people, and had resolved to give a testimony for the cause.—He thought the killing of the archbishop of St. Andrews was not murder; That there is a declared war between those who serve the Lord, and those who serve the king against the Covenant; and that it is lawful to kill such in defence of the gospel; That the king being excommunicated, and there being now a lawful declared war against him on account of the breach of the Covenant, it is lawful to kill him, and all those who are in opposition to the Covenant.

He renewed his confession before the Court and Jury. He was desired to deliberate before he should sign it: He answered, he had resolved to sign it; he thought it his honour to do so; and he did it accordingly.

The Jury unanimously found the pri[illegible]ner "guilty of the treasonable crimes and [illegible]sions mentioned in his dittay, and [illegible] his own confession." The Court sen[illegible] use, [illegible]n to be taken to the Cross of Edinbu[illegible] of November instant, to be ha[illegible] till he be dead, his head to be [illegible] body, and fixed on the Neth[illegible] estate, real and personal, t[illegible]

[illegible]ord Clarendon's Arlington [See his Seymour and Osle earl of Danby and who had all been

* Records of Justiciary, Nov. 22, 1680.

† Fountainhall merely makes mention of this Case with that of two other persons, thus: "November 22, 1680, James Skeen condemned to be hanged for disowning the king; and on the 29th of November thereafter Potter and Stewart are condemned for the same." Decisions, vol. 1, p. 117.

274. Case of JOHN NIVEN, Captain of the Ship Fortune of London, for Leasing-making against James Duke of Albany and York: 32 CHARLES II. A. D. 1680. [Arnot's Collection and Abridgement of celebrated Criminal Trials in Scotland.]

THE prisoner was served with a criminal indictment at the instance of his majesty's advocate, setting forth, that, by the statutory law, and the practice of this realm, Leasing-making, the engendering of discord between the king and his people, and the uttering slanderous speeches to the disturbance of government, are crimes of a capital nature, yet the prisoner had been guilty of them *, by railing against the duke of Albany and York, the king's brother; by charging him with being in a plot to take the king's life; with combining with the French king to invade England; and with coming to Scotland on purpose to make a party to introduce Popery.—Frivolous objections to the relevancy of the indictment were urged for the prisoner, and repelled by the court †.

William Eccles, writer in Edinburgh, deposed, that, being in Dysart on the day libelled in company with the prisoner, and some others, the prisoner inquired at the deponent, and the rest of the company, what stile of reception the duke of York had met in Scotland? To this the deponent answered, 'he had been received according to his great quality and merit, and that he was a fine Prince;' and the prisoner replied, there was not one of ten thousand in England who would say so. He added, that the duke of York was in a plot to take the king's life, and had combined with the French king to invade England; but the deponent cannot say whether the prisoner expressed these words as his own opinion, or that of the people of England. The prisoner at the same time said, no man had a greater regard than him for the duke; that, under his royal highness's conduct, he had lost part of his blood in his majesty's cause; and that he would be ready to hazard his life in the duke's service.

The prisoner objected to William Tarbett, a waiter, being received as a witness; but his objections were repelled. Tarbett deposed, that he was accidentally in Burntisland, in the house of captain Seaton, where he fell in company with the prisoner, and two Englishmen, a shipmaster and his mate, and frequently overheard discourses between them relating to government; and heard the prisoner say, that the duke had come into Scotland to make a party for introducing popery, 'but our good old English hearts would not suffer that.'

Michael Seaton, against whom also the prisoner urged objections which were over-ruled,

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* Records of Justiciary, July 15th, 1680.

† A very unjust account of this Trial is given by lord Fountainhall, in his Decisions, vol. 1. p. 103. The prisoner indisputably fell within the tyrannical statutes against Leasing-making, and there seems no doubt of his having been guilty of the fact. Fountainhall is deemed a writer of authority. He was upon the side of law and liberty; but any one who is conversant in the affairs of that period, and who compares the result of his knowledge with the cases in Fountainhall, must be sensible of the extreme partiality of that writer: a propensity which, in times such as those, it was very difficult to resist.—His partiality is the less surprising, as he appears not to have been untinged with fanaticism; and those who have occasion to compare his Journals with the original records of Justiciary, will see little reason to compliment him upon his accuracy.

Fountainhall's account is as follows:

C[illegible] upon [illegible] July 16, 1680.——Niven, the ma[illegible] [illegible] was pannelled for using some [illegible] them in no[illegible] against the duke of York, viz. '[illegible]tempt on his behal[illegible] Popish plot of taking away '[illegible] protection of his own[illegible] overturning our religion '[illegible] good pleasure, and th[illegible] that he was to consent '[illegible] own fate, which [illegible] the French king with an '[illegible] them. [illegible] Britain'; and that he had come himself to Scotland to make a popish faction there. This was spoken in cups, and with some qualifications; yet he was convened on the acts of parliament against leasing-makers betwixt the king and his people, though it was objected these acts did not meet this case, he neither having lied to the king of his people, nor to the people of their king; and at the most, it was but *scandalum magnatum*, and in England such a process would be laughed at. Yet his defences were all repelled and the dittay found relevant, and the libel sustained, and admitted to probation, and he put to an assize, whereof 7 cleansed him, and 7 found him guilty; and the balance thus standing equal, provost Binny, chancellor of the assize found him guilty; albeit the dittay in itself was neither relevant to infer the pain of death, nor was it proven against him; but this was done to fright England and gratify his royal highness. But the moderation of lex unic. Cod. si quis Imperat. maledix is more commendable, and such a practice should not be standing on record.—It is true he deserved a severe punishment, but law cannot stretch it to death. The pronouncing of sentence was delayed till the 4th of August, on which day they ordained him to be hanged on the 18th of August thereafter: But the judges knew the king, by the duke of York's mediation, was sending a remission, at least a letter converting the sentence to banishment, and confiscating his ship and all his goods, but preferring his creditors therein to the fisk.

deposed, that in his own house in Burntisland, upon a Sunday in April last, he was sent for into the room where the prisoner, two English seamen, and William Tarbett were drinking. He heard Niven and the other Englishman speaking extravagant commonwealth language, and particularly concerning the duke of York. He could not be positive that the words were those charged in the indictment, viz. that he had come to make a party to introduce popery, but thinks they were to that purpose.

The Jury, by a plurality of voices, found the prisoner guilty of leasing making against the duke of York.

On the 4th of August, the court sentenced the prisoner to be hanged at the cross of Edinburgh on the 18th; but, on the 6th of that month, the court, in consequence of an act of privy council, proceeding upon a letter from the king, suspended the execution till his majesty's further pleasure should be declared; and it does not appear that the Sentence ever was executed.

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275. Proceedings in Parliament against EDWARD SEYMOUR, esq.* a Member of the House of Commons and Treasurer of the Navy, upon an Impeachment of High Crimes, Misdemeanors, and Offences: 32 CHARLES II. A. D. 1680. [Journals of both Houses; Grey's Debates, 35; 4 Cobb. Parl. Hist. 1222.]

HOUSE OF COMMONS. Nov. 19, 1680.

Mr *Vernon*. "I HAVE Articles of Accusation of crimes of a high nature against Mr. Seymour. I think he is not here. I shall undertake to prove them. I move that he may be here to-morrow morning to answer, and the charge will be brought in. To charge him, and not present, I know not the method of parliament, but we have Articles ready.

Mr. *Pilkington*. I desire he may be here to morrow to answer his charge.

Ordered, That Edward Seymour, esq., do attend the service of this House, in his place, to-morrow morning.

November 20.

Sir Gilbert Gerrard acquaints the House, That he had Articles of Impeachment of High Crimes, Misdemeanors, and Offences, against Edward Seymour esq., one of his majesty's most honourable Privy Council, Treasurer of the Navy, and a member of this House; and then proceeded as follows:

Whenever such Articles are brought to my hands, and I am satisfied with the proof of them, I take it to be my duty to exhibit them. I shall only say, I have known this gentleman a long while; his fortune was raised in this House, and how he comes now under suspicion of these Articles, he can best answer. This gentleman (if what fame says is true) has laboured with industry to prorogue or dissolve this parliament, which all think will ruin the king, religion, and all we have. I make this use of it, that the king knows whether Seymour has attempted this, or not. I hope you will think that none guilty of such crimes, but fear a parliament. One thing more; with what imperiousness did he put the Commons in contempt, and did talk of "Wind-guns!" I believe you will find matter against him, to send him to the Tower.

Mr. *Seymour*. In order to methods of parliament, the reading of the Articles must have the motion seconded, and I do second it, that the Articles may be read.

The Articles were then read, and are as follows:

ARTICLES of IMPEACHMENT of High Crimes, Misdemeanors, and Offences, against EDWARD SEYMOUR, esq., one of his majesty's most honourable Privy Council, Treasurer of his majesty's Navy, and one of the members of the House of Commons now in Parliament assembled.

"1. That, whereas the sum of 584,978*l.* 2*s* 2*d.* was raised by an act of parliament, for the speedy building of 30 ships of war, and thereby appropriated to the said use, by which act it was particularly directed, "That the treasurer of the navy should keep all monies paid to him by virtue of the said act, distinct and apart from all other monies, and should issue and pay the same by warrant of the principal officers and commissioners of the navy, or any three or more of them;" and mentioning and expressing, "That it is for the building the guns, rigging, and other furnishing of the said thirty ships of war, and to no other use, intent,

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* This Mr. Seymour, who succeeded to a baronetcy upon the death of his father in 1688, and is perhaps more known by the appellation of Sir Edward Seymour, had been thirteen years before this time very active in the prosecution of lord Clarendon [See the proceedings against the earl of Clarendon, vol. 6, p. 317, of this Collection. 4 Cobb. Parl. Hist. 470 et seq. and the Continuation of lord Clarendon's Life]. It is observable that Arlington [See his Case, *ante*, vol. 6, p. 1053], Seymour and Osborne [See the Cases of the earl of Danby and of the duke of Leeds, *infra*], who had all been most eager and most bitter in the attack upon Clarendon, all in their turns became the objects of similar attacks. In the Continuation of the

or purpose whatsoever;" he, the said Edward Seymour, on or about the year 1677, being then treasurer of the navy, did, contrary to the said act, and contrary to the duty of his said office, lend the sum of 90,000*l* at 8 per cent parcel of the said sum, raised by the said act being then in his hands, for and towards the support and continuance of the army then raised, after such time as, by an act of parliament, the said army ought to have been disbanded;

Life of lord Clarendon, contains a passage which is neither uninteresting in itself, nor unconnected with this observation*.

"Before the meeting of the parliament, when it was well known that the combination was entered into by the lord Arlington and sir William Coventry against the chancellor, several members of the House informed him of what they did and what they said, and told him, 'That there was but one way to prevent the 'prejudice intended towards him, which was by 'falling first upon them, which they would 'cause to be done if he would assist them 'with such information as it could not but be in 'his power to do. That he never said or did any 'thing in the most secret council, where they 'two were always present, and where there 'were frequent occasions of mentioning the 'proceedings of both Houses, and the behaviour of several members in both, but those 'gentlemen declared the same, and all that he 'said or did, to those who would be most offended and incensed by it, and who were like in 'some conjuncture to be able to do him most 'mischief. And by those ill arts they had irreconciled many persons to him. And that if 'he would now, without its being possible to be 'taken notice of, give them such information 'and light into the proceedings of those gentlemen, they would undertake to divert the 'storm that threatened him, and cause it to fall 'upon the others.' And this was with much earnestness pressed to him, not only before the meeting of the parliament, and when he was fully informed of the ill arts and ungentlemanly practice those two persons were engaged in to do him hurt but after the House of Commons was incensed against him, with a full assurance, "that they were much inclined to have accused the other two, if the least occasion was given for it."

"But the chancellor would not be prevailed with saying, 'That no provocation or example should dispose him to do any thing that 'would not become him. That they were both 'privy counsellors, and trusted by the king in 'his most weighty affairs, and if he discerned 'any thing amiss in them, he could inform the 'king of it. But the aspersing or accusing 'them any where else was not his part to do, 'nor could it be done by any without some reflection upon the king and duke, who would be 'much offended at it. And therefore he advised them in no degree to make any such attempt on his behalf, but to leave him to the 'protection of his own innocence and of God's 'good pleasure, and those gentlemen to their 'own fate, which at some time would humble 'them.' And it is known to many persons, and possibly to the king himself, for whose service only that office was performed, that one or both those persons had before that time been impeached, if the chancellor's sole industry and interest had not diverted and prevented it.'"

See also lord Carnarvon's Speech cited in the case of lord Danby, *infra*.

Burnet says of him: "The ablest man of his party was Seymour, who was the first Speaker of the House of Commons that was not bred to the law. He was a man of great birth, being the elder branch of the Seymour family; and was a graceful man, bold and quick. But he had a sort of a pride so peculiar to himself, that I never saw any thing like it. He had neither shame nor decency with it. He was violent against the court, till he forced himself into good posts. He was the most assuming Speaker that ever sate in the chair. He knew the House, and every man in it so well, that by looking about he could tell the fate of any question. So, if any thing was put, when the court party was not well gathered together, he would have held the House from doing any thing, by a wilful mistaking or misstating the question. By that he gave time to those, who were appointed for that mercenary work, to go about and gather in all their party. And he would discern when they had got the majority. And then he would very fairly state the question, when he saw he was sure to carry it."

Afterwards, speaking of the parliament which met on March 6, 1679, he says "Seymour had in the last session struck in with such heat against Popery that he was become popular upon it: so he managed the matter in this new parliament that though the Court named Meres yet he was chosen Speaker." This heat of his against Popery was probably one cause of the king's rejection of him as Speaker (See the account of the proceedings thereupon given in 4 Cobb. Parl. Hist 1092 et seq.) but subsequently to that occurrence he had strenuously opposed the bill of exclusion, which probably was one cause of the hostility of the Commons against him on the occasion before us. Nevertheless we are informed by Burnet, (1 Own Times.) 496, that in the next year (1681) he liked the project of declaring the prince of Orange regent with whom the regal power should be lodged. When the prince of Orange had landed he joined him at Exeter, and was the proposer of the 'Association.' The Prince intrusted to his government Exeter (of which he was Recorder,) and Devonshire. Of the various subsequent changes and chances of his conduct and fortunes, Burnet mentions several particulars, but I doubt whether any of them are sufficiently uncommon in the history of political life to require distinct mention in this place.

The following may serve as specimens, and it is to be hoped, will satisfy the generality of readers.

whereby the said two several acts were eluded, and the said army was continued, and kept on foot, to the great disturbance, hazard, and danger of the peace and safety of this kingdom; and the nation was afterwards put to a new charge of raising and paying the sum of 200,000*l.* for the disbanding of the said army.

"2. That, whereas an act of parliament had passed for raising money by a poll, for enabling his majesty to enter into an actual war against

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In relating the discovery of the corruptions of the old East India Company in the year 1695, the bishop tells us, "It was observed that some of the hottest sticklers against the company did insensibly, not only fall off from that heat, but turned to serve the company as much as they had at first endeavoured to destroy it. Seymour was among the chief of these, and it was said that he had 12,000*l.* of their money under the colour of a bargain for their saltpetre."

Again in speaking of king William's fifth parliament which met for dispatch of business on the 10th of March 1701, Burnet says, "Upon the view of the House, it appeared very evidently, that the Tories were a great majority; yet they, to make the matter sure, resolved to clear the house of a great many, that were engaged in another interest: Reports were brought to them of elections, that had been scandalously purchased, by some who were concerned in the new East India Company; instead of drinking and entertainments, by which elections were formerly managed, now a most scandalous practice was brought in of buying votes, with so little decency that the electors engaged themselves by subscription, to chuse a blank person, before they were trusted with the name of their candidate. The old East India Company had driven a course of corruption within doors with so little shame, that the new company intended to follow their example, but with this difference, that, whereas the former had bought the persons who were elected, they resolved to buy elections. Sir Edward Seymour, who had dealt in this corruption his whole life-time, and whom the old company was said to have bought before, at a very high price, brought before the House of Commons the discovery of some of the practices of the new company: The examining into these took up many days; in conclusion, the matter was so well proved, that several elections were declared void: and some of the persons so chosen, were for some time kept in prison; after that they were expelled the House. In these proceedings, great partiality appeared; for when in some cases, corruption was proved clearly against some of the Tory party, and but doubtfully against some of the contrary side, that, which was voted corruption in the latter, was called the giving alms in those of the former sort."

An anecdote of Seymour's modesty and regard to decency is to be found in a note to vol. 5. p. 1359, of this Collection, and more circumstantially in 5 Cobb. Parl. Hist. 412, 413. He lived till the year 1708, and being an ancestor of dukes of Somerset his memory is honoured with a very encomiastic display by Collins of his incorruptible integrity, inflexible consistency, disinterested patriotism, and numerous other virtues. Thus it is, as Mr. Burke says, "These gentle historians (your Garters and Norroys, and Clarencieux, and Rouge Dragons) recorders and blazoners of virtues and arms, dip their pens in nothing but the milk of human kindness. They seek no farther for merit than the preamble of a patent, or the inscription on a tomb. With them every man created a peer is first a hero ready made. They judge of every man's capacity for office by the offices he has filled; and the more offices, the more ability. Every general officer is with them a Marlborough, every statesman a Burleigh, every judge a Murray or a Yorke. They who alive were laughed at or pitied by all their acquaintance" [he might have added who were contemned or detested by all who had any knowledge of their characters] "make as good a figure as the best of them, in the pages of Gwillim, Edmonson and Collins." Letter to a Noble Lord, published in the year 1796.

I subjoin the following passage from Mr. Fox's History of the early part of the Reign of James the Second, because it exhibits a meritorious part of Seymour's conduct, and also because it throws light on the authenticity of two eminent writers of English history. In relating the transactions which occurred at the opening of the parliament in the year 1685, he says:

"As the grant of revenue was unanimous, so there does not appear to have been any thing which can justly be stiled a debate upon it; though Hume employs several pages in giving the arguments which, he affirms, were actually made use of, and, as he gives us to understand, in the House of Commons, for and against the question; arguments which, on both sides, seem to imply a considerable love of freedom, and jealousy of royal power, and are not wholly unmixed even with some sentiments disrespectful to the king. Now I cannot find, either from tradition, or from contemporary writers, any ground to think, that either the reasons which Hume has adduced, or indeed any other, were urged in opposition to the grant. The only speech made upon the occasion, seems to have been that of Mr. (afterwards sir Edward,) Seymour, who though of the Tory party, a strenuous opposer of the Exclusion Bill, and in general, supposed to have been an approver, if not an adviser, of the tyrannical measures of the late reign, has the merit of having stood forward singly, to remind the House of what they owed to themselves and their constituents. He did not, however, directly oppose the grant, but stated, that the elections had been carried on under so much court influence, and in other respects so illegally, that it was the duty of the House first to

the French king; and the money raised by virtue of the said act was thereby appropriated to the said use, and to the repayment of such persons as shall furnish his majesty with any sums of money, or any stores necessary for the said service; and whereas certain Eastland merchants were desired by his majesty's officers to furnish and supply great quantities of stores for the navy, and, as an encouragement thereunto, were assured, that the sum of 40,000*l.*

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ascertain, who were the legal members, before they proceeded to other business of importance. After having pressed this point, he observed, that, if ever it were necessary to adopt such an order of proceeding, it was more peculiarly so now, when the laws and religion of the nation were in evident peril; that the aversion of the English people to popery, and their attachment to the laws, were such, as to secure these blessings from destruction by any other instrumentality than that of parliament itself, which, however, might be easily accomplished, if there were once a parliament intirely dependant upon the persons who might harbour such designs; that it was already rumoured that the Test and Habeas Corpus Acts, the two bulwarks of our religion and liberties, were to be repealed; that what he stated was so notorious as to need no proof. Having descanted with force and ability upon these, and other topics of a similar tendency, he urged his conclusion, that the question of royal revenue ought not to be the first business of the parliament. [Barillon's Dispatches, June 2d, and 4th. Appendix. Burnet, 2. 322.] Whether, as Burnet thinks, because he was too proud to make any previous communication of his intentions, or that the strain of his argument was judged to be too bold for the times, this speech, whatever secret approbation it might excite, did not receive from any quarter either applause or support. Under these circumstances it was not thought necessary to answer him, and the grant was voted unanimously, without further discussion.

"As Barillon, in the relation of parliamentary proceedings, transmitted by him to his court, in which he appears at this time to have been very exact, gives the same description of Seymour's speech and its effects, with Burnet, there can be little doubt but their account is correct. It will be found as well in this, as in many other instances, that an unfortunate inattention, on the part of the reverend historian, to forms, has made his veracity unjustly called in question. He speaks of Seymour's speech as if it had been a motion in the technical sense of the word, for enquiring into the elections, which had no effect. Now no traces remaining of such a motion, and on the other hand, the elections having been at a subsequent period inquired into, Ralph almost pronounces the whole account to be erroneous; whereas the only mistake consists in giving the name of motion to a suggestion, upon the question of a grant. It is whimsical enough, that it should be from the account of the French ambassador, that we are enabled to reconcile to the records, and to the forms of the English House of Commons, a relation made by a distinguished member of the English House of Lords. Sir John Reresby does indeed say, that among the gentlemen of the House of Commons whom he accidentally met, they in general seemed willing to settle a handsome revenue upon the king, and to give him money; but whether their grant should be permanent or only temporary, and to be renewed from time to time by parliament, that the nation might be often consulted, was the question. But besides the looseness of the expression, which may only mean that the point was questionable, it is to be observed, that he does not relate any of the arguments which were brought forward, even in the private conversations to which he refers; and when he afterwards gives an account of what passed in the House of Commons, (where he was present,) he does not hint at any debate having taken place, but rather implies the contrary.

"This misrepresentation of Mr. Hume's is of no small importance, inasmuch as, by intimating that such a question could be debated at all, and much more, that it was debated with the enlightened views, and bold topics of argument with which his genius has supplied him, he gives us a very false notion of the character of the parliament, and of the times which he is describing. It is not improbable, that if the arguments had been used, which this historian supposes, the utterer of them would have been expelled, or sent to the Tower; and it is certain, that he would not have been heard with any degree of attention, or even patience."

It has been a fashion with some writers to depreciate the veracity of Burnet. Sir John Dalrymple says, "it is a piece of justice I owe to historical truth, to say that I have never tried Burnet's facts by the tests of dates, and of original papers, without finding them wrong. For which reason, I have made little use of them in these Memoirs, unless when I found them supported by other authorities. His book is the more reprehensible, because it is full of characters, and most of them are tinged with the colours of his own weaknesses and passions:" 1 Memoirs, 34. (As to the accuracy of sir John Dalrymple himself, see lord Holland's Address to the Reader prefixed to Mr. Fox's History of the early part of the reign of James the Second, the Notes to 4 Laing's Hist. of Scotland, and the Case of lord Russell, A. D. 1683, *infra*). And Dr. Johnson, in more than one passage of his works, gives countenance to the imputation. It may therefore not be improper to present some additional testimony to that already adduced by Mr. Fox in favour of the bishop. Harris, (2 Life of Charles 2, 9. Note (Y. Y.), after having by the evidence of a letter from the duchess of Cleveland, verified an

parcel of the said monies raised by the said act, was at that time actually in the hands of the said Edward Seymour; which he did acknowledge so to be, and did promise that the said sum should be paid to the said merchants, in part of satisfaction for the said stores, which they did furnish upon the credit of the same affirmation and undertaking: He, the said Edward Seymour, did, on or about the year 1678, issue out and pay the said sum to the victuallers of the navy, by way of advance, and for provisions not then brought in, contrary to the true intent and meaning of the said act; whereas the same, by the provision of the said act, ought to have been paid to the Eastland merchants, who had furnished his majesty with flax, hemp, and other necessaries for the said service: of which said deceit and injustice the said merchants did complain in the last parliament.

"3. That the said Edward Seymour, being treasurer of the navy, and then and still having a salary of 3,000*l.* per annum clear for the same, did, during the time he was Speaker of the late Long Parliament, receive, out of the monies appropriated for secret service, the yearly sum of 3,000*l.* over and above his said salary; which was constantly paid to him, as well during the intervals as the sessions of parliament; and particularly during the prorogation of fifteen months.

"4. That, on or about the eighteenth year

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highly improbable incident related by Burnet, observes, "From this letter, we may judge of the goodness of Burnet's intelligence; and rectify an opinion, by too many entertained, that he was hasty, and credulous, and a mere recorder of the tales and scandals of the times." Ralph unjustly accuses Burnet of inaccuracy respecting the Bill "For the Preservation of the Person and Government of his gracious Majesty King James the Second," and asserts, 'That unfortunately for us, or this right rev. 'author, there is not the least trace of 'any such bill [as Burnet had spoken of] 'to be found in any of the accounts of this 'parliament extant; and therefore we are un-'der a necessity to suppose, that if any such 'clause was offered, it was by way of supple-'ment to the bill for the preservation of his 'majesty's person and government, which, no 'doubt, was strict enough, and which passed 'the House of Commons while Monmouth was 'in arms, just before the adjournment, but 'never reached the Lords.' 2. 911.

Upon which, Mr. Fox remarks, "Now the enactment to which the bishop alludes, was not, as Ralph supposes, a supplement to the bill for the preservation of his majesty's person, but made part of the very first clause of it; and the only inaccuracy, if indeed it deserves that name, of which Burnet is guilty, is that of calling the bill what it really was, a bill for Declaring Treasons, and not giving it its formal title of a Bill for the Preservation of his Majesty's Person, &c. The bill is fortunately preserved among the papers of the House of Commons, and as it is not, as far as I know, any where in print, I have subjoined it in my Appendix."

That careful, judicious, and sagacious historian, Mr. Laing, vol. 4, note 1, says,

"Burnet's veracity, at least in Scottish affairs, is attested throughout by his coincidence with Wodrow's History and original materials; an immense mass of MSS. in the Advocates' Library, which I have carefully inspected. The coincidence is the more remarkable, as Wodrow, who published in 1721, 1722, had never seen Burnet's History, published, the first volume in 1723, the second in 1734. In writing from memory, Burnet neither is, nor pretends to be, always correct in dates; and in his latter days he was undoubtedly credulous. But his narrative is neither to be rejected because the dates are displaced, nor are the glowing characters of nature to be discarded because they coincide not with the prejudices of party writers. If we compare his narrative and characters with those of Clarendon, and consider how superior they are to every contemporary production, how frequently they have been silently transcribed by succeeding authors; (Hume himself, for instance, who blames them most), and how imperfectly their loss would have been supplied by more recent memoirs, we shall discover the real value of Burnet as an historian."

See, too, as to the comparative accuracy of Burnet and Dalrymple, the Note to Mitchell's Case, *ante*, vol. 6, p. 1222. In that Note, by a slight error of the press, the reference to Dalrymple's Memoirs is printed p. 94, to ed. 1771, instead of p. 9, 4to ed 1771. An instance of Burnet's want of exactness in his expressions which has been so injurious to his character for veracity, may be found in what he says (see vol. 6, of this Collection, pp. 1420, 1421) of "The Trial of Ireland and others." See the Trials of Ireland, Pickering, and Grove, vol. 7, p. 79; and of White alias Whitebread, and others, vol. 7, p. 311.

Seymour is the Amiel of the 'Absalom and Achitophel,' in which Dryden has ranked him very highly:

"Indulge one labour more, my weary muse,
For Amiel; who can Amiel's praise refuse?
Of ancient race by birth, but nobler yet,
In his own worth, and without title great:
The Sanhedrim long time as chief he rul'd,
Their reason guided, and their passion cool'd:
So dextrous was he in the crown's defence,
So form'd to speak a loyal nation's sense,
That, as their band was Isr'el's tribes in small,
So fit was he to represent them all.
Now rasher charioteers the seat ascend,
Whose loose careers his steady skill commend:
They, like the unequal ruler of the day,
Misguide the seasons and mistake the way.
While he, withdrawn at their mad labour smiles,
And safe enjoys the sabbath of his toils."

of his majesty's reign, (1666,) and during a war with the States-general of the United Netherlands, he, the said Edward Seymour, being then one of the commissioners for prize-goods, did fraudulently, unlawfully, and in deceit of his majesty, unlade a certain prize-ship, taken from the subjects of the said States, without any order or authority from the same; and did house the lading and goods of the said ship, and lock up the same, without the presence of any store-keeper; and did afterwards sell the same, pretending the same to have been only Muscovado Sugars, and did account with his majesty for the same as such; whereas, in truth, the said ship was laden with Cochineal and Indigo, rich merchandizes of a great value."

Mr. *Fleetwood.* The first two Articles, I will undertake, shall be proved.

Mr. *Vernon.* As to the two last Articles, I have credible witnesses that will prove them, to satisfy the House.

Mr. *Seymour.* When my charge is presented you in writing, I do not doubt but you will give me convenient time to answer it. It consists of several parts; as matter of account, &c. and if I may have a copy of it, I shall make such an answer as will satisfy you, and, I am confident, every member.

Mr. *Vernon.* I suppose, the Articles ought to be read, paragraph by paragraph, at the table. (It dropped.)

Sir *Francis Winnington.* If your meaning be, that he shall answer in writing, I conceive, when a man is impeached, the matter is to be finally determined here. [But time being given Mr. Seymour to answer till Thursday, he went not on.]

Mr. *Seymour* desires "he may have the charge in writing." This is an Impeachment, and not to have its determination here, but in the Lords House. We are the great court of enquiry, and are to receive any information. This impeachment being undertaken to be proved, I would know, whether, if articles are exhibited, this House will admit, or allow, the person to give his answer here?

The *Speaker.* When Answer is made to the Articles, then is the proper question, Whether it shall be given in writing. But your order is, "That Mr. Seymour shall make answer on Thursday, and that he have a copy of the Articles."

November 25.

Mr. *Seymour.* You did appoint this time for me to present my Answer to the Charge against me, I am ready to answer. I only wait your method how I shall proceed; whether I shall give my answer in writing, or answer the Articles as they are read.

The Articles were read.

Mr. *Harbord.* You have appointed this day for Mr. Seymour's Answer. It has been the constant practice, when a member is accused, that he stand up in his place, and give Answer.

Mr. *Seymour.* If that be the method, and that be the way to come to your end, I answer.

To the first Article: I do allow, that, by virtue of that act, I received, as treasurer of the navy, 498,251*l.* 1*s.* 10*d.* and no more. That was the total for rigging and equipage of ships. What was more, was for the ordnance, which was above 20,000*l.* but by virtue of that, I received no more than the former sum. That sum lord Danby paid, according to the intention of the act, and none of the money was diverted to any other use; as appears by the accounts. So that the balance of the total is 9*l.* 5*s.* and that is all in my hands. The other sum for that service was 20,000*l.* which the king assigned out of his treasury. Several sums of money were lent to Mr. Kingdon; but what were so lent were before the act for disbanding the army. As to the lending 90,000*l.* &c. I never lent above 10 or 20,000*l.* and none of those sums were for building ships, but of my own proper money, and the money of my friends: And frequently the treasurer of the navy does make use of his credit for the king's service. And this is my answer to the first article.

To the second Article, I humbly present this Answer: That it was in my power to dispose of money till bills were brought signed, which they did not do as long as the money was in my hands. The 40,000*l.* I did issue and pay accordingly, which will appear by the merchants, who are now ready, at the door, to affirm it; and they did never call for money, till it was out of my hands. The time of contract and delivery of the goods was so long, that all the money in my hands was gone: All was done by the navy-board, and before the merchants came with their bills, it was so long, that all the money was paid out. What will make this manifest, will be the merchants complaint, the last parliament. I am so far from prejudicing them, that I did serve them what I could, by reflecting on the hardship of their case; and I humbly offer you their petition.

Mr. *Harbord.* You cannot receive this paper. If Seymour insists upon it, he must withdraw whilst you debate it. This is not the place to hear the merchants; that must be in another place. That Seymour should produce this paper, and desire that the merchants should be heard, is a strange motion to come from Seymour, who has managed so many impeachments.

Mr. *Seymour.* Thus much I know, that when evidence is produced, it has never been denied.

To the third Article: I had the honour to be Speaker of the House before I was treasurer of the navy; and I was in the condition of a private gentleman; but though it was not great, yet it did support my quality; but it would not maintain the principal commoner of England. I had the favour from the king to receive 3,000*l.* a year, as for secret service, to avoid paying the fees in the Exchequer;

which was all the favour I ever received from lord Danby.

To the fourth Article: This Article is of matters done fifteen years ago, and so uncertain a charge, that there remain not any footsteps. For the prizes, I never received the money, nor ever was an accountant for the prizes. I acted no otherwise than as the other commissioners. In the article it is called "a certain ship," without name: When it has a more certain name, and is a more certain charge, I shall make a more certain answer to it. Since the commissioners of the prizes were under a misfortune, the great men at Brook-house never spoke of it; and since that, there has been an act of oblivion. But I disclaim any benefit from acts of oblivion. This article is of matters done fifteen years since, and as there are no footsteps of it, when persons will charge me more particularly, I shall give a more particular answer.

Mr. *Montagu.* If Seymour has done as well as he has spoke (which is always well) he may come off well. I move that he may withdraw.

Mr. *Seymour.* I know what becomes me in point of duty. I acknowledge the justice of the House in their proceeding with me, in granting me a copy of my Charge, and convenient time to make my answer; and I hope to make my defence plain to the House, if not to every particular member. It is my misfortune to answer as criminal, but I do not misdoubt my cause, or apprehend a censure from the Commons of England, who will do according to justice. The gentleman that brought in the Articles, had another, carried on by the wings of fame, "That I was a person of no fortune," and "That I advised the king to prorogue or dissolve this parliament, that I was popishly affected, and had given popish counsels." Things of this nature make impression, when we are involved in common danger. And I can scarce promise myself to be equally heard, and not hardly judged. That prompts me to my vindication. If any thing looks like vanity in me, the good a man has done, or endeavoured to do, may be made use of, when there is a presumption of doing ill. My family were instrumental in the reformation, and not any have been pointed out for popery. The first step I ever made in public, was being a member of parliament, and what my carriage has been is no secret; and when, in continuance of time, I had wearied that service, I had the honour to be called to the chair, not sought for, either to the king, or the House. I affirm, I was indifferent whether—In that parliament, I cannot justify, but that I was subject to mistakes, and those were questioned; but reasons and precedents were produced, which made the House doubt, by letting fall the debate. I knew that the chair could not wander, but in paths untrodden; but the resolution of the House once taken was punctually observed by me. At that time there was an extraordinary question in the Lords House in relation to judiciary causes. I remember that the chair was not altogether positive in that question. I will give you one instance more. The king was on the throne, and the last moment of the session, the House expected that the money-bill should be brought down from the Lords. It was denied, and several messages passed betwixt the Houses. At last, it was not brought down, but met me at the bar. The king was angry at it. I said, "I would be torn out of the chair with wild horses, before I would stir without the bill." The House, at the latter end of a session, were jealous of something that might be offered, and the House thin; they were pleased to lay their trust in me, I was to hinder it. But the matter of discharging the Bankers Debt was brought in here, and in the Lords House, and if I could have been prevailed with, that bill had been an act. Had I been a corrupt man, that bill might have passed. You have heard of it in Mr. Coleman's Papers. A gentleman brought me a present from the city of London, and how that gentleman and his message were received, he will tell you: he is a man of honour. I have taken no indirect way. In the latter end of the parliament that the Plot was discovered in, I suppose it will be admitted that nothing was wanting in the chair for the discovery of it. It was dissolved, but by whose counsels I know not. I had the honour to be of it, and a greater honour, to exercise your place. I was placed in the chair by persons not used to flatter, and, I believe, not me. (Colonel Birch.) And in my carriage in that employment, I hope, I gave up no right nor privilege of the House. I have the honour to be named a manager at the trial of the Lords in the Tower; and that Lord that shall fall into my hands shall have little reason to think I should favour popery. I knew nothing of the dissolving of the last parliament, but I am sure I advised the calling this. I had a great sickness, and went into the country, and returned not till six or seven days within this parliament; and how these unprecedented prorogations have been made, I know not. Concerning the duke of York, how he came to be called back, when gone away, I know not; but being here, and in two or three days sent away, my observation was, "That playing tricks with the parliament would not do." But I could not justify it, that by royal authority any man should be banished; but sending delinquents away is a greater crime than I have to answer for. Having made this declaration of my part, in the next place I hope there will be a happy issue of this parliament, and I think it not in the power of any man to step betwixt the king and the parliament, and those about him know how much he believes his safety is in the parliament. I cannot say I have made so good use of my knees as I ought to do, but not as I hear I am reported to have done, to beg of his majesty for a prorogation of this parliament; but I should do it to establish peace in the kingdom. But I am unhappy to fall into the displeasure of some whom I have no great

veneration for. Let those men walk abroad with what penetential words they please. They that have broken the triple league, shut up the exchequer, because I would not trust their counsels. When the parliament is dismissed, they will do the same thing again. That the Protestant religion may be preserved, I am for the preservation of the crown. There remains my charge with you. Do as you think fit, I will do as an honest man, and never depart from my resolutions of my sincerity in the Protestant religion, and service to my country.

Mr. *Miles Fleetwood.* He answered not to the Article, "That he misemployed the public money." I do justify it, and will prove it by good testimony, that the money granted for an actual war with France was not so disposed of, but to a contrary use. Pray read the charge, article by article, that we may know your opinion of it

Mr. *Vernon.* To the last Article "of Money received for Secret Service," what secret service he did that parliament, he that received the money knows better than I. Unless leaping out of the chair* was "secret service," and that needs no proof. Though he denies selling the king's prizes under the notion of coarse sugars for Indigo, and Cochineal. As for the Act of Indemnity, I know not how that can clear him, since he is impeached; it is not proper here to determine, but in the Lords House If we have not justice against him in the Lords House, I know not where we can have it any where else. In the Courts of Westminster, where the judges stop all proceedings, I expect it not. The duke of York was indicted for a papist, and in other presentments of papists, they stopped the courts of law, because they were too big for the law. This man is in so much favour at court, and has so much money to manage, that he can make all of his side. See the effect of your address to the king; you had put the king upon a most grateful act to the city, and done good service to the nation in the country, yet he, Jeffreys, is chief justice of Chester still. This address was not granted, nor your addresses for pardon of such as should come in to discover the Plot; if ever men deserved pardon, they did, when the king's life and nation were in danger, and an exception of "perjury" was put into one of the pardons. What have you had of effect from your addresses, by means of such counsellors as Seymour near the king? I move you to put the question, "That there is matter of impeachment in this charge."

Mr. *Harbord.* I pretend not to charm any man by what I shall say; but the first step you are to make, is to read the charge, article by article.

The Article was read "for the Money given for Ships."

Mr *Harbord.* So great care the parliament took to provide money for ships, and punishment for diverting that money. Now, in short, whether can this article be proved? It may be said, here is nothing but an affirmative and a negative, and so perhaps men may not be able to give a judgment, to say what to do. From precedents in your ancestors time, and in the Long Parliament, of Impeachments, the question is now, "Whether Mr. Seymour is so far guilty of this charge, as in your judgment to proceed to impeachment." Though he has answered all the four articles, and endeavoured to clear himself from other aspersions. When he was in the Speaker's chair (as you said very well in your speech, "the chair had been so vitiated,") I have seen him cast his eye about, and he was come to that perfection, as to a man to tell you how a vote would pass, and spies and emissaries were sent out, to fetch men in: this I have seen an hundred times. This article two gentlemen undertake to prove, and no man can say, but that if he be guilty of it, he has made a great breach of his trust. The witness that can prove this article, had his hand in putting out the money When a member cannot make good the article, he names witnesses. The first article can be proved by a man that had his hand for it, and Seymour has threatened the man to ruin him, if he gave evidence. (Some called out, "Name the man.") They that bid me name him, are as ill men as he (Seymour.) If gentlemen bid me name a witness, that an offender may escape, they are as guilty as the person accused.

Sir *William Jones.* I have attended the debate, and this is not the time to bring that in question. Seymour is a man of great eloquence, and has showed you that he is an able man If he be good, he is able to do much good by it; if otherwise, much hurt. He has answered the articles, one by one, and it is not much matter whether his answer had been "Not Guilty" only, and he could not make a better answer. I take it, that, as to the great sum given by act of parliament for building of ships, his charge is, "That he diverted that to another purpose, and indeed to an ill purpose, to keep up the army." His answer is, "That he received so much, and the rest was the ordnance, and was paid according to the act;" and he has referred you to his account, and there remains 9*l* &c. It may be, the money lent for keeping up the army was other men's money, upon the credit of himself and his friends With all fairness I do represent the effect of the charge, and his answer. I do not deny but that this is a good answer, but all in effect amounts to no more than, "Not guilty of the charge." I did observe, that he has deceived no man's expectation in his abilities He introduced his speech to this effect, "That he was unfortunate to have a charge against him, but it would be less so, because he should be heard in parliament, and would call an Eastland merchant to testify for him, &c." But that is a mistake. I am afraid this House cannot judge this matter. I could wish they had that power. It may be, it would be more secure for the nation. that this House had a several judicature; but I am

* See 4 Cobb. Parl. Hist. p.890.

afraid this House has none I rise not to aggravate one point of the charge If he be guilty, let him be condemned; if not, acquitted You (under favour) ha e nothing to consider, but whether this article be a crime, if proved Seymour did not take upon him to tell you this article was no crime, though proved No doubt, if proved, it is a crime against several acts of parliament, appropriating sums of money, &c that they should not be misapplied If he, as treasurer of the navy, has mis-spent it, to another use, it is a crime, the penalties and and forfeitures are fine, and loss of his place, if he be guilty of a new crime The next article is of great consideration There was an act of parliament for a war with France, and that army had the ill luck to go off with pay, and not fighting That money was not fit to pay them, but money was borrowed to keep the army up No man can think but that this was a crime to continue the army against an act, though he lent the king his own money, especially considering the hazard the nation did run, by that army's being kept up, when there was no work for them, It was well done for Seymour to mention his good actions it may a little mitigate his punishment in the Lords court, but this is not so proper, to tell you any other aggravations not in the article If they be crimes let them add them as articles, let right be done, and proceed with that gravity as in other places If any member will say that this matter contained in the article is an offence let him rise up and say so Two members have said, that they do undertake to prove it

Sir *Tho Lee* That which is out of question is not the question, but the question is "Whether upon these articles, you will impeach Mr Seymour?"

Mr *Kingdon* I should not rise up to speak unless it were in my power to give the House some information, and it is only because I am named by Mr Seymour to whom I lent money This money he lent to me, but whether it was misemployed, I know not He has offered to produce his accounts Some part of this money he lent me not, for some part he borrowed of me As to the other part, said to be lent for continuance of the army, I lent none for that purpose, for those great sums were lent long before the matter of disbanding the army entered into debate, or whether you should continue them Long before the act for disbanding the army, there was a necessity that the army in Flanders should have 10,000*l.* to prevent them from starving The other money I took out of his house to disband the army with, which might else have cost the kingdom 80,000*l* more

Sir *Thomas Lee* I have been long acquainted and have had a friendship with Mr Seymour, but what I shall say shall be for your service which will be, to commit this matter at large, because Seymour is charged with having employed the money to different uses, and Kingdon says it was not employed to the uses in the article mentioned, but on the contrary It is no light thing for the Commons to make complaint to the Lords of one of their own members This will be but a mean recompence of your credit, to lose your proof, when witnesses shall go back in the Lords House, and the Commons use not to fail in their prosecution For that reason the Commons have given notice to offenders as to the duke of Buckingham, &c because they would be so well informed, that they may never complain but the person may be found guilty It is a matter of so great weight, an impeachment, that the Commons ought not lightly to accuse Impeachment is your weapon and you must not blunt it If you are taken in one part of it you may be in another, and it will be a fatal thing to go to the Lords with a mistake You have heard Seymour's defence and Kingdon's evidence

Mr *Harbord* Vice Admiral Penn, a commissioner of the navy, was accused at the bar of this House before the commissioners of accounts Penn was accused that he had embezzled prize-goods He was summoned hither, and answered the charge, and then the question was, "Whether upon this complaint, there was ground for an impeachment?" And it was resolved in the affirmative You have the same question now against Seymour I can undertake for my part I will not for another man to make good what I have stated Mr Cellier spoke to what is in question, yet the evidence I mentioned at the bar in the Lower House ... they may be ... money I ... us but hereafter I shall propose a way to make the kingdom happy

Mr *Boscawen* I rise up to take care gentlemen ... that friend up ... and his ... matter and no reason and ... Whosoever says so is guilty of ... If Seymour be guilty, condemn him; if not ... acquit him It will be hard if ... in the Lords House it will happen ... you shall do therefore I would commit the Articles to be well considered In the last parliament the Articles were kept ... and I doubt it will be said, there is something of revenge in it more than upon public account And if that appear, it will be a damp to all you do Therefore commit the Articles

Mr *Montague* In the last parliament did come a credible substantial gentleman with an impeachment against Seymour, but he had used him ill and the parliament was dissolved

Sir *Christ Musgrave* An Impeachment has been brought in and your members have answered it What is before you is, the ground of Impeachment in this Article The members that brought in the articles may have ground to believe them, yet they may be deceived, and so you may lose the honour of the House In the Impeachment of lord Mordaunt,* several witnesses were examined, and several days were heard and next, you have done so in the case of Sir Wil-

* See vol 6, pp 866, 870 of this Collection

ham Penn Several persons did enquire into miscarriages, and it was so difficult to make them out, that the House did, by act, &c commission persons to enquire into them They examined witnesses upon oath at Brooke House, and they made a particular report of the evidence Could any thing be clearer But here it is said, "gentlemen will make this charge good," but yet no proof is made of them Seymour produces his account, and will stand and fall by it Kingdon tells you "That that of the money borrowed was a mistake and the money was not so employed as in the charge I move therefore that it be committed

Mr *Love* [illegible] at [illegible] Long Parliament, but Seymour I remember accused lord Clarendon in the Long Parliament It was then [illegible] to charge that great lord and prove [illegible] would be a dishonour to the House [illegible] gentleman then of the House [illegible] the very speeches I then [illegible] [illegible] who were [illegible] that they might be taken off [illegible] upon his honour did undertake to prove the [illegible] saying the king's secret [illegible] to his [illegible] and that was all that was expected this gentleman should [illegible] to prove that article

Colonel *Birch* [illegible] under great awe [illegible] great fear [illegible] see the dissolution of [illegible] members [illegible] lord Clarendon [illegible] I believe [illegible] which Clarendon was [illegible] I press no man [illegible] to be examined but [illegible] that to examine the matter We know which wind blew Clarendon over sea, and what wind blow now Seymour his self he is a lover of his king and country &c but I cannot but observe the hand of God in this charge against Clarendon When Seymour was in the chair, no man was more sharp upon me, and I sometimes as smartly replied But as to the last parliament, I think he did believe the plot in the Long Parliament, and therefore I did recommend him to the chair If he be guilty of this charge, no man shall prosecute him with more warmth than I will do When you resolved that money should be given upon a poll bill, for the French war (which I was convinced of) an 100,000*l* for some things was to be provided in a few days, I said to sir R Howard, "You have 50,000*l* remaining, &c in your hands," he replied, "I would be taxing &c" I told you formerly of [illegible] a cudgel, that would break that glittering bottle, the French king," but you must have a sharp sword to do it now Sir Robert Howard said "He had orders for issuing out that money &c" I never heard but that if a member said he was mistaken in an Article it was no further insisted on; as in Clarendon's case The money might be lent and possibly the individual money for ships that were to be built, but can any man have satisfaction unless a committee enquire? And so your honour will be saved Be upon sure ground, and that the evidence may be clear, commit it

Mr *Papillon* There were two acts for disbanding the army but the parliament had a trick put upon them There was two hundred thousand pounds given for disbanding the army, and it was employed to keep it up I am [illegible] this money lent by Seymour was that which kept it up He should not have parted with the money till it was effected I do not lay so much weight upon what is said by Mr. Kingdon as to carry his charge to a committee

Mr *Kingdon* I speak to order I should not have troubled you but that I find myself reflected on by Papillon [illegible] that money went to disband the army and what was lent to Mr Seymour was before the disbanding the army

Sir *Fr Winnington* I look upon this Article, and I find it [illegible] not one word of of Kingdon but [illegible] that Seymour directed 86,000*l* &c [illegible] this [illegible] King- [illegible] paying the money [illegible] Seymour [illegible] impeached but there is a [illegible] [illegible] that when the [illegible] after the [illegible] [illegible] impeachment a gentleman of quality [illegible] And that was the reason [illegible] came not in that parliament [illegible] Seymour [illegible] that parliament being [illegible] I would know, when a man [illegible] any man shall stand up [illegible] he does not believe the article' whether this shall destroy my impeachment But gentlemen say still, it may be committed, which [illegible] a gentle rejection of the thing If this gentleman be guilty, it is more glorious for him to be tried in the greatest place of the kingdom, and to justify himself, than to stifle it here by commitment, and then the next thing will be, witnesses will run away because this great man is too great for the Commons of England If you take away the means you take away the end The court ever calls for prosecutors, but never for witnesses till issue be joined Seymour has committed a great crime, and he will commit a greater to keep himself from justice I was counsel for lord Mordaunt * in his impeachment, and I remember the House would not let me produce one witness for him, and he was impeached We know what constitution the long parliament was of, and what precedents they made, but at the latter end of it, when it began to be filled with brave men, Articles were presented against lord Danby, and there was nothing but prosecution, no recommitment If the articles be not proved upon trial,

* See vol 6, p 383 of this Collection
† Ibid p 340

* See vol 6, p 785 of this Collection

it is no reflection upon the House of Commons but on particular men who undertook them; but if the gentlemen undertake to prove the articles, and you do not impeach thereupon, this will be a great discouragement to call great men to account. Kingdon borders upon the same offence with Mr. Seymour, if it be one, and so what he says is of no weight.

Colonel *Birch*. I will begin where he ended. He tells me, "I will look to my interest." I say, that Winnington pleaded for lord Mordaunt, and then you know where his interest was. So he grounded that old maxim of mine. I think myself not well dealt withal, to tell me of my nibbling about money. I am auditor of the excise, and can any man charge me with ever taking six-pence bribe? Lately I was one appointed to disband the army, and I meddled with no money but what I gave account of; because I am told of "nibbling." I did not say "that it was impossible to prove these Articles," but no man can but he that keeps the cash. If, after all this, this individual money was given for this use, &c. it is an Article to impeach upon; if not you cannot.

The Debate was adjourned to the next day.

November 26.

Sir *John Knight*. I conceive that the House intended to proceed to such Articles as may be suitable to your honour, and that the honour of the kingdom may not be laid level, and your member acquitted. As for the first Article, "that Mr. Seymour had directed the money you gave, for another use, &c." it is very fit that he be called to an account for it. If I stand up and say, "I will make good an article," consider how it will be made good. Says Seymour, "Not one penny has been diverted, but employed according to the act of parliament," and proffers to produce his accounts. In the one way or the other, consider well what you do, lest, if he be impeached, the Lords find him not guilty. Therefore it is not enough that a gentleman rise and say, he will make it good, but be sure of proof for your honour.

Mr. *Harbord*. If you proceed by precedents, I am sure you have many; but the question of commitment of the articles was not first put. If you put the question, "Whether there be ground of Impeachment upon these Articles," those gentlemen left off—

Sir *Nicholas Carew*. The question of commitment of the Articles arises from arguments of the honour of the House. But no man had been impeached in the long parliament, if that had been an argument. If you put so great a discouragement upon members that bring in impeachments against great men, what use are you of, unless to give money? We know the condition of the nation; if we go this way to work, we give up all. You must mistrust the honour and wisdom of your members, that they brought in this charge maliciously, if you refer it to a committee, and rest not upon their undertaking to make it good. Were this charge only a breach of the letter of the law, I would not open my mouth, for every one offends: But what became of your money, when the ships should have been built within the time, and an army raised for an actual war with France, and you were told from the bar, "That a gentleman would rather be guilty of forty murders, than that it should not be a war." And, you know, a letter was produced, "That, about that time lord Danby was treating to make the king tributary to the king of France, and, on that pretence, to keep off the parliament;" and an army was raised; for aught I know, to carry on the Plot. There is evidence enough; but if you do not impeach Seymour give up all.

Mr. *Leveson Gower*. I differ in the means, but not in the end; when a member did stand up and say, "He will undertake to prove the charge," and yesterday another stood up (Kingdon) and told you, "He believed the contrary," and another replied, "Kingdon was as criminal as Seymour." Keeping up the army was a great fault, after the act for disbanding it; but in the act for disbanding it and paying it off, there is a clause of indemnity. Next it is said, "If the Articles be referred to a committee to examine the proofs, witnesses may be menaced and taken off." But if so, it might have been in the committee for the Plot; Bedlow, Oates, Dugdale, &c. might have been taken off. One of the evidence is said to be a man worth 10,000*l*. I wonder, such a man should be bribed or menaced. Be sure of the proof, else the honour of the House is exposed. Is not all the evidence at the bar against the Lords in the Tower known, and printed? shall we be afraid to show our evidence against a Protestant, a man of family, and not afraid of evidence against papists? I am for committing it.

Lord *Cavendish*. You are moved, "That this charge may be referred to a committee." I think for no other reason but that the matter of the prizes may be examined. Persons at a committee may say things, and retract them again; but those against the five Lords in the Tower were past retracting; they were all upon oath. If that be so, committing the Articles is the way to have them fall to nothing. Without doubt, the Articles are criminal, and a breach of two acts of parliament. A member has said, "He knows, that part of that money was not employed for building ships, and that money kept up the army." On the other side, a member spoke positively to one Article. If the honour of the House be concerned, it may be vindicated; but I cannot imagine that the honour of two members that asserted the Articles will be exposed. I cannot suppose that. The Articles are criminal, and undertaken to be proved. And there is ground to me sufficient, that in the articles there is matter to impeach Seymour.

Mr. *Dubois*. There must go a great many blows to fell a great oak. Here are high crimes charged upon Mr. Seymour, and offered to be proved. The issue is, Whether upon this en-

quiry you will find it *Billa vera?* If the last parliament had sat a week longer, I would not have been in his case for 2½d. The money for building the ships, fenced with so many clauses in the act, &c. should not have been diverted There is indemnity in the first act, but not in the last. The credit of Kingdon's negative evidence, I hope, will not be put in competition with two affirmatives. If Seymour be inclinable to popery, he is ready to bring in arbitrary government. I am for impeaching him upon these articles.

Sir *Leoline Jenkins.* In this case, you are involved as prosecutors, and therefore I hope you will well consider of it. If you prosecute wrongfully, it will be very ill, and therefore a man should not mingle any of his own passion in the prosecution; it should be to no ill end, and there should be a moral assurance of the truth of the charge. I do not see that industry used yet, whether the charge be well grounded One worthy member (Kingdon) speaks *actu—proprio facto*; two members speak their thoughts by hearsay. If this business come before the Lords, it will be absolved in this condition, being positive proof from one, and only hearsay from two.

Mr. *Evelyn.* Falsity and truth are vastly different; but when falsity is in a fine dress, it makes a show. I was at first full of fear, lest the House should suffer in not making good the articles, and so might have a blot, and the gentleman a greater that brought in the articles. Considering the vast trouble the Plot has given the House, the quality of the conspirators, and their number, and that the House should receive a blemish! Those without doors will think this a bold act, who are for impeachments. I conceive, your proper question is, "Whether this matter in the Articles be a proper ground to impeach Mr. Seymour, &c.?"

Sir *Francis Russel.* This is but in the nature of a presentment to a grand jury. To what intent should persons give the committee knowledge of the evidence? Let it be known upon the impeachment before the Lords. It is not only a distrust of your members, to refer the Articles to a committee to be proved, but it is needless, and against the method of parliament. You must carry it to another place, where you are to discover the evidence, and till then, the prisoner is not to know the evidence. But to refer it to a committee to hear the proof, is against all law and method.

Mr. *Finch.* If I was of opinion that the honour of the House was concerned in it, I should possibly be as eager as those gentlemen that move it, that this charge should go to the Lords, before it pass a committee here. It would be a great misfortune to the House, if, through this apprehension of partiality, the Lords should disappoint you: therefore I shall say something, before you put it to so great a hazard. It is injustice to the House, and your member, who has been a zealous assertor of the rights of the Commons in the matter of the Lords taking upon them to judge original causes. Your right in carrying up the money-bill he vigorously asserted. It is a justice you owe him, not to expose him to that tribunal, without evidence first heard. The evidence will all be exposed to your censure; therefore examine the grounds of the charge. I shall not speak to precedents of impeachments; but there is a considerable difference betwixt impeachments of treason, and misdemeanor. It does not follow, because no treason is found by the Lords, that therefore no misdemeanor. Precedents are express in the case, as that of sir William Penn's impeachment; and you will hardly find one precedent of misdemeanor, that has gone in a contrary way, but has been examined at a committee. Where the matter charged and the proof was presented to the House at the same time, as in the case of lord Danby's letter to Mr Montagu, there was no need of witnesses. And another reason is, where a gentleman undertakes to make the charge good upon his own knowledge; that is much different from the credit of others; that is not giving credit to your member, but to persons not known. I will not reflect on the credit of the proof undertaken by your members; but I must say, you heard, on the other side, the testimony of a member (Kingdon,) if not all the considerable circumstances, of his own knowledge. I am sorry to hear it objected against his testimony, "that he is *particeps criminis*;" if so, I fear you will want most, if not all, your testimony against the five lords in the Tower, which is so far from invalidating their testimony, that it confirms it. Not to accuse himself to excuse another. In the impeachment of lord Strafford, when sir William Pennyman was brought by my lord to show that his words had been otherwise than they were taken to be in the impeachment, viz. "That the king's little finger should be heavier than the loins of the law, &c." one of the managers of the impeachment told sir William, "He did ill discharge his duty to the Commons (being a member) to suffer the House to run upon such a mistake." Has not Seymour done your service worthily, and I hope you will as worthily consider it, in your manner of proceeding with him. That matter alledged against Seymour, "his dexterity when he cast his eye about in the long parliament to tell the House," is not in any one article. You may see, by his accounts, the money received and the money paid; and the navy-board must be his vouchers, and those he will produce. If Seymour must answer for the faults of all men, there is ground for impeachment. Therefore, upon the whole examination of this case, before it go to the Lords, no objection can be against commitment I do conceive that the act of parliament for building the ships, &c. does impower those accounts to be taken by the House of Commons, in an express clause. I remember, in a dispute betwixt the Lords and Commons about the accounting, &c. the Lords are excluded, and you ought regularly to receive

that account in the House, and to let a committee examine it. If this be so, receive the first motion of committing the Articles, and so you may receive the account in the House.

Mr. *Herbord.* There is a reflection upon me, of dexterity, &c. It is a terrible expression, to fright a gentleman from his public duty. I will never decline my country's service. For do I covet Seymour's place, nor envy him, there for I hope ye will not suffer a man to bear the t [illegible] dexterity [illegible]. You told [illegible] Seymour [illegible] he has [illegible] without [illegible] the Commissioners of the navy [illegible] great [illegible] Commissioners &c. [illegible] Seymour [illegible] and [illegible] telling the commissioners of the navy. Seymour had instructions not to pay any money without warrant from the commissioners of the navy. The merchants said, "That the commissioners had told them they had order for their money, but Seymour was not ready to pay it." But the reason why Seymour would not obey the commissioners order was, that he despised them and came not to them in some months. I have the papers to prove Seymour's Answer and the commissioners Reply to it. (Then he spoke of his return [illegible] conveyance to lord Danby of [illegible].) As to what Finch said of 'dexterity, &c.' I never voted in any council, That the duke of York should stay in England, when he was deemed an enemy to the nation.

Mr. *Finch.* When Harbord replied, I did not know the matter betwixt Seymour and the navy board. I do say the navy board orders you here to Seymour's accounts, and the Exchequer, if they find one, will not deny the other. As for Harbord's being even with me in the aspersion, That I was one of those that retained the duke in England,' I can justify myself to every member, and the most particular. I was not for giving them the handle to satisfy themselves to the people. I did think it was necessary the duke should be absent, and had security for it, in the opinion of the parliament, and I was satisfied. I never knew that "dexterity was a crime," and am willing to excuse Harbord from that matter.

Col. *Titus.* Whoever has the keeping of the unrighteous Mammon can make friends. I know not well which way to give my opinion in this matter, when I consider how successful Addresses and Impeachments have been. I never saw by addresses that we have removed ministers. Instead of blowing up our enemies, we blow up our own work backward. But how fruitless soever impeachments are, yet we must proceed, to satisfy the world. Two things induce men to believe the Impeachment; one the probability of the thing, and next, the credibility of the testimony. If the thing be probable in itself, that such sums could be raised on the credit of a particular person.—This matter you had had before you the last parliament if it had sat, (as some took care it should not, by dissolving it) by the person's evidence who was employed in the things themselves. They tell their story with coherence, and give reasons why they may be trusted. Some of this money was employed for the army, to keep it up. But others say, by circumstances, who believe—You are told by Jenkins of "facto proprio, &c." I think, Kingdon is under suspicion of the same thing, and it is a [illegible] this gentleman to be accused for money, &c. And should not I think that [illegible], because we conclude, that [illegible] was in danger. And that is Kingdon's. It is natural for men to be advocates [illegible] fault, that they may be questioned for [illegible] there is ground for impeachment, the [illegible] being criminal, and will be proved. The thing itself makes the fact criminal, and you have no suspicion of the evidence undertaken by one Kingdon [illegible] in his own case. It has been well objected, 'That a great person that has great power can never be punished if evidence be brought to the committee,' therefore I desire evidence may not be known, that art, force, or money can corrupt or [illegible] them in giving their testimony. The committee [illegible] the last parliament, we only [illegible] all they did was known publicly. I speak it of my own knowledge, and many [illegible] young men, constantly, every night, [illegible] had intelligence of what was done. Finch tells you, "That by dexterity [illegible] were brought under the shelter of this article of the money, &c." And he took occasion to vindicate Seymour, &c. If the witness against the lords, being *particeps criminis*, had gone about to excuse what the lords had done, he would be no competent evidence; but if Kingdon will accuse Seymour he is a competent evidence. To commit this charge, [illegible] the zeal of the House. Therefore put the question, That there is matter of impeachment in these articles.

Mr. *Hyde.* I was present at the Impeachment of lord Clarendon. Yesterday, I heard a member say, "That in that impeachment, to every article a member did rise and say, 'I will make that article good;' and for that reason I am now against that way of proceeding, for afterwards one declined. He was unsatisfied in the article he undertook to prove; he owned he was abused by the evidence." It was a hard case, the proceeding then; and I think it will be so now, if he were the greatest enemy I had in the world; and therefore I am for commitment.

Mr. *Love.* I shall speak only to the question. If I were convinced in the reason and equity of it, I should not be against commitment. I have refreshed my memory, since last night, out of my notes that I took in lord Clarendon's Impeachment. It was then said, 'Now you have heard the articles read, for the honour of the House you are to know where and when the crimes were committed, and by whom they will be proved.' Says Seymour himself, "That is

the way to invalidate all your testimony, by publishing the witnesses, who by corruption or menace may be taken off

Mr *Trenchard.* I desire you will keep strictly to the question. In the case of lord Clarendon, the House had not so great inducement to impeach as now, because members did not undertake the proof of the charge then, they had only inducements to believe it. Money was lent by Seymour, and, contrary to the intent of the act, not lent to Kingdon. In an impeachment of treason we ought to be more tender than in charge barely of misdemeanors. When gentlemen undertake the proofs of the charge, it is a disparagement to the members to refer it to a committee to examine evidence. You must not put discouragement upon your members, lest you lay out inducements for the future. When the duke of Lauderdale ... charged soon after the parliament was prorogued ... ... the ... the ... the Lords find not the charge ... the diminution of their honour ... your ... no more than a petty jury ... ... guilty ... ... Pray put the question

That there is matter in the articles to impeach Seymour

Sir *Th. L.* I know not what the Lords will say concerning the Ships and the money in the charge, but ... matters ... to particular ... ... to consider the act of ... ... the crime be pardoned by the ... You are bound to take notice of that ... ... expressed ... That ... ... Sec by that act

... ... and the act ... ... the goods, the ... &c. of which ... ... was made ... ... another, the question is ...

Sir *Thomas Lee.* I desire only to know whether a particular exception does not explain the matter

Sir *Fr. Winnington.* Look into that act of pardon which passed some time before the disbanding act, and you will find abundance of exceptions in it for the benefit of great men. I should be very loth to put an article upon Seymour that is clearly pardoned. Seymour did say, Though haply he might be pardoned by the act, he would not shelter himself under it. But as to his particular relating to purloining the stores, or any corruption in his office, if you but think that an argument probable to impeach, I love the gentleman so well that I would hardly advise him to plead it.

Colonel *Birch.* I will not take notice of pardons in gentlemen's pockets, but that act of pardon spoken of, I said formerly, upon that act, "That it was only for the sake of some great persons." If lawyers say that Seymour is not pardoned as to the prizes, &c. by that act, put it to the question.

The question being put, That the consideration of the Articles be referred to a committee, it passed in the negative.

Resolved, 'That Mr. Seymour be impeached upon these Articles, and that a Committee be appointed to prepare the said Impeachment.'

Mr. *Harbord.* I have seen no other precedent of commitment upon a charge of misdemeanors, but that of Sir Giles Mompesson. The House did order his commitment to the serjeant. I desire the long robe may consider of it.

Sir *Christ. Musgrave.* Pray call for the Journal, and see the precedent of sir William Penn.

Mr. *G.* ... We have not been frequently troubled with impeachments, but in the last parliament, the case of the impeachment of lord Mordaunt and sir William Penn was for misdemeanors. That of lord Clarendon was another case. In this you cannot extend the impeachment further than the articles.

Sir *Thomas Lee.* Unless you will do in this case more than has been done in any, refer it to a committee. Consider the precedents of sir Giles Mompesson, &c. Because nobody would be security for his forthcoming, and he confessed the fact, he was imprisoned. Is there no difference betwixt misdemeanor and treason? But I will not enter into the debate, but desire to know the course of all parliaments relating to precedents. Let the fact be plainly before you, and do what you will.

Sir *Fr. Winnington.* Be careful not to go from the rule of right. I appeal to you, if an information of misdemeanor be against a man in an inferior court, whether they do not imprison the party till they shall think fit to bail him. I believe there are several precedents of members complained of here, that have been committed. Sir John Bennet was ... committed to custody in order to have an impeachment drawn against him. Seymour being committed to the serjeant, if he says "I desire to be bailed," he ought to be in a court of record. But I take it there is more ... from an impeachment of the House of Commons that sounds of grievance, &c. It is not the judgment of the House that he should remain in custody but for so small a time till the impeachment may be drawn up. Better precedents than those of the long parliament must guide you, that so, if he ... be ... ... till the impeachment be drawn up ... no wrong done him.

Sir *Chr. Musgrave.* I cannot agree to refer this to a committee to examine Precedents, and in the mean time to commit him, which is first to commit him, and then to examine precedents of commitment. I would know by what rule you commit him to custody, if the crime be bailable. If he offer bail, the House of Commons cannot bail him. Let us that complain of arbitrary courts take care that we be not offenders ourselves. Being a member of this House, you cannot divest him of the pri-

vilege he has out of the House. Pray walk in wary steps in this matter. This manner of proceeding is not for your honour.

Sir *William Jones*. In all our proceedings we are as well to satisfy our own consciences as other mens. I am yet but young in parliament, but what moves me is reason of law. If a man be accused of crimes, there is not a necessity he should be in custody; it may be, in case there is danger of flight. If he be accused of capital crimes, the man may run away, and hazard his estate, to save his life. In some capital cases a man cannot be bailed; but in most cases bail may be taken. It is said, "he may go away if not imprisoned;" so far, it may be, we desire it; but the reason and practice of all other courts is against it. I desire only that your precedents may not outgo all other Courts of Justice.

Colonel *Titus*. If you do any thing, and have no precedent for it, Seymour will have all the reason to accuse you of injustice, and your own honour be exposed. To obviate both inconveniences, pray let precedents be searched.

Ordered; That, the searching for Precedents concerning the committing a Member to custody when impeached in parliament, be referred to the Committee appointed to draw the Impeachment.

December 17

Sir William Pulteney reports from the Committee to whom it was referred to prepare the Impeachment against Edward Seymour, esq. a member of this House; and to search precedents touching the Imprisoning of Members of this House, when impeached in parliament; That the committee had directed him to make a special report thereof: Which he read in his place; and afterwards, delivered the same in at the clerk's table: Where the same was read; and is as follows:

"The 18th and 19th king James, sir Giles Mompesson's case, who was committed by the House to the Serjeant's custody. He made his escape, and a proclamation was issued out from the king to apprehend him, (he reads the Proclamation) he being committed by order of the House, to be sent to the Tower.

"Sir John Bennett's case, who was Judge of the prerogative court, in the 18th and 19th K. James: Resolved, That the sheriff of London do secure his person.

"Sir William Penn's and Mr. Brunkard's case, as in the Journal 1668: Penn's runs thus: "13 April, 1668, Ordered, That Penn do attend the 14th." And then there is a Narrative of Penn's embezzlement of Prize-Goods. "Ordered, That on Thursday next he make answer to his charge." The Committee was to acquaint Penn with this order, and Penn was to deliver his answer.

"A Letter from the commissioners of accounts was read, and the evidence was read; and the question was put, and an Impeachment was ordered to be drawn up against him, and to search for precedents of suspension from his attendance in parliament."—"Ordered, That he be suspended whilst the Impeachment is depending."

"Mr. Brunkard not being to be found, for his contempt in the waving the Justice of the House, Ordered, That he be expelled the House."

Mr. *Harbord*. The precedents reported were such as the House ordered to be searched, which were none but commitments upon impeachments. Mompesson was committed to the serjeant, but he broke from that custody, and the Lords censured him; they degraded him from his knighthood, and fined him a sum of money. Bennet served for the university of Oxford, and was judge of the prerogative court. He took great sums of money and bribes; he likewise was turned out of the House, but being sick and infirm, was permitted to stay at his own house. He was ordered to be conveyed to the Tower by the sheriff of London, or to take security from him for his appearance. There are two other precedents in the late long parliament. Penn was accused by the commissioners of accounts of taking prize-goods out of an East India ship: he stood up to justify himself from the articles, and was suspended. Precedents of commitment were searched. Mompesson ran away, &c. Bennet was not committed, &c. Brunkard was accused for causing the duke's ship to strike sail, when the fleet was in pursuit of the Dutch. He did not attend the House, and was expelled, and articles were exhibited against him. As for the state of commitment in general, I find precedents anciently of commitment for crimes of much less nature, as, for speaking scandalously of acts passed, 19 king James: Mr. Shepherd said, "That the bill for the better keeping the Lord's day was rather like a gin against the papists, than against the Puritans." Whether he had an inclination to favour popery, I know not. He did not explain, in his place, to give satisfaction to the House, and was expelled. Sir Edmund Sawyer was the king's servant: he exacted double to the book of rates. Hervey and Dawes, farmers of the customs, were commanded to come to Whitehall to discourse the matter. By the duke of Buckingham's favour, Sawyer came to the House, and there were arguments upon it. Sheldon was expelled the House, and was made not capable to serve in parliament. Dr. Parry, in queen Elizabeth, &c. For a hundred years last past, precedents are clear of commitment of persons impeached. Upon the whole matter, I move, "That you will commit Mr. Seymour to the serjeant."

Sir *Joseph Tredenham*. I did attend the committee that you ordered to search for precedents: the matter has been opened by Harbord; give me leave to express it more fully, and to have recourse to the paper in my hand to help my memory. The 18th king James, sir Edward Coke was chairman to the com-

mittee of grievances. Mompesson was charged for the monopoly of licensing inns and alehouses, &c. He confessed his crime at the committee, and before the House; and the next day, upon the report, the House resolved to go up to the Lords to impeach him: then, and not till then, he was committed. He confessed the crime he was charged with, and for fear of flight he was committed. Sir Edward Coke delivered it as the opinion of the committee, "That, unless some persons would undertake for his forthcoming, he should be secured by the serjeant." After this vote for his commitment, the Commons addressed the Lords, and both the king, to issue out a proclamation to take him, being fled. Sir John Bennet's case was much the same, for exorbitances in a court of judicature. Sir Edward Sackville made the report, "That he had taken many bribes, and had committed extortions in his office." Bennet was not in the House; he was sick, and was heard by his counsel at the committee, and the House would not suffer them to be judged, till they were heard in their places. Bennet continued his excuse of sickness, and his counsel being asked, "Whether he would confess, or deny, the charge,' they said "Neither." Whereupon the House came to this resolution, "That Bennet is faulty;" and so he was ordered into safe custody of the sheriffs, &c. to be committed to the Tower of London. The other precedents reported are foreign to this case before you. They were committed upon the notoriety of the thing, and suspicion of flight. Penn's was only suspension of the House, and Brunkard, for his flight, was expelled, and an impeachment voted against him; but nothing of commitment. As for Shepherd's case, 27 Elizabeth, I know not where Harbord finds it; it is not in any journal of that time. As for Hall's case, no doubt but this House has power of judging their own members: it was for a book reflecting upon the proceedings of this House, and so judged, "upon the House itself." You are upon prosecuting Seymour in the Lords House, and so I suppose your commitment of him is in order to his custody, not his punishment. In cases of information, you have not expelled a member without witnesses being heard It has been moved, "That Mr. Seymour might be secured." I appeal to you whether an impeachment be not the severest charge? It has always been, that members of the House are free from arrests, unless in case of felony, treason, or breach of the peace. Have you a mind to think fit that Seymour be committed for an accusation that Westminster-Hall does bail? For liberty of a man's person is as essential here, as liberty of speech. In Hen. 6's time (it was an unfortunate age, I wish ours more fortunate) the duke of York then aiming at the crown, no one man stood so much in his way as Thorpe, Speaker of the Commons, who upon an execution arrested him. This parliament did what they could for the House of Lancaster, and from thence came the civil wars, and so much blood; but the same parliament could never extirpate the House of York till they garbled it. If once you pass a resolution, "That an information upon a bare averment must be necessarily followed with commitment," I would know, whether you garble not the House? But consider the consequence; no man's innocence can save him, if his testimony is not heard till his trial. I would know, whether the gentlemen, who would commit Seymour, think he cannot find security for his appearance? There is no likelihood that Seymour should shun his trial. I move, "That he may not be committed."

Mr. *Harbord*. The chairman was directed to report what he did, and no more, and the committee, if there be occasion, will justify it. I did not cite Hall's case, but the journals were brought to us, and none beyond 1610; some few notes the committee were forced to use, and those were brought by Mr. Petty, which we took to be authentic. If we had made no search but in the Journals, they were so imperfect, that we should have had no precedents at all. Tredenham told you of the Speaker, Thorpe, arrested in Hen. 6's time, &c. I would preserve the privilege of your members, but I remember about ten years ago, there was a design to turn out eight or ten members who voted against the Court. I laid my hand to the work, and to prevent it, I searched the outlawry-office, and found 56 members outlawed, and Mr. Seymour sat many years in the chair outlawed. I pulled that out of my pocket, and saved those eight or ten by it that were designed to be turned out. I know not whether Seymour will run away. I have told you, that my opinion is, to secure him; do as you please.

Sir *William Pulteney*. I observe that, upon commitments, &c. the person accused was either committed upon confession of the fact, or flight. But it is moved, "That witnesses be produced against Seymour." But if he should know before-hand what they can say against him, they may be corrupted, or menaced out of their evidence. But when you have given your judgment that you will impeach a man, there is no precedent to be found that, when a judgment of impeachment has been found and carried up to the Lords, that you should say, your member is not in custody. It does tantamount prove a vindication. When the Commons came to the Lords House with the impeachment of Bennet and Mompesson, they had imprisoned them; and to produce proofs before that time may be dangerous, and of very ill consequence.

Sir *Chris. Musgrave*. There is a great deal of difference betwixt Mompesson's and Bennet's case and that of your member. To preserve your privileges, it is the best way to go by ancient precedents: Mompesson's witnesses were heard at the committee before he was charged. There is a great deal of difference betwixt a bare assertion against a man, and when you

are assured of evidence. One reason why Mompesson was secured, was, because nobody would answer for his forth-coming. If his commitment was a punishment, yet if Seymour was charged in Westminster-Hall, as the first and second articles are, they would take security for his appearance. Why will you then confine him? And it may be the Lords will set him at liberty. You will punish that judge, I believe, that will not bail a person that is bailable by law. Seymour may be forth-coming upon security for his appearance, and therefore I would not commit him.

Mr. *Garroway.* Methinks you are irregular, and a little aforehand with it. You must vote, "That the Articles must go to the Lords;" else Seymour will stand committed, and nothing will appear against him. Sir John Benet was bailed by the sheriff of London; and if so, Seymour may be bailed to be forth-coming, and there is no danger of his escape, in this case of misdemeanor; therefore put the question first for ingrossing the Articles.*

Sir William Pouheney reports from the Committee appointed to put the Articles against Mr. Seymour into the form of an impeachment, That the said Committee had agreed upon a form: which he read in his place; and afterwards, delivered the same in at the clerk's table: where the same being twice read, was, upon the question, agreed to.

Ordered, "That the said Articles, so agreed upon, be ingrossed.

"Ordered, "That Mr. Seymour be taken into custody of the Serjeant at Arms attending this House, for securing his forthcoming, to answer to the Impeachment of this House against him, until he shall have given sufficient security to this House, to answer to the said impeachment.

Ordered, "That the Serjeant at Arms attending this House, be impowered to receive security for the forth-coming of the said Mr. Seymour, to answer to the impeachment of this House."

Then sir William Portman, Mr. Ash, and others, proffered their security, &c.

Sir *Thomas Lee.* It is not an ordinary case for a member accused to have so many acquaintance to proffer security for him. You know therefore that you have made an offer to impower the serjeant to take his security.'

House of Lords, *December* 21, 1680.

A Message was brought from the House of Commons, by sir Gilbert Gerrard, knight, and others; who did, in the name of the Commons assembled in parliament, and in the name of all the Commons of England, impeach Edward Seymour, esq. for several high Crimes and Misdemeanors and Offences; and was commanded to exhibit Articles against him for the said high Crimes and Misdemeanors. The House commanded the said Articles to be read. (See p. 428.)

The House being acquainted, "That Edward Seymour, esq. was attending at the door, to receive their lordships' pleasure;" he was called in; and being brought to the bar, and kneeling, the Lord Chancellor told him, "That there are Articles of Impeachment, for high Crimes and Misdemeanors, brought from the House of Commons against him, which he should hear read." Which being read; he desired he might have a copy of the Articles, and a short time given him to put in his Answer thereunto; which he is ready to do.

Ordered, by the Lords spiritual and temporal in parliament assembled, That Edward Seymour, esq. may have a copy of the Articles of Impeachment brought up by the House of Commons against him.

December 23.

This day being appointed for Edward Seymour, esq. to put in his Answer to the Articles of Impeachment brought from the House of Commons against him; he was called for. And being at the bar, the Lord Chancellor asked him, "If his Answer was ready?" He acknowledged it to be a high and great favour to him from this most honourable House, that he was commanded to answer so soon as this day. He said, His Answer was short, plain, and true; and so delivered in his Answer, which was read while he was at the bar, as followeth:

"The Answer of the right honourable Edward Seymour, esq. to the Articles of Impeachment exhibited against him by the Commons assembled in Parliament.

"The said Edward Seymour, saving to himself all advantage of exception to the uncertainty and insufficiency of the said Impeachment, and all benefit which by the laws or statutes of this kingdom he may have for his defence against the matters therein charged, humbly answereth and saith,

"To the first Article: That this Respondent, being Treasurer of the Navy, did receive of the monies raised by the act of parliament mentioned in the said first Article, for building 30 ships, the sum of 493,241*l.* 1*s.* 10*d* and no more; all which this Respondent did apply to the uses mentioned in the said act, as by this Respondent's accounts, ready to be produced to this honourable House, doth more at large appear. And this Respondent saith, he did not lend 90,000*l.* or any other sum, parcel of the monies raised by the said act, to any person whatsoever.

"To the second Article: This Respondent saith, That he had 10,000*l* parcel of the monies raised by the act mentioned in the second Article, in his hands, at the time of the treaty between the commissioners of the navy, and the Eastland merchants, mentioned in the second Article. But this Respondent denieth that he ever promised the said merchants to pay them the said 40,000*l.* or any part of it. And

* See the Case of Warren Hastings, A. D. 1788, in this Collection.

this Respondent further saith, That, before the said Eastland merchants did bring this Respondent any bills signed by the commissioners of the navy to be paid, this Respondent had paid the said 40,000*l.* by virtue of several orders assigned upon him, to be paid for the uses, and according to the directions of the said act.

"To the third Article: This Respondent saith, That he was Speaker of the House of Commons before he was Treasurer of the Navy; and that, to support the dignity of the place of Speaker, his majesty was graciously pleased to grant unto this Respondent the yearly salary of 3,000*l.*; which, to avoid the charges and trouble of the Exchequer, was paid out of the monies directed for secret service; which this Respondent doth acknowledge was paid, as well during the times of prorogations, as during the times of sessions.

"To the fourth Article: This Respondent saith, That the matters therein charged are so general and uncertain, that this Respondent can make no particular answer to the same: but sure he is, that he did not act alone in any thing as a commissioner of the prizes, but jointly with others, according to his commission; and did never commit any such fraud and deceit, as in the said Article mentioned.

"All which he humbly offers to the consideration of this honourable House.

"EDWARD SEYMOUR."

The Lord Chancellor asked him, "If this were the Answer he would abide by?" He said, 'It was;' and withdrew.

Ordered, That a copy of this Answer be sent to the House of Commons.

January 3, 1681.

A Petition was presented to the House, from Edward Seymour, esq.; which was read, as followeth:

"To the right honourable the Lords spiritual and temporal in Parliament assembled: The humble Petition of Edward Seymour, esquire;

"Sheweth; That whereas, for some time, he hath lain under the weight of an Impeachment from the House of Commons, of several high crimes and misdemeanors, to which he hath given an Answer to your lordships; and since he is in no manner guilty of the Articles he stands charged with, that his truth and innocence may be fully manifested, he humbly desires, your lordships will be pleased to appoint some speedy time for his trial and to assign him counsel learned in the law, to assist him in his defence. And your Petitioner (as in duty bound) shall ever pray, &c.

"EDW. SEYMOUR."

Mr. Seymour being called in; he was asked, "What counsel he did desire?" And he named Mr. Pollexfen, Mr. Keck, and Mr. Thursby.

A Message was sent to the House of Commons, by sir Miles Fleetwood and sir Adam Oateley: To acquaint them, that the Lords have received a Petition from Mr. Seymour, wherein he desires a day may be appointed for his speedy Trial; that their lordships, finding no issue joined by replication of the House of Commons, think fit to give them notice hereof.

Ordered, That Mr. Pollexfen, Mr. Keck, and Mr. Thursby, be, and are hereby, at the desire of Edward Seymour, esq. assigned to be of counsel for him, in order to his defence upon his trial, upon the Impeachment of the House of Commons, whereby he is charged with high crimes, misdemeanors, and offences.

HOUSE OF COMMONS, *January* 3, 1681.

The Answer of Edward Seymour, esq. to the Articles of Impeachment exhibited against him by the Commons, assembled in parliament, was read.

Ordered, That a Committee be appointed to prepare Evidence against Mr. Seymour, and manage the same at his Trial. They are to sit *de die in diem*: And are impowered to send for persons, papers, and records.

HOUSE OF LORDS, *January* 8, 1681.

Ordered, That Saturday the 15th day of this instant January is hereby appointed for the Trial of Edward Seymour, esq. upon the Articles brought up against him by the House of Commons, whereby he stands charged with several high crimes and misdemeanors.

A Message was sent to the House of Commons, by sir John Coel and sir Timothy Baldwin: To let them know, that this House have appointed the 15th day of this instant January, for the Trial of Edward Seymour, esq. upon the Articles brought up against him by the House of Commons this day sevennight; and that the Commons may reply, if they think fit.

Two days after this the parliament was prorogued by his majesty to the 20th of January, and soon after was dissolved.

276. Proceedings against Lord Chief Justice SCROGGS before the Privy Council; and against the said Lord Chief Justice and other Judges in Parliament.* 32 CHARLES II. A. D. 1680.

PROCEEDINGS BEFORE THE PRIVY COUNCIL.

ARTICLES OF HIGH MISDEMEANORS, humbly offered and presented to the consideration of his most sacred Majesty, and his most honourable Privy Council, against Sir WILLIAM SCROGGS, Lord Chief Justice of the King's Bench; exhibited by Dr. Oates, and Capt. Bedlow, 31 Car. 2.

I. THAT the said Lord Chief Justice, contrary to his oath, the duty of his place, in contempt of the king, his crown and dignity, did set at liberty several persons accused upon oath before him of High Treason, without their being ever tried, or otherwise acquitted; as namely, the lord Brudenell, &c.

II. That at the Trial of sir George Wakeman and others, [See vol. 7, p. 589, of this Collection], at the Sessions-house in the Old Bailey, for High Treason, the said Lord Chief Justice (according to the dignity of his place) managing the said trial, did brow-beat and

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* Roger North, whose representations, however, are always to be received with caution, has interwoven his character of Scroggs, Jones and Weston into the account which he gives of these proceedings against them:

"Mr. Justice Jones was a very reverend and learned judge, a gentleman, and impartial; but, being of Welsh extraction, was apt to warm, and, when much offended, often shewed his heats in a rubor of his countenance, set off by his grey hairs, but appeared in no other disorder; for he refrained himself in due bounds and temper, and seldom or never broke the laws of his gravity. There are, in the Report of the committee, certain relations tending to accuse divers of the judges; and we know how such matters came ready cooked and dressed up by party men to serve turns, and are presented, with the worst sides forwards, to an assembly then willing to take every thing in the worst sense, and who, from superficial colours, conclude deep in substances; which matters, passing without hearing, but of one side only, are not much to be regarded. Of this sort was a story from Taunton Dean of the punishment of one Dare, the very person that affronted the king with a petition as I touched before. [A petition from Taunton Dean was brought up by a man whose sirname was Dare: He, with his fellows waited upon the stairs of the House of Lords, and, as the king came down, put the roll into his hand; the king asked, How he dared do that? Sir, said he, my name is Dare. But he had better been asleep elsewhere; for he was afterwards caught speaking seditious words, and was punished by the judge of Assize; and the judge, who was then Mr. Justice Jones, being pressed to intercede to the king for him, answered, He knew no favour he deserved: which was afterwards put among the sins of the judges, p. 513.] This judge, it seems, upon a legal conviction for seditious words spoken, inflicted such punishment as he thought the crime deserved; and, being pressed to intercede with the king for his majesty's favour to him, answered he knew no favour he deserved. There was one of the sins of that judge. There was nothing more in particular; but he was taken in, with the other judges of the King's Bench, for two or three matters that passed there while he sat as judge in that court. One was the refusing to present to the king a petition of the Grand Jury of Middlesex about sitting of the parliament. If that was a crime, it was a very slight one; nor do I think any man of law will say that the judges are bound to carry all the crudities of jury-men to the king, but are to use their discretion. Their address, of that sort, is no part of their office; nor do they, in any respect, represent the county; they are taken 'de Corpore Comitatus,' and not *pro*, nor have any authority to bind the country in any thing; but, as to all matters, out of the crown law, they are as single persons and not a jury, nor is any magistrate, or other person, bound to go on their errand. Another great sin of that court was the discharging the Grand Jury three days before the end of the term, while they had divers bills before them to present; among which was an indictment of recusancy against the king's brother the Duke of York. This discharge, they said, was precipitous and unusual, and done on purpose to stop that indictment, which was an obstruction of the justice of the nation. The jury here, it seems, were not ignoramus, though from the same shop we shall soon hear of a total obstruction of justice, and no crime at all to be found. But now, to examine this affair of the judges, first it is absolutely in the judges discretion when to determine a session, and when to detain or discharge Grand Juries; and 'de officio judicis 'non datur exceptio.' But what did it hinder? an Indictment, that is the cause of the crown; and who else is concerned in it? But for what end? Not for any real effect, for such a bill may be *Non Pros.* or pardoned the next moment. What then? To be a public affront to the king and his brother; and that if the king had stopped such an Indictment, they might have it to say, in order to rebellion, that there was no justice to be had against papists, and so they must right themselves. Now was it not a very careful provision of the court, by using a discretion the law undoubtedly entrusts them with, to stop such an inconvenience, and so as as it went off silently and without noise? But

curb Dr. Titus Oates and Mr. William Bedlow, two of the principal witnesses for the king i[n] that case; and encourage the jury impannelled and sworn to try the malefactors, against the

faction are the only masters of discretion, and will not allow the liberty of any to their superiors.

"The next matter, which was highly aggravated against the judges of the King's Bench, as such an illegal invasion of property as had not been heard of since William the Conqueror, was a rule made by that court, that a certain book—Liber intitulatus, The Weekly Pacquet of Advice from Rome, 'non ulterius imprimatur.' The case of that book was this. The whole labour of the faction at that time was bent to make popery as odious and dreadful in the minds of the common people, as was possible; for then the inference of course was, All this you are to expect from the Duke of York, and that the king and the duke are all one, ergo, &c. Upon this design a weekly libel came forth entitled as above, which, under the mask of telling all the extravagant legends of popery in a buffoon style, continually reflected on the government of that time; and so that collection went on and was published in pieces, which the zealous gathered together most religiously, and now would exchange for any softer sort of paper; for nothing grows so insipid, as old state libels. The printer I think was one Langley Curtis, or one Janeway, and had been informed against, and, I think, convict and punished for some of them. But it was an abuse not easily corrected; for, the outward pretence being against popery, to be accused for that, was to be accused for taking the Protestant side against popery; and every week they varied, so that a conviction of one did not extend to the next, and no ordinary judicial order could reach it. Thus it was very hard to meet with this inconvenience, which may happen at any time, when popularity runs very hard against any government. At length the experiment of this rule was made, but, I think, it went no farther, nor was the printer taken up for any contempt of it; but it was enough; the rule itself was shewed, and, as I said, made a great noise. I do not remember much agitation about the reason upon which the court of King's-Bench took this authority of making a provisional order upon them; but it seems grounded on that law which takes away the Star-Chamber; for it is therein declared, or the judges have resolved, that all jurisdiction which the Star-Chamber might lawfully exercise, rested by law in the court of King's Bench. And it is well known that the Star-Chamber made provisionary orders, as well as punitive decrees, to obviate great offences; and that some, as Hales (in a posthumous piece) allows, though the originals are not extant, may be ingrafted into the usage of the common law; especially in matters of public nusances. Without doubt the point was controvertible; for it might be said on the other side, true, but then each court must follow the nature of their proceeding, viz. the King's Bench by indictment or information, having no ground by law or precedent to proceed for offences, extra to the court, otherwise. And when a book is convict of crime, it may be part of the judgment 'quod non ulterius imprimatur,' which will bind the person defendant. But how inept this method is to stop such a Protean mischief, after a little time, may become sensible. But admit it not to be a clear case on the court-side, there was ground enough for the court, as they say good judges do, to resolve it for their own jurisdiction; and errors in judgment of courts of justice are not criminal, but corrigible by superior authorities. Therefore, in quiet times, this question had been carried into the House [of L]ords by a petition of the printer, if he had [tho]ught himself grieved; and then there had been a due consideration of the law, and the king's counsel had been heard upon it, and the determination authentic, as upon a writ of error; or occasion might have been taken by a short clause in an act of parliament, to have declared the law one way or other. There should be always a distinction between corruption and error; the latter, if Westminster Hall may be heard in the case, is no crime, nor is it, with any aggravation, to be actionable at law. And, upon the reason of these instances, it seems [t]hat to proceed by impeachment, for error in [j]udgment, as for crime, is contrary to the po[l]icy of the English constitution; in which the authority of courts of justice is sacred, and the [e]xorbitances of them, when they happen, should [b]e set right without exposing to contempt either [t]he persons of judges, or the reverence due to [t]heir stations, lest what is got in the shire, is [l]ost in the hundred. But it is seldom found [t]hat, when persons are fallen upon in an heat, as [u]pon the vindicative turns of parties, any deco[r]um is observed, or due steps taken; for they will always be too long or too short. Thus far concerning the King's Bench, as a court, and its legal jurisdiction; which, in this instance also (but in nothing more) touched Mr. Justice [J]ones.

"The case of Mr. Baron Weston was very [e]xtraordinary indeed; he was a learned man, [n]ot only in the common law, wherein he had a [r]efined and speculative skill, but in the civil and [i]mperial law, as also in history and humanity [i]n general. But, being insupportably tortured with the gout, became of so touchy a temper, and susceptible of anger and passion, that any affected or unreasonable opposition to his opi[n]ion would inflame him so as to make him ap[p]ear as if he were mad; but, when treated [re]asonably, no man ever was more a gentleman, [o]bliging, condescensive, and communicative than he was. Therefore, while a practiser, he was observed always to succeed better in arguing solemnly, than in managing of evidence; for the adversary knew how to touch his passions, and make them disorder him, and then

said witnesses, by his publicly speaking slightly and abusively against them and their evidence, and the misrepeating and omitting material parts of their evidence; whereby the

take advantage of it. But, at the bottom, he was as just as the driven snow, and, being a judge, for which office he was fit, because he had neither fear, favour nor affection besides his judgment, he would often, in his charges, shine with his learning and wit; and a little too much of that brought this accusation over him. He was one of a clear conduct, and by principle, honest and just, and, as we find in the best of that character, so was he intrepid, and feared not the face of all human kind. He made no ceremony of flying in the face of faction at all turns, and, being one of those they call prerogative men, inaccessible and unalterable, he was hated bitterly by the party. And to do him and the rest of those gentlemen right, I must needs say that the prerogative of the crown is a doctrine so constantly recommended in the law books, that a man cannot be an honest learned lawyer, but must be in the popular sense, a prerogative man, and, in every sense, a hater of what they call a republic. This learned judge was so steady in his administration, that no advantage could be taken against him for what he did; so they watched his circuit charges, to find somewhat he might say to accuse him of. And the only passage, I find charged upon him, was at Kingston assizes, where he ranted against Zuinglius and Calvin, and their disciples, for their fanatical restless spirit. For now, said he, they are amusing us with fears, and nothing would serve them but a parliament. He knew no representative of the nation but the king (which in an actual sense, is true, for, in parliament, such, as do not choose, have no actual representative; but, in a legal sense, as to the being bound all are represented) all power, says he, centers in him. (That is all coercive power.) And then the judge, in the towering of his fancy, says 'i'faith he (the king) has wisdom enough to 'entrust it no more with these men, who have 'given us such late examples of their wisdom 'and faithfulness.' It would be hard to prove here whom he spoke of, so as to frame, out of these words, an accusation; but it seems there was no better, and so it came before the House of Commons; would any one have thought it?

"It is to be noted that, during this heat, as if the common law of justice had been abrogated, none of these reverend men were either called to be heard, or had any time given them to answer; but the censure of the House, past, and, for punishment, they were to be impeached. The crime against baron Weston, was 'that the words, in his charge, were scandalous 'to the reformation, and tending to raise discord,' &c. A new sort of offence. It hath been the usage of the common law, to charge men with fact done, or words, of a direct sense spoken. Matter of aggravation never makes an accusation where the subject, of itself, doth not bear it. And so careful is the law of criminal matters, that it requires an indictment to be certain to every intent, or else it is void and will be quashed. For which reason, if words may be taken in any harmless sense, though the same words will also bear a criminal sense, they shall be taken in the mildest sense. But however, was it reasonable to bring such a charge as this against an, otherwise, unexceptionable judge? It was much wondered, at the time, that, in all this noise about the judges, none were sent for to the House; the cause was thought to be, that they were stout men, and would have justified all they had done, and that was not thought seasonable. The baron for his part, was so far from being concerned at the terrible sound of an impeachment, that, when the other judges looked grave and solemn, he was as gay and debonair as at a wedding; and was only sorry that he had not an opportunity of talking in the House of Commons, and would have compounded, for a moderate punishment, to have had his full scope of arguing his own case before them. And, as for impeachment, he longed to be at it with them, he cared not where, or before whom, provided he might have his talk out. He was prepared to set up Magna Charta, and to demand the *Judicium parium*, and his lawful challenges, and to shew that *Lex Terræ* was referred to the court, and not to the country, and was nothing to the purpose against his right of trial; and, upon that law he would have died at a stake, and not have quitted one iota of his judgment to all the world. It is pity such a stout combatant had not had a clear stage and a fair enemy; but, as things fell out, they were not so hard pressed.

"No articles were ever prepared against any of the judges, except sir William Scroggs, the chief justice of the King's-bench, against whom articles were brought to the House, and ordered to stand; but I do not find by the print, that any members were appointed by the House to carry them up. He was a man that lay too open; his course of life was scandalous, and his discourses violent and intemperate. His talent was wit; and he was master of sagacity and boldness enough, for the setting off of which, his person was large, and his visage broad. He had a fluent expression, and many good turns of thought and language. But he could not avoid extremities; if he did ill, it was extremely so, and if well, in extreme also. In the plot, he was violent to insanity; and then, receiving intelligence of a truer interest at court, he was converted, and became, all at once, no less violent the other way; which made the plot-drivers and witnesses hate him. And Oates and Bedloe did him the honour to prefer articles to the king in council against him, charging various immoralities; and there was an hearing, but, they failing of proof, he was justified. The occasion of his conversion, as I was told by the person that administered the means to him, was this. The lord chief justice came once from Windsor with a lord of the

parties indicted were by the said jury acquitted of the fact then charged against them, and fully proved by the said witnesses.*

III. That the said Lord Chief Justice, after the trial of the said sir George Wakeman, and others for High Treason, as aforesaid, in the further abuse of the said Dr. Titus Oates and Mr. William Bedlow, and in their great disparagement, speaking of them, said, that before the trial of sir George Wakeman (meaning the aforesaid trial) the witnesses (meaning the aforesaid Dr. Titus Oates, and the said Mr. William Bedlow) were to be believed; but that at and after the said trial they were not to be believed by him, nor should not be believed by him; or to that very effect.

IV. That the said Lord Chief Justice, by reason of his office, hath taken upon him the power to oppress by imprisonment, his majesty's loyal subjects; namely, Henry Care, for writing and causing to be printed divers single sheet books in English called The Packet of Advice from Rome, for the information and discovery of the idolatrous errors and impieties of the Romish church, to his majesty's loyal and obedient protestant subjects (in this conjuncture of time very useful) although the said Lord Chief Justice neither did, nor could alledge or charge the said Care with any thing contained in the said book, that was any ways criminal or derogatory to his majesty's laws, crown or dignity; and refused to take very good bail for him, though offered; and afterwards less bail taken for him upon his Habeas Corpus in court, but by the said Lord Chief Justice's means he was continued bound all the term to his good behaviour; and at the end thereof until the next term; although no particular crime was, or could be proved against or laid to his charge.

V. That to the great oppression of his majesty's loyal subjects, the said Lord Chief Justice, contrary to law, and in manifest breach of his oath, hath without any reasonable cause, imprisoned a feme covert, and divers others his majesty's said subjects, and refused to take bail, though tendered, and the matter bailable, as in the case of Mrs. Jane Curtis, Mr. Francis Smith, &c.

VI. That the Lord Chief Justice is very much addicted to swearing and cursing in his common discourse; and to drink to excess, to the great disparagement of the dignity and gravity of his said place. He did in his common discourse at dinner at a gentleman's house of quality, publicly and openly use and utter many oaths and curses, and there drank to excess.

VII. That Charles Price being accused upon oath, before the said Lord Chief Justice, to be a Popish priest and Jesuit, and imprisoned for the same; and also divers other persons accused upon oath for High Treason; as namely, sir Francis Mannock, Richard Vaughan, esq. and Daniel Arthur, merchant; the said Lord Chief Justice set them at large upon bail, without consulting his majesty's counsel, or his witnesses, and against their consent; divers of which persons have not since appeared, but have forfeited their recognizances, and the persons not to be found.

VIII. That the said Lord Chief Justice, to the great discouragement of his majesty's loyal protestant subjects; to the manifest encouragement of the Roman catholic subjects; when information hath been duly and legally given

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privy council in his coach, and among other discourse Scroggs asked that lord, if the lord Shaftsbury (who was then lord President of the council) had really that interest with the king as he seemed to have. No, replied that lord, no more than your footman hath with you. This sunk into the man and quite altered the ferment, so as from that time he was a new man. It was well for him that the parliament was dissolved, else they had pursued their impeachment against him; and what an embroil it had made in parliament is not easy to conjecture."

Burnet's short account is erroneous. They impeached Scroggs for High Treason; but it was visible that the matter objected to him were only Misdemeanors, so the Lords rejected the impeachment, which was carried chiefly by the earl of Danby's party and in favour to him. 1 Own Times, ...

* Sir Francis Winnington, in his speech in the parliament October ... 1680, says, "at Wakeman's Trial those persons who at former trials had been treated with that respect that is due to the king's evidence, and whose credit and reputation had stood clear without exception in all other trials, were now not only brow-beaten, but their evidence presented to the jury as doubtful and not to be depended on; and so it ... the other trials of papists from that time forward. By which many of the greatest offenders were acquitted and cleared as to the plot; and those that were brought for defaming the king's evidence, and suborning witnesses, in order thereto, very kindly treated, and discharged with easy sentence, especially if papists; but if protestants, though only for printing or vending some unlicensed book, were imprisoned and heavily fined. But I beg leave to particularize in the case of one Care, who was indicted for printing a weekly intelligence, called The Packet of Advice from Rome, or 'the History of Popery.' This man had a strange knack of writing extraordinary well upon that subject, and that paper was by most persons thought not only very ingenious, but also very useful at this time for the information of the people, because it laid open very intelligibly the errors and cheats of that church. However, upon an information given to the court of King's bench against this Care, this rule was made, 'Ordinatum est, quod Liber 'intitulat. The Weekly Packet, &c. non ulterius imprimatur, vel publicetur per aliquam 'personam quamcunque. Per Cur.' I think it amounts to little less than a total prohibition of printing any thing against popery." 4 Cobb. Parl. Hist. 1109.

to him of the abode, or person of a Popish priest or Jesuit, and a warrant desired from him to take or search for such priests or Jesuits, he hath in a slighting and scornful manner refused the same, and bid the informer go to sir William Waller, who busied himself in such matters mainly.

IX. That the trial of Knox and Lane, at the bar of the King's-bench court for their misdemeanors, in endeavouring to take away the credit of Dr. Titus Oates, and Mr. William Bedlow, two of the principal witnesses for his majesty, in the proving of the conspiracy and conspirators against his majesty's life and government of these kingdoms of England, Scotland, and Ireland, the destruction of the protestants and protestant religion, and introducing and settling of popery there; although the evidence was so full and clear against them, that the jury found them guilty without going from the bar; yet the said Lord Chief Justice, in further discouragement and disparaging the evidence of the said Dr. Titus Oates, and Mr. William Bedlow, would not, nor did not give any charge to the jury therein, but rose up suddenly, after the evidence closed by the counsel, and left the said court abruptly, before the said jury had given in their verdict.

X. That the said Lord Chief Justice, knowing that one William Osborne was in the conspiracy and contrivance with the said Knox and Lane, in the last article mentioned, to take away the credit of the said Dr. Titus Oates, and Mr. William Bedlow; and knowing the said Dr. Titus Oates, and Mr. William Bedlow, to be material witnesses for his majesty, in proving of the conspiracy and conspirators, in the said last article mentioned, and had been so against several of the said censpirators that had been tried, and were to be so against several others of the said conspirators that were impeached or accused for the said High-treason, and were to be tried for the same; and knowing the said Wiliam Osborne had been detected before the Lords in parliament assembled, for his said conspiracy and contrivance with the said Knox and Lane; and that upon his own oath, thereupon denying the fact in their said conspiracy and contrivance to be true: yet out of his malice to the said Dr. Titus Oates, and Mr. William Bedlow; and as much as in him lay to endeavour the disparagement, if not the suppressing of the further discovery of that hellish and damnable plot; the said Lord Chief Justice, without the knowledge, consent or approbation of his majesty, or any of his learned counsel in the law, or the said Dr. Titus Oates, or Mr. William Bedlow; did voluntarily give the said Osborne liberty to make an affidavit before him upon oath, of the truth of the said fact, he had before, as aforesaid, denied upon his oath; with intent that the same might be made use of against the said Dr. Titus Oates, and Mr. William Bedlow, to their disparagement, and the apparent prejudice of his majesty, against the said conspirators, in the said High Treason.

XI. That he the said Lord Chief Justice, to manifest his slighting opinion of the evidence of the said Dr. Titus Oates, and Mr. William Bedlow, in the presence of his most sacred majesty and the right hon. the lords and others of his majesty's most honourable privy council; did dare to say, that he had thought that Dr. Titus Oates, and Mr. William Bedlow, always had an accusation ready against any body.

XII. That at the assize holden at Monmouth last, the said Lord Chief Justice, in the presence of several justices of the peace for the said county, did say to Mr. William Bedlow, that he did believe in his conscience, that Richard Langhorn, whom he condemned, died wrongfully, to the great disparagement of his majesty's crown and dignity, the justice of the court, the jury and evidence.

XIII. That the said Lord Chief Justice, contrary to the dignity of his place, did make merchandize of the trials of certain priests to be tried in Staffordshire, and took twenty guineas in earnest; then sold the said trials to other persons, refusing to return the said twenty guineas to those from whom he had received them. And furthermore, before the trial of sir George Wakeman; he the said Lord Chief Justice did bargain with two booksellers for 150 guineas, for them to print the trials; and in case they would not lay down the money before he went into the court, he would not go into the court, but would go into the country: and if the said trial by reason of its length, could not be finished in one day, he would have 100 guineas more, or to that very effect.

The ANSWER of Sir WILLIAM SCROGGS, knt. Lord Chief Justice of the Court of King's-Bench, to the Articles of Mr. Titus Oates and Mr. William Bedlow.

I. To the first he saith, That the lord Brudenell was bailed by the Court of King's Bench in open Court, and afterwards by the Court discharged; with this, that William Bedlow did importune the lord Westmoreland to get the said lord Brudenell discharged, for that he had nothing to say against him, as he said to the lord Westmoreland. (See the Rules of Court.)

II. To the second, he saith, That as to his omitting or misrepeating the evidence at sir George Wakeman's Trial, it is a reflection upon the whole court to suppose it true, and that they should let it pass. But he saith, that Mr. Oates being asked at that trial, why he did not charge sir George Wakeman at the council table with a letter under his own hand concerning the death of the king? He answered, He did not know but that he did: to which it was replied, It is plain he did not; for then the council would have committed him. To which Mr. Oates replied, that that council would commit nobody for the plot; which might be the cause of the misdemeanor of frowning in the articles mentioned.

III. To the third, he saith, he doth not remember that ever he expressed much concerning their credit before their trial; but that there were some passages at that trial which gave

him great cause of doubt: which he hopes he might do, without making it an article of misdemeanor.

IV. and V. To the fourth and fifth, he saith That the persons in the articles mentioned, were committed by him for publishing several libellous and scandalous papers, which were proved against them upon oath: which commitments, even of a Feme-Covert also, notwithstanding Mr. Oates and Mr. Bedlow's skill, were according to law. though there is no law for these persons to call me to account for judicial acts done upon other men.

VI. To the sixth, which is an insolent scandal, he referreth himself to the testimony of that gentleman of quality, whoever he be.

VII. To the seventh, he saith, that the persons in this article were bailed and discharged by the court, where the Attorney-General was first called; but indeed Mr Oates and Mr. Bedlow's consent was not asked.

VIII. To the eighth, he saith, he conceives himself not obliged to do all the business that justices of the peace may do; and though without an offence he might have given such an answer as is mentioned, yet he did not, but a servant of his did.

IX. To the ninth, he saith, That when the cause was tried, he told the jury the matter was plain, and so did the rest of the court; upon which he went away, without any compliment to Mr. Oates, to try causes in London.

X. To the tenth, he saith, That Osborn made only two affidavits before him: the substance of one was, that one Bowring, a servant to Mr. Oates, had said, that he had heard Mr. Oates say, that the kingdom of England would never flourish, until it became elective, and the kings chosen by the people. The other affidavit was when he was sent to him by an order of council to be examined; wherein amongst other things he swears, that though at the trial of Knox and Lane, it was asked where Osborn was, and Mr. Oates's counsel answered, that he was fled; yet Osborn swears, that he at that time was at his father's house in the country, and that Mr. Oates knew it; that he took his leave of him the day before he went, and told whither he went, and saw a letter wrote by Mr. Oates to his father to send for him. Notwithstanding it was carried at the trial, as if he had been fled no man knew whither; so that the affidavit which the article chargeth me for permitting to be made, was not sworn before me.

XI. He saith, it is more to be wondered how Mr. Oates should dare to charge that as an article of misdemeanor, which was said in the king's presence, and yet repeated false too.

XII. That at Monmouth assizes he did tell Mr. Bedlow, that he was more unsatisfied about Mr. Langhorn's trial than all the rest; and the rather, for that he was credibly informed since the trial, that Mr. Langhorn's study was so situated, that he that walked in his chamber could not see Mr. Langhorn write in his study: which was Mr. Bedlow's evidence.

XIII. He saith, the matter complained of is a mere contract with other men, of which he thinks himself not bound to give Mr. Oates and Mr. Bedlow any other account, but that by the taking of twenty guineas he lost forty; and that his backwardness to go into the court at Wakeman's trial, makes it look as if he had not had ten thousand pounds to favour Wakeman in his trial.

If these Articles shall appear to your majesty to be frivolous, or scandalous, or not true; I humbly pray your majesty's just resentment thereon, in honour to your courts and government. And that such an unknown attempt may not go unpunished; that the promoters may be left to be proceeded against according to law.

The Articles of Mr. Titus Oates, and Mr. William Bedlow, against the Lord Chief Justice Scroggs, were heard this 21st of January, 1679, before the King and Council; and upon the hearing of both sides, Mr. Oates and Captain Bedlow are left to be proceeded against according to law. But we do not find that the Chief Justice recovered any damages.

PROCEEDINGS AGAINST SIR WILLIAM SCROGGS,* KNT. LORD CHIEF JUSTICE OF THE KING'S-BENCH, AND OTHER JUDGES, IN PARLIAMENT, 32 CAR. II. A. D. 1680.

HOUSE OF COMMONS, *November* 23, 1680.

Lord *Russel*. 'There are some persons at the door, who can give you an account of the illegal proceedings of my Lord Chief Justice Scroggs, in discharging the Grand Jury of Middlesex.'—

Whereupon, several of the Grand Jury were called in, and some other persons, who gave an Account of the carriage of that matter, as will be at large recited in the Articles against the Lord Chief Justice Scroggs.

Sir *William Jones*.† Sir, The preservation of

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* See what Burnet says of Scroggs, *ante*, vol. 6, p. 1425, and Roger North's character of him in the Note at the beginning of this Case.

† Burnet, after mentioning that he obtained by means of his "Memoirs of the Dukes of Hamilton," the acquaintance and friendship of sir William Jones, then Attorney General, proceeds, "He was raised to that high post merely by merit, and by his being thought the greatest man of the law: for, as he was no flatterer, but a man of a morose temper, so he was against all the measures that they took at Court. They were weary of him, and were raising sir John King to vie with him: but he died in his rise, which indeed went on very quick. Jones was an honest, and wise man. He had a roughness in his deportment, that was very disagreeable: but he was a good natured man at bottom, and a faithful friend. He grew weary of his employment, and laid it down: and, though the Great Seal was offered him, he would not accept of it, nor return to

the government in general, as well as our particular safeties, have a dependance upon the matter that is now before you; in which there are so many miscarriages so complicated, as there ariseth some difficulty how to examine them. I cannot but observe, how the Proclamation is here again mentioned; by which you may conclude there lieth a great weight on the

business. The quickness of his thoughts carried his views far. And the sourness of his temper made him too apt both to suspect and to despise most of those that came to him."

Afterwards, the bishop speaking of the dismission of lord Danby's party and the introduction of Essex to the treasury in 1679, says, "No part of the change that was then made was more acceptable than that of the judges. For lord Danby had brought in some sad creatures to those important posts, and Jones had the new modelling of the Bench; and he put in very worthy men in the room of those ignorant judges that were now dismissed." As to this, it may be observed, that if sir William Jones possessed the power of completely new modelling the Bench, he appears to have employed it with more moderation than might be expected from a man of such a temper as Burnet has described sir William Jones to have been. Of his zeal and activity against lord Stafford, proofs are to be seen in the Trial of that lord, and in the Parliamentary History. He was one of the most strenuous and pertinacious supporters of the Bill for excluding the duke of York. See the Parliamentary History. See, too, 1 Burnet's Own Times, 466, 468.

Sir William Temple, mentioning sir William Jones entering upon the Bill of Exclusion, so abruptly and so desperately as he did, adds, "And this person having the name of the greatest lawyer of England and commonly of a very wise man, besides this of a very rich, and of a wary or rather timorous nature, made people generally conclude that the thing was certain and safe, and would at last be agreed on all parts, whatever countenance were made at court." And Swift has inserted in his Appendix to the third Part of Temple's Memoirs the following very curious Anecdote, which, in his preface, he says, Temple told him: "Sir William Jones was reputed one of the best speakers in the House, and was very zealous in his endeavours for promoting the Bill of Exclusion. He was a person of great piety and virtue, and having taken an affection to sir William Temple, was sorry to see him employed in the delivery of so unacceptable a message [that of January 4th, 1681, against the Exclusion Bill] to the House: the substance of what he said to the author upon it was this: that 'for himself he was old and infirm, and expected to die soon. But you, said he, will in all probability live to see the whole kingdom lament the consequences of this message you have now brought us from the king.'

Sir William Jones is generally reputed to have been the author of the "Just and Modest Vindication of the Proceedings of the two last Parliaments of King Charles the Second." [4 Cobb. Parl. Hist. Appendix, No. XV.] See Lebard 1008; 3 Kenn. 399; 1st ed. Roger Coke seems not to think it certain that sir William wrote it, but seems to admit the general reputation that he did. Burnet says, "It was at first penned by Sidney; but a new draught was made by Somers, and corrected by Jones:" with which pretty nearly agrees Oldmixon's account that it was first drawn up by Algernoon Sidney, then improved by lord Somers, and last of all corrected by the very eminent sir William Jones.

Roger North, whose language is in general sufficiently unsparing of those whom he disliked, and who assailed sir William Jones, not only for his political principles and conduct, but for his professional rivalry with sir Francis North; nevertheless ascribes to him much merit. "I am persuaded," says he, "that, being in place, he was very weary of the Plot prosecutions, as he was afterwards of being among the heads of a faction against the Court in which he had served: the former was obnoxious to uneasy reflections, that, if out of ardour he exceeded, innocent blood might be in the rear of him; and the other touched his reputation, as not consistent with the decorum of a servant, who though never so ill used, should not publicly fly in his quondam master's face. All which matters must needs be weighed by one of his penetration and judgment, and who was no ill man at the bottom, though unhappily mistaken in his conduct. And I verily believe, that, all along he aimed at a certain post in the law, then filled by the lord chief justice North, and directed all his steps towards it, proposing to himself, in acquiring that, to compass his final and retired settlement; but he was disappointed and that encreased the uneasiness of his mind, according as the proffers he had made towards it, were violent and irregular: all which mystery I hope to resolve clearly before I have done. After the Oxford parliament, he did not appear much abroad. He hated Shaftsbury, and, notwithstanding party work, would not willingly come into the room where he was. His personal gravity and virtue was great, and he could not bear such a flirting wit and libertine as the other was. He had a great value for Mr. Hampden, and used to magnify his father as the greatest man, for sense and foresight, that was concerned against king Charles 1. And not without reason; for he knew all that litigating in parliament would (as was intended) end in open rebellion; therefore he was in with the first, and took a regiment, but was killed betimes, else he might have had the post of Cromwell upon more generous terms. Sir William Jones was at a meeting at Mr. Hampden's house in Buckinghamshire, where several of the most confiding men of the faction as-

people's right to petition by means thereof; and that the best way to remove it is to find out the advisers and contrivers of that Proclamation in order to proceed against them according to their deserts. Without which, what you have done in asserting the right of petitioning, will remain with some doubt; and those that advised the proclaiming to the people, that it is seditious to petition the king, without that chastisement they deserve. And therefore I humbly conceive, you will do well to consider of it as soon as you can. It is not strange, that the Proclamation shall be made use of with country gentlemen to get abhorrers to petitioning, seeing the Judges themselves have made use of it to that purpose; they should have known, that though a Proclamation might be of great use, to intimate the observation of a law, yet it had never been used instead of a law. But yet I do not admire so much at this, as I do at the discharge of the Grand Jury, before they had finished their presentments. It tends so much to the subversion of the established laws of this land, that I dare pronounce that all the laws you have already, and all that you can make, will signify nothing against any great man, unless you can remedy it for the future. I observe, there were two reasons why this Grand Jury were so extrajudicially discharged; one, because they would otherwise have presented the duke of York for a Papist;* the

sembled to consult of the convention at . . . whether before or after the Rye discovery, I cannot tell, but either way it must sit hard upon sir William Jones's spirits, who being a lawyer, and, as I said, in the general, no bad man, was for doing his work the formal way, and hated violence. So that knowing the horrid consequences and hazards of that Plot, which could be no secret to him, the thought of it was a burthen to his mind. And it is said an unusual badge gave him a great cold, upon which inflection, having had this burthen at the weight of force to master the distemper, so it turned to . . . and carried him off.

He was a person of a very clear understanding, and (if possible) clearer expression, wherein he was assisted with an extraordinary opinion he had of both, as also of his own general worth, for that was his foible. He was extremely proud and impatient of competition and much more of being left behind, as it was his chance to be in the course of his preferment, whereby he missed of his desired post. And that partly occasioned a sort of restlessness, which made him commit several gross errors in the main chances of his life. His felicity was never to be disturbed in speaking nor, by any audience or emergence, put by the forecast and connection of his thoughts; but dilated with a constancy, steadiness, and deliberation admirable in his way, so that, in speaking as counsel, one might mistake him for the judge. He affected somewhat of the rustic phrase of his own country, which was Gloucestershire, as, to instance in a word, Althoff instead of Although, as we pronounce, which was no disadvantage, but rather set him off. He studied the law in Gray's Inn, and rose first in the King's-bench practice. He affected also general learning, as history and theology, and, as great men usually have their vanities, his was to profess of that sort more than belonged to him. And accordingly he choose his company, who were, for the most part, divines, such as were most eminent in his time, as Tillotson, &c. and I dare say they profited more in his company, than he in theirs. I have touched his felicities; his infelicity was a penchant towards the anticourt, or rather republican, party; and consequently must be a favourer of nonconformity; for opposites to government, of all kinds, seem to make but one party. Whatever his thoughts were, it is certain this course was wholly out of the way of his aim. He had another great disadvantage, which was timidity; he could not support himself under any apprehension of danger. Once, being at his house at Hampstead, about the beginning of Oates's discovery, whether for real or affected fear he knew best, but it is certain he sent an express to his house in London, to have all his books removed out of his cellars into his back yard, lest the papists, with fireballs thrown in, should set his house on fire. And, as he was apt to be dejected upon melancholy reflections, so on the other side, he was commonly elated and triumphant when he had fancied prospects. But his greatest misfortune was his mistaken politics; for he thought the crown must needs, at length, truckle to the House of Commons: but this error being common to the whole faction with whom he conversed, it is no wonder it infected him."

The Examen contains a considerable number of anecdotes respecting sir William Jones.

* Dryden, in allusion, I conjecture to the Bill of Exclusion, describes him in 'Absalom and Achitophel,' under the character of

——"Bull-faced Jonas who could statutes draw
To mean rebellion and make treason law."

* In what Macpherson calls the Life of King James the Second, written by himself, (see the Introduction to lord Clarendon's Case, vol 6, p. 291, of this Collection), the following passages occur respecting the Presentment of the duke of York: "January, 1681, on Oates's affidavit that he had seen the duke of York at mass, and receive the sacrament after the rites of the Church of Rome, the Grand-jury, after being discharged at Hicks's-hall, were sent for by the Justices of the Old Bailey, and presented him for Recusancy, which allowed a pretence for the duke to appear after Proclamation, as the duke of Norfolk and others had done. But this was neither safe nor practicable, so was removed by *Certiorari* to the King's-bench, and, if necessary, by a *Noli Prosequi*. March, 1681, Arguments by Smith, a lawyer, against

other, because they presented a Petition to be delivered to the King, for the sitting of the parliament; which they said it was not their business to deliver. Though I cannot but observe, how, upon other occasions, they did receive petitions, and delivered them to the king; and all the difference was, that those petitions so delivered, were against sittings of parliaments. The truth is, I cannot much condemn them for it; for if they were guilty of such crimes as the witnesses have this day given you information of, I think they had no reason to further petitions for the sitting of a parliament. But, Sir, this business will need a further information; and therefore I humbly pray it may be referred to a committee.

Sir *Henry Capel*. This matter is of the greatest moment. We are under the security of parliaments for redressing our grievances, and another out of parliament, that the law have its course, that the judges obstruct not the law. I observe that these judges are grown omnipotent. 'They have done those things which they should have left undone.' This is very fine, that judges, who must be upon the Bench, must be dropped at Whitehall, before they come to Westminster-hall: and I know what law we must have, if they

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removing the duke of York's Presentment by *Certiorari*. The duke's counsel not prepared to answer a thing never yet disputed, so prevailed with the court to adjourn till the answer could be framed, which proving satisfactory, the *Certiorari* was granted." Collins, in his Peerage, calls the instrument an indictment of the duke of York for not coming to church, which was presented to the Grand Jury of Middlesex, on June 16, 1680.

In the volume of State Tracts, which was published in 1689, is the following article:

Reasons for the Indictment of the Duke of York, presented to the Grand-Jury of Middlesex, Saturday, June 26, 1680. By the persons hereunder named.

1. Because the 25th Car. 2, when an act was made to throw Popish Recusants out of all offices and places of trust, the duke of York did lay down several great offices and places (as lord high admiral of England, generalissimo of all his majesty's forces, both by land and sea; governor of the Cinque Ports, and divers others) thereby to avoid the punishment of that law against Papists.

2. 30th Car. 2. When an act was made to disable Papists from sitting in either House of Parliament; there was a proviso inserted in that act, That it should not extend to the duke of York. On purpose to save his right of sitting in the Lords House; though he refuses to take those oaths which Protestant peers ought to do.

3. That his majesty in his speech, March 6, the 31st year of his reign, doth give for a reason to the parliament, why he sent his brother out of England; because he would leave no man room to say, that he had not removed all cause which might influence him to Popish counsels.

4. That there have been divers letters read in both Houses of Parliament, and at the Secret Committees of both Houses from several cardinals and others at Rome; and also from other Popish bishops and agents of the Pope, in other foreign parts, which do apparently shew the great correspondencies between the duke of York and the Pope. And how the Pope could not choose but weep for joy at the reading some of the duke's letters, and what great satisfaction it was to the Pope, to hear the duke was advanced to the Catholic religion. That the Pope has granted Breve's to the duke, sent him beads, ample indulgences, with much more [to] this purpose.

5. That the whole House of Commons hath declared him to be a Papist in their Votes, Sunday April 6, 1679. 'Resolved, *nem. con.* That 'the duke of York' being a papist, and the 'hopes of his coming such to the crown, has 'given the greatest countenance and encouragement to the present conspiracy and designs of the papists against the King and protestant religion.'—What this Conspiracy and Designs is, will appear by a Declaration made to both Houses of Parliament, March 25. 'Resolved, *nem. con.* by the Lords Spiritual 'and Temporal, and Commons in parliament 'assembled; that they do declare, that they 'are fully satisfied, by the proofs they have 'heard, there now is, and for divers years last 'past hath been a horrid and treasonable plot 'and conspiracy contrived and carried on by those of the popish religion, for the murdering 'of his majesty's sacred person, and for subverting the Protestant Religion, and the ancient well established government of this 'realm.'

6. That besides all this proof, and much more to this purpose, it is most notorious and evident, he hath for many years absented himself from Protestant Churches during religious worship.

These are the Reasons why we believe the duke of York to be a papist.

Huntington, Shaftsbury, Gray of Wark, L. Russel, L. Cavendish, L. Brandon, Sir Edward Hungerford, kt. of the bath; Sir Hen. Calverly, Tho. Thyn, esq. Will. Forrester, esq. John Trenchard, esq. Tho. Wharton, Sir Will. Cooper, bart. Sir Gilbert Gerrard, bart. Sir Scroop How.

The Jury was sent for up by the court of King's Bench, whilst they were on this Indictment, and dismist, so that nothing was farther done upon it, saving that the Jury received the presentment. And by the dismission of the Jury, a very great number of the indictments were discharged. A thing scarcely to be paralleled, and of very ill consequence, not only to many private persons but chiefly to the public.

take instructions from those that advised the proclamation against petitioning. See the consequence; is it not as much as to say, that the judges know all the grievances of the country, and the judges must redress them, and we sit here but for form-sake? All misdemeanors, and what is amiss in the nation, the judges must rectify. This is such a presumption, that they must answer it. If this be done in Westminster hall, how dare grand juries in the country represent any thing that is amiss? Suppose there should be an indictment of murdering a man's father or brother, &c. and the judges take upon them to discharge the jury; this stops all justice, and the consequence will be, men will murder us, and we kill them again. I move, therefore, that you will proceed to punish the offender in this great matter, and remedy the miscarriage for the time to come.

Sir *F. Winnington.* Sir, I think we are come to the old times again, when the judges pretended they had a rule of government, as well as a rule of law; and that they have acted accordingly. If they did never read Magna Charta, I think they are not fit to be judges; if they had read Magna Charta and do thus so contrary, they deserve a severe chastisement. To discharge grand juries, of purpose to disappoint them of making their presentments, is to deprive the subject of the greatest benefit and security the law hath provided for them. If the judges, instead of acting by law, shall be acted by their own ambition; and endeavour to get promotions, rather by worshipping the rising sun, than by doing justice, this nation will soon be reduced to a miserable condition. Suppose that after the discharge of this grand jury, some person had offered to present some murder, treason, or other capital crime, for want of the grand jury there would have been a failure of justice. As faults committed by judges are of more dangerous consequence than others to the public; so there do not want precedents of severer chastisements for them, than for others. I humbly move you, first to pass a vote upon this business, of discharging grand juries; and then to appoint a committee to examine the miscarriages of the judges in Westminster-hall, and to report the same with all speed to you.

Col. *Titus.* Sir, as it hath been observed, that this business hath some reference to the proclamation; so I believe, there is something of the plot in it too. And, therefore I think if this plot does not go on, it will have the worst luck that ever plot had; seeing the judges, as well as most other persons in public places, have given it as much assistance as they could. But whereas some have spoken ill of these judges, I desire to speak well of them in one thing: I am confident they have herein shewed themselves grateful to their benefactors; for I do believe, that some of them were preferred to their places of purpose, because they should do what they have done. Laws of themselves are but dead letters; unless you can secure the execution, as well of those you have already, as of those you are now making, we shall spend our time to little purpose.

Mr. *Sacheverel.* Sir, the business of this debate is a great instance of our sick and languishing condition. As our ships, forts, and castles, are for securing us from the danger of our enemies from abroad, so our laws from our enemies at home; and if committed to such persons as will turn their strength upon us, are equally dangerous. Sir, we all know, how the government of Scotland hath been quite altered since his majesty's Restoration, by some laws made there; pray let us have a care that ours be not altered, by the corrupt proceedings of judges, lest we be reduced to the same weak condition of defending ourselves against popery and arbitrary government here, that they are there. If judges can thus prevent the penalties of the law, by discharging grand juries before they have made their presentments, and can make laws by their rules of court, the government may soon be subverted; and therefore it is high time for this House to speak with those gentlemen. In former times several judges have been impeached, and hanged too, for less crimes than these; and the reason was because they had broke the king's oath as well as their own. If what hath been said of some of these judges be fully proved, they shall not want my vote to inflict on them the same chastisement. The truth is, Sir, I know not how the ill consequences we justly fear from judges can be prevented, as long as they are made *durante bene-placito*, and have such dependencies as they have. But this must be a work of time: in order to remedy our present grievances, let us pass a vote upon this business of discharging grand juries; and that it may be penned as the case deserves.

Mr. *H. Sidney.* Sir, I would beg leave to observe to you, because I think it may be necessary to to be considered by your committee what an opinion was given not long since by some of these judges about printing; which was, that printing of news might be prohibited by law; and accordingly a proclamation issued out. I will not take on me to censure the opinion as illegal, but leave it to your farther consideration. But I remember there was a consultation held by the judges a little before; and they gave their opinion, that they knew not of any way to prevent printing by law; because the act for that purpose was expired. Upon which, some judges were put out, and new ones put in; and then this other opinion was given. These things are worthy of a serious examination. For if treasurers may raise money by shutting up the Exchequer, borrowing of the bankers, or retrenchments; and the judges make new laws by an ill construction, or an ill execution of the old ones: I conclude, that parliaments will soon be found useless; and the liberty of the people an inconvenience to the government. And therefore, I think, Sir, you have been well moved to endeavour to

pass your censure on some of these illegal proceedings by a vote.

Mr. *Powle.* Sir, in the front of Magna Charta it is said, 'nulli negabimus, nulli differemus justitiam;' we will defer or deny justice to no man: to this the king is sworn, and with this the judges are entrusted by their oaths. I admire what they can say for themselves; if they have not read this law, they are not fit to sit upon the bench: and if they have, I had almost said they deserve to lose their heads.—Th this poor nation is to be deplored, that in almost all ages, the judges, who ought to be preservers of the laws, have endeavoured to destroy them: and that to please a court-faction, they have by treachery attempted to break the bonds asunder of Magna Charta, the great treasury of our peace. It was no sooner passed, but a chief justice (Hubert de Burg) in that day, persuades the king he was not bound by it; because he was under age when it was passed.* But this sort of insolence the next parliament resented, to the ruin of the pernicious chief justice. In the time of Rd. 2, an unthinking dissolute prince, there were judges that did insinuate into the king, that the parliament were only his creatures, and depended on his will, and not on the fundamental constitutions of the land; which treacherous advice proved the ruin of the king, and for which all those evil instruments were brought to justice.† In his late majesty's time, his misfortunes were occasioned chiefly by corruptions of the long robe; his judges, by an extra-judicial opinion, gave the king power to raise money, upon any extraordinary occasion, without parliament; and made the king judge of such occasions; charity prompts me to think they thought this a service to the king; but the sad consequences of it may convince all mankind, that every illegal act weakens the royal interest; and to endeavour to introduce absolute dominion in these realms, is the worst of treasons: because whilst it bears the face of friendship to the king, and designs to be for his service, it never fails of the contrary effect.—The two great pillars of the government, are parliaments and juries; it is this gives us the title of free born Englishmen: for my notion of free Englishmen is this, that they are ruled by laws of their own making, and tried by men of the same condition with themselves. The two great and undoubted privileges of the people, have been lately invaded by the judges that now sit in Westminster-hall, ; they have espoused proclamations against law; they have discountenanced and opposed several legal acts, that tended to the sitting of this House; they have grasped the legislative power into their own hands, as in that instance of printing; the parliament was considering that matter, but they in the interim made their private opinion to be law, to supersede the judgment of this House. They have discharged Grand-Juries on purpose to quell their presentments, and shelter great criminals from justice; and when juries have presented their opinion for the sitting of this parliament, they have in disdain thrown them, at their feet, and told them they would be no messengers to carry such petitions; and yet in a few days after, have encouraged all that would spit their venom against the government: they have served an ignorant and arbitary faction, and been the messengers of abhorrences to the king. What we have now to do, is to load them with shame, who bid defiance to the law: they are guilty of crimes against nature, against the king, against their knowledge, and against posterity. The whole frame of nature doth loudly and daily petition to God their creator; and king God, may be addressed to in like manner, by petition, not command. They likewise knew it was lawful to petition: ignorance can be no plea, and their knowledge aggravates their crimes; the children unborn are bound to curse such proceedings, for it was not petitioning, but parliaments they abhorred. The atheist pleads against a God, not that he disbelieves a deity, but would have it so. Tresilian and Belknap were judges too; their learning gave them honour, but their villainies made their exit by a rope. The end of my motion therefore is, that we may address warmly to our prince against them. let us settle a committee to enquire into their crimes, and not fail of doing justice upon them that have perverted it: let us purge the fountain and the streams will issue pure.

Then the House agreed to the following Resolutions: 1. "That the discharging of a "Grand Jury by any judge, before the end of "the term, assizes, or sessions, while matters "are under their consideration, and not pre-"sented, is arbitrary, illegal, destructive to pub-"lic justice, a manifest violation of his oath, "and is a means to subvert the fundamental "laws of this kingdom. 2. That a committee "be appointed to examine the proceedings of "the Judges in Westminster hall, and report "the same, with their opinion thereon, to this "House."

Whereupon a committee was appointed, and they sat several days, and then made the following Report:

The REPORT * of the Committee of the House of Commons, appointed to examine the Proceedings of the JUDGES, &c. Thursday, Dec. 23, 1680.

This Committee being informed, that in Trinity-term last, the court of King's-bench dis-

* See Echard, 112. 1 Rapin, p. 303. fol. Ed. of 1743. See some proceedings against Hubert de Burgh, vol. 1. p. 13. of this Collection.

† See the case of Nevil archbishop of York, Tresilian, Chief Justice, and others; *ante*, vol. 1, p. 89.

* 'I appoint John Wright, and Richard 'Chiswell, to print these Resolutions, Report, 'Resolves, and Notes, perused by me. According to the order of the House of Commons;

charged the grand-jury, that served for the hundred of Ossulston, in the county of Middlesex, in a very unusual manner: proceeded to enquire into the same, and found by the information of Charles Umfreville, esq. foreman of the said jury, Edward Proby, Henry Gerard, and John Smith, gentlemen, also of the said jury, that on the 21st of June last, the constables attending the said jury were found defective, in not presenting the papists as they ought, and thereupon were ordered by the said jury to make further presentments of them on the 26th following, on which day the jury met for that purpose; when several peers of this realm, and other persons of honour and quality, brought them a bill against James, duke of York, for not coming to church: but some exceptions being taken to that bill, in that it did not set forth the said duke to be a papist, some of the jury attended the said persons of quality to receive satisfaction therein. In the mean time, and about an hour after they had received the said bill, some of the jury attended the court of King's bench with a petition, which they desired the court to present in their name unto his majesty for the sitting of this parliament. Upon which the Lord Chief Justice Scroggs raised many scruples, and on pretence that they were not all in court (though twenty of the jury had subscribed the petition), sent for them, saying, he would dispatch them presently. The jury being come, and their names called over, they renewed their desire that the court would present their petition. But the chief justice asked, if they had any bills? They answered, they had, but the clerks were drawing them into form. Upon which, the chief justice said, they would not make two works of one business. And the petition being read, he said this was no article of their charge, nor was there any act of parliament that required the court to deliver the grand jury's petition: That there was a proclamation about them; and that it was not reasonable the court should be obliged to run on their errands; and he thought it much, that they should come with a petition to alter the King's mind declared in the news-book. The jury said, they did it not to impose on the court, but (as other juries had done) with all submission they desired it; but the court refused, bidding the cryer return them their petition. And Mr. Justice Jones told them, they had meddled with matters of state, not given them in charge, but presented no bills of the matters given in charge. They answered as before, they had many before them, that would be ready in due time. Notwithstanding which, the said justice Jones told them, they were discharged from further service. But Philip Ward (the clerk that attended the said jury) cried out, No, no, they have many bills before them; for which the court understanding (as it seems to this committee) a secret reason, which the clerk did not, reproved him, asking, If he or they were to give the rule there? The crier then told the court, they would not receive their petition; the chief-justice bid him let it alone, so it was left there; and the jury returned to the court-house, and there found several constables with presentments of papists and other offenders, as the jury had directed them on the 21st before, but could not now receive the said presentments, being discharged; whereby much business was obstructed, though none of the said informants ever knew the said jury discharged before the last day of the term, which was not till four days after. And it further appeareth to the committee, by the evidences of Samuel Astry, Jasper Waterhouse, and Philip Ward, clerks, that have long served in the said court, that they were much surprised at the said discharging of the jury, in that it was never done in their memory before; and the rather, because the said Waterhouse, as secondary, constantly enters on that grand jury's paper, that the last day of the term is given them to return their verdict on, as the last day but one is given to the other two grand juries of that county, which entry is as followeth.

Trinit. 32 Car. 2. 'Juratores habent diem 'ad veredictum suum reddendum usq; diem 'Mercurii proxime post tres Septimanas sanctæ 'Trinitatis.' Being the last day of the term, and so in all the other terms the last day is given; which makes it appear to this committee, that they were not in truth discharged for not having their presentments ready, since the court had given them a longer day, but only to obstruct their further proceedings: and it appeareth by the evidence aforesaid to this committee, that the four judges of that court were present at the discharging of the said jury, and it did not appear that any of them did dissent therein; upon consideration whereof the committee came to this Resolution:

"*Resolved*, That it is the opinion of this "committee, that the discharging of the grand "jury of the hundred of Ossulston, in the "county of Middlesex, by the court of King's "Bench, in Trinity term last, before the last "day of the term, and before they had finished "their presentments, was illegal, arbitrary, "and a high misdemeanor."

This Committee proceeded also to enquire into a rule of the court of King's-bench, lately made against the publishing of a book, called The Weekly Packet of Advice from Rome; or, The History of Popery: and Samuel Astry, gent.

'And that no other person presume to print 'them. 23rd Decem. 1680. W. WILLIAMS, 'Speaker.' In former editions of the State Trials this Report was inserted twice, viz. in vol 3, p. 218, without the Impeachment and Answer of the Lord Chief Justice Scroggs or the Debates in Parliament; and again in vol. 7, with the addition of those articles.—Oldmixon speaking of the transaction says, "It is a melancholy reflection that in the former reign and this the crown never wanted a bench of bishops and a bench of judges to promote the designs which were formed against the reformed religion and the liberties of England."

examined thereupon, informed this committee, that the author of the said book, Henry Care, had been informed against for the same, and had pleaded to the information, but before it was tried, a rule was made upon a motion, as he supposeth, against the said book; all the judges of that court (as he remembers) being present, and none dissenting. The copy of which rule he gave in to the committee, and is as followeth:

'Dies Mercurii proxima post tres septimanas
'sanctae Trinitatis, Anno 32 Car. II. Regis.
'Ordinatum est quod Liber intitulat. The Week-
'ly Packet of Advice from Rome; or, The
'History of Popery, non ulterius imprimatur
'vel publicetur per aliquam Personam quam-
'cunque. Per Cur.'

And this committee admiring that protestant judges should take offence against a book, whose chief design was to expose the cheats and foppery of popery, enquired further into it and found by the evidence of Jane Curtis, that the said book had been licensed for several months, that her husband paid for the copy, and entered it in the hall-book of the company. But for all this, she could not prevail by these reasons, with the Lord Chief Justice Scroggs, to permit it any longer; who said, it was a scandalous libel, and against the king's proclamation, and he would ruin her if ever she printed it any more. And soon after she was served with the said rule, as the author, and other printers were; and by the author's evidence it appears, that he was taken and brought before the said Chief Justice by his warrant above a year since, and upon his owning he writ part of that book, the Chief Justice called him rogue and other ill names; saying, he would fill all the gaols in England with such rogues, and pile them up as men do faggots; and so committed him to prison, refusing sufficient bail, and saying he would gaol him, to put him to charges; and his lordship observed his word punctually therein, forcing him to his Habeas Corpus, and then taking the same bail he refused before. Upon which, this committee came to this Resolution:

"Resolved, That it is the opinion of the
"committee, that the rule made by the court
"of King's-bench in Trinity term last, against
"printing a book, called The Weekly Packet
"of Advice from Rome, is illegal and arbi-
"trary."

And the Committee proceeded further, and upon information that a very great latitude had been taken of late by the judges, in imposing fines on the persons found guilty before them, caused a transcript of all the fines imposed by the King's-bench since Easter term, in the 28th of his majesty's reign, to be brought before them, from the said court, by Samuel Astry, gent. By the perusal of which, it appeared to this committee, that the quality of the offence, and the ability of the person found guilty, have not been the measures that have determined the quantity of many of these fines; which being so very numerous, the committee refer themselves to those records as to the general, instancing some particulars as follows:

Trinit. 29 Car. 2. Upon J. Brown, of London gent. on an information for publishing a printed book, called The Long Parliament Dissolved; in which is set forth these words: 'Nor 'let any man think it strange, that we account 'it treason for you to sit and act contrary to 'our laws; for if in the first parliament of 'Richard 2, Grimes and Weston, for lack of 'courage only were adjudged guilty of high 'treason for surrendering the places committed 'to their trust; how much more you, if you 'turn renegadoes to the people that entrusted 'you, and as much as in you lie surrender 'not a little puny castle or two, but all the 'legal defence the people of England have for 'their lives, liberties, and properties at once! 'Neither let the vain persuasion delude you, 'that no precedent can be found, that one 'English parliament hath hanged up another; 'though peradventure even that may be proved a mistake; for an unprecedented crime 'calls for an unprecedented punishment; and 'if you shall be so wicked to do the one, or 'rather endeavour to do, (for now you are no 'longer a parliament) what ground of confidence you can have that none will be found so 'worthy to do the other, we cannot understand: and do faithfully promise if your unworthiness provoke us to it, that we will use 'our honest and utmost endeavours (whenever 'a new parliament shall be called) to chuse 'such as may convince you of your mistake: 'The old and infallible observation, That Parliaments are the Pulse of the People, shall 'lose its esteem; or you will find, that this 'your presumption was over-fond; however, 'it argues but a bad mind to sin, because it is 'believed it shall not be punished.' The judgment was,' that he be fined 1,000 marks, be bound to the good behaviour for seven years, and his name struck out of the roll of the attorneys, without any offence alledged in his said vocation. And the publishing the libel consisted only in superscribing a pacquet, with this inclosed, to the East Indies. Which fine he not being able to pay, (living only upon his practice) he lay in prison for three years, till his majesty graciously pardoned him, and recommended him to be restored to his place again of attorney, by his warrant dated the 15th of December, 1679. Notwithstanding which he has not yet obtained the said restoration from the court of King's-bench.

Hil. 29 and 30 Car. 2. Upon John Harrington of London, gent. for speaking these words laid in Latin thus: 'Quod nostra gu- 'bernatio de tribus statibus consistebat, et si 'rebellio evenirit in regno, et non accideret 'contra omnes tres status non est rebellio.' A fine of 1,000*l.* Sureties for the good behaviour for seven years, and to recant the words in open court; which fine he was in no capacity of ever paying.

Hil. 31 and 32 Car. 2. Upon Benjamin

Harris of London, stationer, on an Information for printing a book, called 'An Appeal 'from the Country to the City,' setting forth these words: 'We in the country have done 'our parts, in chusing for the generality good 'members to serve in parliament: but if (as 'our two last parliaments were) they must be 'dissolved or prorogued whenever they come 'to redress the grievances of the subject, we 'may be pitied, not blamed, if the Plot takes 'effect; and in all probability it will. Our 'parliaments are not then to be condemned, for 'that their not being suffered to sit, occasioned 'it.'* Judgment to pay 500*l.* fine, stand on the pillory an hour, and give sureties for the good behaviour for three years. And the said Benjamin Harris informed this committee, That the lord chief-justice Scroggs pressed the court then to add to this judgment, his being publicly whipt; but Mr. Justice Pemberton holding up his hands in admiration at their severity therein, Mr. Justice Jones pronounced the judgment aforesaid; and he remains yet in prison, unable to pay the said fine.

Notwithstanding which severity in the cases fore-mentioned, this committee has observed the said Court has not wanted in any other cases an extraordinary compassion and mercy, though there appeared no public reason judicially in the trial; as in particular:

Hil. 31 and 32 Car. 2. Upon Thomas Knox, principal, on an indictment of subornation and conspiracy against the testimony and life of Dr. Oates, for sodomy; and also against the testimony of William Bedloe; a fine of 200 marks, a year's imprisonment, and to find sureties for the good behaviour for three years.

Eod. Ter. Upon John Lane, for the same offence, a fine of 100 marks, to stand in the pillory for an hour, and to be imprisoned for one year.

Pas. 32 Car. 2. Upon John Tasborough, gent. on an Indictment for subornation of Stephen Dugdale, tending to overthrow the whole discovery of the Plot: the said Tasborough being affirmed to be a person of good quality, a fine of 100*l.*

Eod. Ter. Upon Ann Price, for the same offence, 200*l.*

Trin. 32 Car. 2. Upon Nathaniel Thompson and William Badcock, on an information for printing and publishing a weekly libel, called "The True Domestic Intelligence, or, News both from City and Country," and known to be popishly affected, a fine of 3*l.* 6*s.* 8*d.* on each of them.

Eod. Ter. Upon Matthew Turner, stationer, on an information for vending and publishing a book, called "The Compendium;" wherein the justice of the nation in the late trials of the popish conspirators, even by some of these judges themselves, is highly arraigned; and all the witnesses for the king horribly aspersed: and this being the common notorious popish bookseller of the town, judgment to pay a fine of 100 marks, and is said to be out of prison already.

Trin. 32 Car. 2. Upon ---- Loveland, on an indictment for a notorious conspiracy and subornation against the life and honour of the duke of Buckingham, for sodomy, a fine of 5*l.* and to stand an hour in the pillory.

Mich. 32 Car. 2. Upon Edward Christian, esq. for the same offence, a fine of 100 marks, and to stand an hour in the pillory. And upon Arthur Obrian, for the same offence, a fine of 20 marks, and to stand an hour in the pillory.

Upon consideration whereof, this Committee came to this Resolution:

"Resolved, That it is the opinion of this "Committee, that the Court of King's-bench "(in the Imposition of Fines on Offenders of "late years) hath acted arbitrarily, illegally, "and partially, favouring papists, and persons "popishly affected, and excessively oppressing "his majesty's Protestant subjects."

And this Committee being informed, That several of his majesty's subjects had been committed for crimes bailable by law, although they then tendered sufficient sureties, which were refused, only to put them to vexation and charge, proceeded to enquire into the same, and found that not only the fore-mentioned Henry Carr had been so refused the common right of a subject, as is above said; but that George Broome, being a constable last year in London, and committing some of the lord chief justice Scroggs's servants, for great disorders, according to his duty, he was in a few days arrested by a tipstaff, without any London constable, and carried before the lord chief justice, by his warrant, to answer for the said committing of those persons aforesaid; but being there, was accused of having spoken irreverently of the said chief-justice, and an affidavit read to him to that purpose; and was falsely (as the said George Broome affirms) sworn against, by two persons that use to be common bail in that court, and of very ill reputation. Upon which he was committed to the King's-bench, though he then tendered two able citizens and common-council-men of London to be his bail: and he was forced to bring his Habeas Corpus, to his great charge, before he came out; when the marshal, Mr. Cooling, exacted 5*l.* of him, of which he complained to the chief-justice; but had no other answer, but he might ask his remedy at law. But the said marshal fearing he should be questioned, restored him two guineas of it.

And further, this committee was informed by Francis Smith, bookseller, that about Michaelmas was twelve-month he was brought before the said chief-justice, by his warrant, and charged by the messenger, Robert Stephens, That he had seen some parcels of a pamphlet, called 'Observations on sir George Wakeman's 'Trial,' in his shop: upon which the chief-justice told him, he would make him an example, use him like a boor in France, and pile him and all the booksellers and printers up in prison like faggots: and so committed him to

* See vol. 7, p. 926, of this Collection.

the King's-bench, swearing and cursing at him in great fury And when he tendered three sufficient citizens of London for his bail, alledging, imprisonment in his circumstances would be his utter ruin; the chief-justice replied, the citizens looked like sufficient persons, but he would take no bail: and so he was forced to come out by a Habeas Corpus, and was afterwards informed against for the same matter, to his great charge and vexation. And a while after Francis (the son of the said Francis Smith) was committed by the said Chief-justice, and bail refused, for selling a pamphlet, called "A New-Year's Gift for the said Chief-justice," to a coffee house; and he declared to them he would take no bail, for he would ruin them all.

And further it appeared to this committee, that the said chief-justice (about October was twelve-month) committed in like manner Jane Curtis, she having a husband and children, for selling a book, called "A Satire against Injustice;" which his lordship called a libel against him: and her friends tendering sufficient bail, and desiring him to have mercy upon her poverty and condition, he swore by the name of God she should go to prison, and he would shew her no more mercy, than they could expect from a wolf that came to devour them; and she might bring her Habeas Corpus, and come out so; which she was forced to do; and after informed against and prosecuted, to her utter ruin, four or five terms after.

In like manner it appeared to this committee, that about that time also, Edward Berry, stationer, of Gray's-Inn, was committed by the said chief-justice, being accused of selling "The Observations on sir George Wakeman's Trial:" and though he tendered 1,000*l.* bail, yet the chief justice said, He would take no bail, he should go to prison, and come out according to law. And after he, with much trouble and charge, got out by a Habeas Corpus, he was forced by himself, or his attorney, to attend five terms before he could be discharged, though no information was exhibited against him in all that time. In consideration whereof, and of others of the like nature (too tedious here to relate), this committee came to this resolution:

"Resolved, That it is the opinion of this "committee, that the refusing sufficient bail in "these cases, wherein the persons committed "were bailable by law, was illegal, and a high "breach of the liberty of the subject."

And this Committee being informed of an extraordinary kind of a charge given at the last assizes at Kingston, in the county of Surry, by Mr. Baron Weston, and proceeding to examine several persons then and there present, it was made appear to this Committee, by the testimony of John Cole, Richard Mayo, and John Pierce, gentlemen, and others, some of whom put down the said baron's words in writing, immediately, that part of the said charge was to this effect: he inveighed very much against Farel, Luther, Calvin, and Zuinglius, condemning them as authors of the Reformation, which was against their princes minds: and then adding to this purpose; 'Zuinglius 'set up his fanaticism, and Calvin built on that 'blessed foundation; and, to speak truth, all 'his disciples are seasoned with such a sharpness of spirit, that it much concerns magistrates to keep a strait hand over them; and 'now they are restless, amusing us with fears, 'and nothing will serve them but a parliament. 'For my part, I know no representative of the 'nation but the king; all power centers in him: 'It is true, he does intrust it with his ministers, 'but he is the sole representative; and i'faith, 'he has wisdom enough to intrust it no more 'in these men, who have given us such late 'examples of their wisdom and faithfulness.' And this Committee taking the said matter into their consideration, came to this Resolution:

"Resolved, &c. That the said expressions in "the charge given by the said baron Weston, "were a scandal to the Reformation, in derogation of the rights and privileges of parliaments and tending to raise discord between "his majesty and his subjects."

And this Committee being informed by several printers and booksellers, of great trouble and vexation given them unjustly, by one Robert Stephens, called a messenger of the press; the said Stephens being examined by this Committee, by what authority he had proceeded in that manner, produced two warrants under the hand and seal of the Chief Justice Scroggs, which were *in hæc verba*:

'*Angl. ss.* Whereas there are divers ill-disposed persons, who do daily print and publish 'many seditious and treasonable books and 'pamphlets, endeavouring thereby to dispose 'the minds of his majesty's subjects to sedition 'and rebellion: and also infamous libels, reflecting upon particular persons, to the great 'scandal of his majesty's government. For 'suppressing whereof, his majesty hath lately 'issued out his royal proclamation: and for the 'more speedy suppressing the said seditious 'books, libels, and pamphlets, and to the end 'that the authors and publishers thereof may 'be brought to their punishment:—These are 'to will and require you, and in his majesty's 'name to charge and command you, and every 'of you, upon sight hereof, to be aiding and 'assisting to Robert Stephens, messenger of 'the press, in the seizing on all such books and 'pamphlets as aforesaid, as he shall be informed of, in any bookseller's or printer's shops or 'warehouses, or elsewhere, whatsoever; to the 'end they may be disposed as to law shall appertain. Also if you shall be informed of the 'authors, printers, or publishers of such books 'or pamphlets as are above-mentioned, you 'are to apprehend them, and have them before 'one of his majesty's justices of the peace, to 'be proceeded against according to law. Dated 'Nov. 29, 1679. 'W. SCROGGS.'

'To R. Stephens, messenger of the press,
'and to all mayors, sheriffs, bailiffs, constables, and all other officers and ministers whom these may concern.'

'*Angl. ss.* Whereas the king's majesty hath 'lately issued out his Proclamation for suppressing the printing and publishing unlicensed news-books, and pamphlets of news: 'notwithstanding which, there are divers persons who do daily print and publish such unlicensed books and pamphlets:

"These are therefore to will and require you, 'and in his majesty's name to charge and command you, and every of you, from time to 'time, and at all times, so often as you shall be 'thereunto required, to be aiding and assisting 'to Robert Stephens, messenger of the press, 'in the seizing of all such books and pamphlets as aforesaid, as he shall be informed of, 'in any bookseller's shop, or printer's shop, or 'warehouses, or elsewhere whatsoever, to the 'end they may be disposed of as to law shall 'appertain. Likewise, if you shall be informed 'of the authors, printers or publishers of such 'books or pamphlets, you are to apprehend 'them, and have them before me, or one of his 'majesty's justices of the peace, to be proceeded against as to law shall appertain. Dated 'this 28th day of May, A. D. 1680.'

'W. SCROGGS.'

'To all mayors, sheriffs, bailiffs, constables, and all other officers and ministers whom these may concern.

'To Robert Stephens, messenger of 'the press.'

Upon view whereof this Committee came to this Resolution:

"Resolved, That it is the opinion of this "Committee, that the said warrants are arbitrary and illegal."

And this Committee being informed of certain scandalous discourses, said to be uttered in public places by the lord chief justice Scroggs, proceeded to examine sir Robert Atkins, late one of the justices of the Common Pleas, concerning the same; by whom it appears, That at a sessions dinner at the Old Bailey, in the mayoralty of sir Robert Clayton, who was then present; the said chief justice took occasion to speak very much against petitioning, condemning it as resembling 41, as factious and tending to rebellion, or to that effect; to which the said sir Robert Atkins made no reply, suspecting he waited for some advantage over him. But the chief justice continuing and pressing him with the said discourse, he began to justify petitioning as the right of the people; especially for the sitting of a parliament, which the law requires, if it be done with modesty and respect. Upon which the chief justice fell into a great passion; and there is some reason to believe, that soon after he made an ill representation of what the said sir Robert had then spoke, unto his majesty. And this Committee was further informed, that the said sir Robert Atkins being in circuit with the said chief justice, at summer assizes was twelvemonth, at Monmouth, (Mr. Arnold, Mr. Price, and Mr. Bedloe being then in company) the chief justice fell severely, in public, upon Mr. Bedloe; taking off the credit of his evidence, and alledging he had over-shot himself in it, or to that effect, very much to the disparagement of his testimony. And the said sir Robert defending Mr. Bedloe's evidence and credit, he grew extreme angry and loud: saying to this effect, 'That he verily believed Langhorn died 'innocently.' To which the said sir Robert replied, He wondered how he could think so, who had condemned him himself, and had not moved the king for a reprieve for him. All which matters of discourse, this Committee humbly submit to the wisdom and consideration of this House, without taking upon them to give any opinion therein.

And this Committee proceeded further to enquire into some passages that happened at Lent assizes last for the county of Somerset, at the trial of Thomas Dare, gent. there, upon an Indictment for saying falsly and seditiously, 'That 'the subjects had but two means to redress 'their grievances, one by petitioning, the other 'by rebellion:' and found, that though by his other discourse, when he said so, that it appeared plainly he had no rebellious intent in that he said, 'Then God forbid there should be 'a rebellion, he would be the first man to draw 'the sword against a rebel;' yet he was prosecuted with great violence: and having pleaded, Not Guilty, he moved Mr. Justice Jones, (who then sat Judge there) that he might try it at the next assizes; for that Mr. Searle (who was by at the speaking of the words, and a material witness for his defence) was not then to be had, and an affidavit to that purpose was made and received; but the said Justice Jones told him, that was a favour of the court only, and he had not deserved any favour, and so forced him to try it presently. But the jury, appearing to be an extraordinary one, provided on purpose, being all of persons that had highly opposed petitioning for the sitting of this parliament, he was advised to withdraw his plea; and the said Justice Jones encouraging him so to do, he confest the words, denying any evil intention, and gave the said Justice an account in writing, of the truth of the whole matter, and made a submission in court, as he was directed by the said Justice, who promised to recommend him to his majesty; but imposed a fine of 500*l.* on him, and to be bound to good behaviour for three years: declaring also, that he was turned out from being a common-counsellor of the corporation of Taunton, in the said county, on pretence of a clause in their charter, giving such a power to a judge of assize. And the said Thomas Dare remains yet in prison for the said fine; in which matter of the trial aforesaid, this committee desireth to refer itself to the judgment of this House.

The RESOLUTIONS *of the House of Commons upon the said Report.*

"1. That it is the opinion of this House, that the discharging of the Grand Jury of the hundred of Ossulston, in the county of Middlesex, by the court of King's Bench, in Trinity term

last, before the last day of the term, and the they had not had their presentments, was arbitrary, illegal, destructive to public justice, a manifest violation of the oaths of the judges of that court, and a means to subvert the fundamental laws of this kingdom and to introduce popery.

2. "That it is the opinion of this House, that the rule made by the court of King's Bench, in Trinity term last, against printing of a book, called, the Weekly Packet of Advice from Rome, is illegal and arbitrary, thereby usurping to themselves legislative power, to the great discouragement of the Protestants and for the countenancing of popery.

3. "That it is the opinion of this House, that the court of King's Bench in the imposition of fines on offenders of late years, have acted arbitrarily, illegally and partially, favouring papists, and persons popishly affected, and excessively oppressing his majesty's Protestant subjects.

4.* "That it is the opinion of this House, that the refusing sufficient bail in these cases wherein the persons committed were bailable by law, was illegal, and a high breach of the liberties of the subject.

5. "That it is the opinion of this House, that the said expressions in the charge given by the said baron Weston were a scandal to the reformation, and tending to raise discord between his majesty and his subjects, and to the subversion of the ancient constitution of parliaments, and of the government of this kingdom."

6. "That it is the opinion of this House that the said warrants are arbitrary and illegal."

The Resolutions of the Commons, for the Impeachment of the said Judges.

Resolved, "That sir William Scroggs, knight, Chief Justice of the court of King's Bench, be impeached upon the said Report and the Resolutions of the House thereupon.

2. "That sir Thomas Jones, one of the justices of the court of King's Bench, be impeached upon the said Report, and Resolutions of the House thereupon."

* See North's account of sir Thomas Jones in the Note at the beginning of this Case. In 1683 he was appointed Chief Justice of the King's Bench. Some insight into his real character may be obtained from perusal of the trials of Fernley, Ring, Gaunt, and Cornish, A. D. 1685, *infra*. In the following year, however, king James displaced him. Roger Coke relates the circumstances of his removal thus:

"The king to make a thorough reformation will make the judges in Westminster Hall to murder the Common Law, as well as the king and his brother designed to murder the parliament by itself, and to this end, the king, before he would make any judges, would make a bargain with them, that they should declare the king's power of dispensing with the penal laws and tests made against recusants, out of parliament.

"However, herein the king stumbled at the threshold; for it is said he began with sir Thomas Jones, who had merited so much in Mr. Cornish's trial, and in the West; yet sir Thomas boggled at this, and told the king, He could not do it: to which the king answered, he would have twelve judges of his opinion; and sir Thomas replied, he might have twelve judges of his opinion, but would scarce find twelve lawyers. The truth of this I have only from fame; but I am sure the king's practice in reforming the judges, whereof all (except my Lord Chief Baron Atkins, and Justice Powel) were such a pack as never before sat in Westminster Hall, gave credit to it.

But if the Lord Chief Justice Thorp, for taking a bribe of 100*l.* was adjudged to be hanged, and all his land and goods forfeited, in the reign of Edward the 3d, because thereby as much as in him lay he had broken the king's oath made unto the people, which the king had intrusted him withal; and if Justice Tresilian was hanged, drawn and quartered, for giving his judgment that the king might act contrary to one act of parliament; and if Blake, the king's counsel, and Usk the under-sheriff of Middlesex, and five more of quality were hanged in the reign of Henry the 4th, for but assisting in Tresilian's judgment: what then did these judges deserve, which made bargains with the king before hand to break the king's oath he had made to the people, and to entitle the king to a power to abrogate the laws, to give judgment before hand to act contrary to them? Andrew Horn in his Mirror of Justice, tells us, that king Alfred (the mirror of kings) hanged Darling, Segnor, Cadwine, Cone, and 40 judges more, because they judged in particular causes contrary to law: but sure this was not more to Alfred's honour than it was to the dishonour of king James to make bargains before hand with judges to give judgment contrary to the laws themselves: and unless they would break the king's oath to his people, they should not be his judges."

The following is the account given by the candid, upright sir John Reresby:

"This day, April 29, 1686, being the first of the Term, a great change was made among the judges in Westminster-hall: there was a new Chief justice of the Common Pleas, and another new judge of the same bench; there was a new Chief baron, in fine, four new judges of the several courts. This made a considerable noise, as the gentlemen now displaced were of great learning and loyalty, and whose only crime had been, they would not give their opinions, as several of their brethren had done, that the king by his prerogative might dispense with the test required of Roman Catholics. The next day I was informed by Mr. Jones, son to the chief justice of that name, lately turned out, that his father, upon his dismission, observed to the king, that he was by no means sorry he was laid aside, old

3. "That sir Richard Weston,* one of the barons of the court of Exchequer, be impeached upon the said Report, and Resolutions of the House thereupon.

Ordered, "That the Committee appointed to prepare an impeachment against sir Francis North, Chief Justice of the court of Common-Pleas, do prepare Impeachments against the said sir William Scroggs, sir Thomas Jones, and sir Richard Weston, upon the said Report and Resolutions."

Ordered, "That the said Report, and several Resolutions of this House thereupon, be printed; and that Mr. Speaker take care in the printing thereof apart from this day's other Votes."

Sir Richard Corbett reports from the Committee appointed to prepare an Impeachment against sir William Scroggs, knt. Chief Justice of the court of King's-Bench, upon the former Report of the said Committee, and the Resolutions of the House thereupon, That the Committee, having taken the matters to them referred into consideration, had agreed upon several Articles of Impeachment against the said sir William Scroggs: which he read in his place; and afterwards delivered them in at the clerk's table: where the same being read, are as follows:

ARTICLES OF IMPEACHMENT against Sir WM. SCROGGS, knt. Chief Justice of the court of King's-Bench, by the Commons, in this present Parliament assembled, in their own name, and in the name of all the Commons of England, of High-Treason, and other great Crimes and Misdemeanors.†

I. That he the said William Scroggs, then being Chief-Justice of the court of King's-Bench, hath traiterously and wickedly endeavoured to subvert the fundamental laws, and the established religion and government of this kingdom of England; and instead thereof, to introduce popery, and arbitrary and tyrannical government against law; which he has declared by divers traiterous and wicked words, opinions, judgments, practices, and actions.

II. That he the said sir William Scroggs, in Trinity Term last, being then Chief-Justice of the said court; and having taken an oath duly to administer justice according to the laws and statutes of this realm; in pursuance of his said traiterous purposes, did, together with the rest of the justices of the same court, several days before the end of the said term, in an arbitrary manner, discharge the Grand-Jury, which then served for the hundred of Oswaldston, in the county of Middlesex, before they had made their presentments, or had found several bills of indictment, which were then before them: whereof the said sir William Scroggs was then fully informed; and that the same would be tendered to the court upon the last day of the said term; which day then was, and by the known course of the said court, hath always heretofore been given unto the said jury for the delivering in of their bills and presentments: by which sudden and illegal discharge of the said jury, the course of justice was stopped maliciously and designedly; the presentments of many Papists, and other offenders, were obstructed; and, in particular, a bill of indictment against James duke of York, for absenting himself from church, which was then before them, was prevented from being proceeded upon.

III. That, whereas one Henry Carr had, for some time before, published every week a certain book, intitled, "The Weekly Pacquet of Advice from Rome, or, the History of Popery;" wherein the superstitions and cheats of the church of Rome, were from time to time exposed; he the said sir William Scroggs, then Chief Justice of the court of King's Bench, together with the other judges of the said court, before any legal conviction of the said Carr of any crime, did in the same Trinity Term, in a most illegal and arbitrary manner, make, and cause to be entered, a certain rule of that court against the printing of the said book, *in hæc verba*;

'Die Mercurii proxima post tres Septimanas Sanctæ Trinitatis, Anno 32 Car. II. Regis. 'Ordinatum est quod Liber intitulat' 'The ' Weekly Pacquet of Advice from Rome, or, ' the History of Popery,' non ulterius imprimatur vel publicetur per aliquam personam 'quamcunque. *Per Cur'*'*

And did cause the said Carr, and divers printers and other persons to be served with the same; which said rule and other proceedings were most apparently contrary to all justice, in condemning not only what had been written without hearing the parties, but also all that might for the future be written on that subject; a manifest countenancing of popery and

and worn out as he was in his service, but concerned, that his majesty should expect such a construction of the law from him, as he could not honestly give; and that none but indigent, ignorant, or ambitious men would give their judgment as he expected; and that to this his majesty made answer, It was necessary his judges should be all of one mind."

See, also, 1 Burnet's Own Times, 669; 1 Oldmixon, 708; Echard, 1077; 3 Kennett, 451, 1st ed.; 2 Rapin, 754, 755, ed. of 1743; 1 Ralph, 920.

* See Roger North's character of him, *ante*, p. 166. Baron Weston seems to have been a man of much boldness; for, notwithstanding these proceedings against him, he afterwards braved the power of the House by liberating, upon an Habeas Corpus, Sheridan, who was in custody under a commitment of the House.

† As to the right of the Lords to try a Commoner upon an Impeachment of High Treason, see a Note to the Case of Fitzharris, A. D. 1681, in this Collection.

* See the Case, vol. 7, p. 1111, of this Collection.

discouragement of protestants, an open invasion upon the right of the subject, and an encroaching and assuming to themselves a legislative power and authority.

IV. That he the said sir William Scroggs, since he was made Chief Justice of the King's Bench, hath, together with the other judges of the said court, most notoriously departed from all rules of justice and equality, in the imposition of fines upon persons convicted of misdemeanors in the said court; and particularly in the Term of Easter last past, did openly declare in the said court, in the case of one Jessop, who was convicted of publishing false news, and was then to be fined, That he would have regard to persons and their principles in imposing of fines, and would set a fine of 500*l.* on one person for the same offence, for the which he would not fine another 100*l.* And according to his said unjust and arbitrary declaration, he the said sir William Scroggs, together with the said other justices, did then impose a fine of 100*l.* upon the said Jessop; although the said Jessop had before that time proved one Hewit to be convicted as author of the said false news; and afterwards, in the same Term, did fine the said Hewit upon his said conviction, only five marks: Nor hath the said sir Willliam Scroggs, together with the other judges of the said court, had any regard to the nature of the offences, or the ability of the persons, in the imposing of fines; but have been manifestly partial and favourable to papists, and persons affected to, and promoting the popish interest, in this time of imminent danger from them: And at the same time have most severely and grievously oppressed his majesty's protestant subjects, as will appear upon view of the several records of fines set in the said court. By which arbitrary, unjust, and partial proceedings, many of his majesty's liege-people have been ruined, and popery countenanced under colour of justice; and all the mischiefs and excesses of the court of Star-Chamber, by act of parliament suppressed, have been again, in direct opposition of the said law, introduced.

V. That he the said sir William Scroggs, for the further accomplishing of his said traitorous and wicked purposes, and designing to subject the persons, as well as the estates of his majesty's liege people, to his lawless will and pleasure, hath frequently refused to accept of bail, though the same were sufficient, and legally tendered to him by many persons accused before him only of such crimes for which by law bail ought to have been taken, and divers of the said persons being only accused of offences against himself; declaring at the same time, that he refused bail, and committed them to gaol only to put them to charges; and using such furious threats as were to the terror of his majesty's subjects, and such scandalous expressions as were a dishonour to the government, and to the dignity of his office. And, particularly, that he the said sir William Scroggs did, in the year 1679, commit and detain in prison, in such unlawful manner, among others, Henry Carr, George Broome, Edward Berry, Benjamin Harris, Francis Smith, sen. Francis Smith, jun. and Jane Curtis, citizens of London: Which proceedings of the said sir William Scroggs, are a high breach of the liberty of the subject, destructive to the fundamental laws of this realm, contrary to the Petition of Right, and other statutes, and do manifestly tend to the introducing of arbitrary power.

VI. That he the said sir William Scroggs, in further oppression of his majesty's liege people, hath, since his being made Chief Justice of the said court of King's-bench, in an arbitrary manner, granted divers general warrants* for attaching the persons and seizing the goods of his majesty's subjects, not named or described particularly in the said warrants: By means whereof, many of his majesty's subjects have been vexed, their houses entered into, and they themselves grievously oppressed, contrary to law.

VII. Whereas there hath been a horrid and damnable plot contrived and carried on by the papists, for the murdering the king, the subversion of the laws and government of this kingdom, and for the destruction of the protestant religion in the same; all which the said sir William Scroggs well knew, having himself not only tried, but given judgment against several of the offenders: Nevertheless, the said sir William Scroggs did, at divers times and places, as well sitting in court, as otherwise, openly defame and scandalize several of the witnesses, who had proved the said treasons against divers of the conspirators, and had given evidence against divers other persons, who were then untried, and did endeavour to disparage their evidence, and take off their credit; whereby, as much as in him lay, he did traitorously and wickedly suppress and stifle the discovery of the said Popish Plot, and encourage the conspirators to proceed in the same, to the great and apparent danger of his majesty's sacred life, and of the well established government, and religion of this realm of England.

VIII. Whereas the said sir William Scroggs, being advanced to be Chief Justice of the Court of King's Bench, ought, by a sober, grave and virtuous conversation, to have given a good example to the king's liege people, and to demean himself answerable to the dignity of so eminent a station; yet he the said sir William Scroggs, on the contrary, by his frequent and notorious excesses and debaucheries, and his profane and atheistical discourses, doth daily affront Almighty God, dishonour his majesty, give countenance and encouragement to all manner of vice and wickedness, and bring the highest scandal on the public justice of the kingdom.

* See this Case referred to by Mr. Dunning in his Argument in the Case of Leach *v.* Money, and others, A. D. 1765, in this Collection.

All which words, opinions and actions of the said sir William Scroggs, were by him spoken and done, traiterously, wickedly, falsly, and maliciously, to alienate the hearts of the king's subjects from his majesty, and to set a division between him and them; and to subvert the fundamental laws, and the established religion and government of this kingdom, and to introduce popery, and an arbitrary and tyrannical government, contrary to his own knowledge, and the known laws of the realm of England. And thereby he the said sir William Scroggs hath not only broken his own oath, but also, as far as in him lay, hath broken the king's oath to his people; whereof he the said sir Willliam Scroggs, representing his majesty in so high an office of justice, had the custody; for which the said Commons do impeach him the said sir William Scroggs, of the High-Treason against our sovereign lord the king, and his crown and dignity, and other the high crimes and misdemeanors aforesaid.

And the said Commons, by protestation saving to themselves the liberty of exhibiting at any time hereafter, any other accusation or impeachment against the said sir William Scroggs and also of replying to the answer that he shall make thereunto, and of offering proofs of the premises or of any other impeachments or accusations that shall be by them exhibited against him, as the case shall (according to the course of parliament) require; do pray that the said sir William Scroggs, chief justice of the court of King's-bench, may be put to answer to all and every the premises, and may be committed to safe custody; and that such proceedings, examinations, trials and judgments may be upon him had and used, as is agreeable to law and justice, and the course of parliaments. *

Upon the above Articles the following Debate took place.

Sir *Francis Winnington*. It is said, by Maynard, That the first article is general. All I can say is, that it is a substantial article, "To subvert the fundamental laws of England, and to introduce popery and arbitrary government by words, actions, and opinions." That article was a great crime, when that learned serjeant was concerned in the impeachment of lord Strafford.

Sir *John Knight*. That article was then of great importance. In lord Clarendon's impeachment lord Strafford's case was cited; but there they proceeded by act of parliament, and within two or three days passed it, with a clause of not being hereafter drawn into example. I would have the statute 1 Mary read which declares "That nothing shall be construed treason but what is already so by 25 Edw. 3. No otherwise declared, but by act of parliament." I would not, in behalf of the subject, make new treasons.

Serjeant *Maynard*. What Knight says of 25 Edw. 3. is very true, but by a distinction it must go. The question moved is, "Whether any punishment of any offence can be by the name of treason in parliament?" No man can deny it. But enormous offences may be impeached by the name of treason, notwithstanding the statutes. There was a treason at common law before the statute of 25 Edw. 3, and the judges took upon them to determine treason. But, by that statute, the judgment of treason, in doubtful cases, is expressly reserved to parliament, amongst other things. "But because men cannot think what sort of men may be judges, they shall not proceed in a doubtful case, but shall acquaint the parliament, which is not to have an act made, but by judgment in parliament to declare it treason." What treason is, no man can define, nor describe. In that statute it is not; but treasons are enumerated;" "only those, and those cases; if any other cases come before them, they shall not proceed upon them, but shall acquaint the parliament. If an offence be committed, the parliament shall judge whether it deserves the punishment of treason," What if, as in our case, in interval of parliament, there should be a contrivance to destroy all the Lords and Commons; is that comparable to the treason of coining a shilling? After the statute 25 Edw. 3. many acts were made Treasons on particular occasions, as in Hen. 6. Hen. 8. Edw. 6, 1 Mary, "None shall be judged treason, but what is so by 25 Edw. 3. in reference to the courts below." If an act of parliament does not name the king, it does not bind him. And will any man think that the Lords will let their throats lie open to be cut, and not judge such a conspiracy to be treason? Whatever offence deserves the punishment of a traitor, the parliament may impeach, &c. and the Lords judge accordingly. Before the statute 25 Edw. 3. a lord did raise eight hundred men, &c. and it was judged but a riot. Where the offence is a public destruction to the nation, as all offences to the king, as coining, &c. it is treason; but in a riot, the intention and scope is on particular persons, and was not judged treason in the levying eight hundred men, &c. To destroy the inclosure of particular persons, is not treason; but to go in great numbers to destroy all inclosures in general, is treason; for it differs in the scope and intention of the party. In this case before you, here is a design and intention to destroy the nation, and our religion, and people combine to form companies and raise arms, and intend to destroy the Lords and Commons. Think you, that this cannot be judged treason? Now comes the statute, and says "If such an offence, as men cannot define, should happen, the judges are to acquaint the parliament with it." And an act of par-

'* I appoint John Wright, and Richard 'Chiswell, to print these Articles of impeachment, with the Resolution of the House of 'Commons relating to the same, upon Wednesday the 5th of Jan. 1680. Perused by me 'according to the order of the House of Commons; And that no other person presume to 'print them. WM. WILLIAMS, Speaker.'

liament does not bind the parliament unless the parliament be named. General words shall never take away the right of the nation, in the judgment of Lords and Commons. The words about Hen. 8. and the taking his wife again, &c. were as strange a thing as we can imagine. Since 25 Edw. 3. in Rich. 2.'s time, some that betrayed a castle in France, by judgment of parliament, without more ado, were beheaded; and that is a different judgment from the law in case of treason. What the act 25 Edw. 3. does reserve for parliament, shall not be judged in any inferior court. 1 Mary—Not to define but enumerate what the judges shall judge. In Rich. 2.'s time a judgment was declared in parliament against Tresilian. The statute does not define before-hand, but when an offence does fall, then to judge it. Sometimes the parliament have judged hanging and drawing, and not quartering nor embowelling, and sometimes beheading only. In treason, the forfeiture is to the king; in felony, to the lord of the manor. This case we now debate is no case enumerated in 25 Edw. 3. But take that power away of declaring treason in parliament, and you may have all your throats cut. (He spoke low, not well to be heard.)

Sir *John Otway*. No doubt nor question but an offence shall be treason, if King, Lords, and Commons declare it so, since that statute 25 Edw. 3. This article against Scroggs is very uncertain. Has he broken the fundamental laws of the nation? Wherein? It is a hard thing for a man to fall under the displeasure of the House of Commons. No subject is too big for them. It had been a great satisfaction for Scroggs to have acknowledged the offence here and explained himself; and it has been frequently done here by some Lords; as the duke of Buckingham, and lord Arlington, who explained their actions, &c. and upon satisfaction, the House has forborne to impeach. Mr. Thompson of Bristol was heard at the committee; so was sir John Davis of Ireland. Lord chief justice Keeling was heard in the House, upon complaints against him, and the matter went no farther. I would have Scroggs sent for, to know what answer he can make for himself. Let him have the same justice others have had.

Sir *Thomas Lee*. I am one of those who think that by that statute the parliament is not so bound up, that, when such enormous offences are committed, by judgment of parliament they may be made treason, and no doubt of it for the safety of the government. But now as to this particular person, in what degree will the Commons make their complaint to expect judgment from the Lords? As the Articles are framed, you must change your title; but whether it is prudence to dress your articles in these terms, is the question. It was an odd sort of practice of the judges in the case of sir Samuel Barnardiston, &c. to construe "maliciously, &c." but pepper and vinegar-sauce. They told the jury, "Find you but the fact, and we shall lay the crime in law." I often have taken this for a great mischief in the city juries, where great fines have been imposed. There can be no higher crimes than Scroggs is accused of; but as to the word "traiterous," that he did traiterously discharge the grand jury, &c. Still I take before me what the proof will be; for the Court will judge according to that, and not your title of the impeachment. It may be, the judges did this to aggrandize themselves. I would consider, whether to say "an universal subversion of the laws," to that one particular action of discharging the jury. If you expect no bigger judgment from the Lords than the misdemeanor, consider of it. The rest of the judges are equally guilty in this matter; it was the intention of all the four judges. Call it by a lower name of offence; you cannot have a higher judgment from the Lords than you complain of. If the parliament happen to rise before the matter be judged, the impeachment remains upon record, and may be proceeded in, the next parliament. I have stated the matter, in every part, plainly, not in favour of Scroggs; that, if any thing should fall out, you may not be unprepared. Another thing may fall out; if the charge be treason the bishops are not to be judges of it, and so you may have the better effect of it. In the body of the articles is the very evidence, and it may be of great inconvenience to show the Lords the nature of the crimes from the evidence itself. If the Lords happen to say, This is but a single act; they may make a question whether to commit him for treason? And whether the Lords be free to make this a declaratory treason? Let us take care, not to put the Lords too often to renew their orders, as in lord Danby's case. If you intend to print this, I suppose you intend it not a censure by act of parliament. If the charge must be as you lay it, all acts, for the future, of the judges, will be the same in what may follow hereafter. I would be better informed by learned men, if this should fall out, to consider what difficulties you will be upon. In Lord Strafford's case, because such judgments should not for the future be given by the judges, therefore the Commons proceeded by bill of attainder, and not by judgment.

Sir *Francis Winnington*. To the first point, "Whether the declaratory power of treason be in the parliament?" Although doubted the other day by Jones, yet if you consider the arguments in lord Danby's case, the House was delivered of that difficulty. Taking that point for granted, if this article be true, now we are come to a mature debate, read the articles one by one. As to the fairness of the thing, when enormous crimes are committed, it is our duty to take care to question them.

Sir *Thomas Meres*. When I heard this article read, I did think it was an article by itself; and now I perceive that the other articles must explain this. But if the treasons be in the following articles, I would see them. It is not for the interest of the Commons to multiply treasons; but still to consider whether

this be treason at common law; for when we have declared it treason, the judges at Westminster-Hall must judge so. In the case of lord Clarendon's impeachment the Lords did object, "That our charge was general treason;" therefore I desire to express particular matter in this charge. Pray be wary in that point of too many declaratory treasons.

Mr. *Finch.* What I shall say in this case shall be in discharge of my duty to my country, and I should be sorry any man should think me an advocate for Scroggs, for I think him not fit for his place, nor ever was, and I think much less now. This crime he stands accused of, in its own nature, is not capital, yet when he committed it, he knew it to be a fault, but not capital; so that I would not have blood, for a crime *ex post facto.* This being said by way of preliminary, I shall say something to the declaratory power in the parliament. Suppose you had such a power, yet no crime can be declared treason, but by King, Lords, and Commons; you go on a little too fast, first to declare it before you impeach him. But what I shall chiefly insist upon is, the declaratory power in parliament itself. What is said by Maynard is a doctrine so mischievous, that this age, or the next, may rue it. When you have once declared the fact treason, the judges may judge that fact as treason for the future, unless it be with a 'Ne trahatur in exemplum.' Put the case of a forcible entry, a much greater crime than a robbery on the highway; for that puts a man in fright, and takes away his land as well as his money. Before the statute 25 Edw. 3. there were great factions in the kingdom, and there usually followed revenge; and as the parliament became more on one side than the other, they were made instruments of their rage; it may be, such times may come again; and then the judges must punish upon the like occasion. Men cannot suppose parliaments in being, nor good judges, and what a miserable case will it be, when upon such judgments no remedy can be had! By the statute 25 Edw. 3. in high-treason the forfeiture is to the king, as well of lands held of other Lords, as of the king. Another sort; in petty treasons the forfeiture of those crimes is to the lord of the fee. And because there may be many such like treasons, the proceedings shall be stopped, till the parliament declare whether the crime be treason or felony. The intent of that act was, that the mean Lords should not lose their rights and forfeiture, and should be given to the king, and proceedings should be stopped till the treason was declared. I would have a precedent showed me, when ever any offence was declared treason in parliament, that was not felony before; whether ever they did declare or enact a man out of his life? By bill you have mature deliberation; the Lords and the king consider of it; but here by a declaration of treason, you read it but once, and in a hasty proceeding declare a man a traitor, which is worse than enacting a man out of his life. I do think this man (Scroggs) is not fit for his place, and has done crimes fit for great punishing. Consider that all the ill precedents have been the result of mens prejudices in odious cases. When we suffer ourselves to be transported, we may proceed well in this case, but ill for ourselves and our posterity.

The Speaker read the Declaratory Clause in 25 Edw. 3.

Sir *Francis Winnington.* The gentleman who spoke last, calls me up. I did think that point of declaratory treason inherent in parliament. What I say shall not relate to the person of Scroggs, but I shall go upon the warrantable steps of our ancestors, in what they have done to lay the foundation of right. His argument (to my understanding) though the power of declaratory treason, &c. be agreed by the House, yet his argument does go directly against declaratory treason. To be better understood, I shall state the law how it stands upon that statute 25 Edw. 3. and the precedents. By the statute there is no necessity that the offence, before you declare it treason, should be felony before. 1 Hen. 4. chap. 20. 1 Edw. 6. chap. 3. 1 Mary, chap. 1. By reason of the disorders of the kingdom in the barons wars, the parliament did reduce all treasons to the statute 25 Edw. 3. I observe that, since that time, there should be no other treasons but what should be adjudged and agreed in parliament; by which I do plainly observe, that, to that time, there were other treasons than in that statute are enumerated; and that statute takes them not away, but forbids the judges to meddle with them in judgment. As this case is, by search of precedents, there was never, or very rarely, any judgment in parliament which the judges in Westminster-Hall or commissioners of Oyer and Terminer, could try below; all was upon declaratory treason. But says Finch, "By 25 Edw. 3. the parliament did not declare a treason, unless it was felony at common-law." But to deflower the queen, and several other instances, as the bringing six-pence false money into England, was declared treason by that statute, and was not felony before. In the case of Richard Weston, who delivered a castle at Berwick, and Commines at Arles, both were judged treason. Parliam. Roll. Numb. 5. I would know whether that was felony at common-law? It was only breach of trust against the government. The offence of Tresilian and Belknap was no felony before. But as Maynard said, "That what is committed to the destruction of the government deserves as much punishment as those treasons in the statute;" but to subvert the government, that is a parliament treason. But 11 Rich. 2. there was a distinction of treasons, which were not by that statute. For that question put to the judges (Tresilian and Belknap) belonged to the parliament, and not to them, to decide. And they are not made but declared treasons at common-law which were not felonies before. The main objection is agreed as to the declaratory power of treason in parliament. But it is urged by Finch,

"If you come and call this treason, the judges will call it treason; and will you give them that power?" But the declaratory power is to be argued for every special case; and if so, it is not an argument to support declaratory power in the judges, but to prevent it. In the case of Empson and Dudley, the judges could not proceed upon those indictments 1 Hen. 8. They came to parliament, and the history says, they were attainted in parliament; lord Herbert, in his history, says, "For adhering to the king's enemies." But the journal of the Lords happened to be inspected in king James's time, when the Lords intended to give a judgment, but they found it only misdemeanor—The attorney-general brought in the indictment of Empson and Dudley, and the Lords took notice of it, and called it "*Proditoriè*," though it was but a bare encroachment. In the forty articles against sir John Finch, and the articles against justice Berkeley, they were indicted of treason, in the general articles, as in this case; they refused a lawyer to plead before them in the case of Ship-money, and they refused a jury to enquire into the misdemeanor of the spiritual courts; and all the articles said, "*Proditoriè*:" For here is a thing we must consider: The Chancellor is keeper of the king's conscience, and the judges of the king's oath, to do equal justice, "secundum legem terræ," and when they impose arbitrary power, it is not as in the case of trespass or felony, but that is to subvert the government. The case of justice Thorpe, 23 Edw. 1. 'Sacramentum Domini Regis et 'suum maliciosè, falsò, et rebellitèr falsifica- 'cavit.' So we must judge things according to reason. This man was supposed to be learned and virtuous. He has the keeping of the king's oath, and he has betrayed it; Thorpe did so, and was hanged. I am not now to make a declamation against Scroggs, but for my country. In the Mirror of Justice, Fo. 135. three of a jury acquitted a man, and nine found him guilty; a judge put out three, and put in three who found it; and the man was hanged, and the judge was hanged for it. If not checked in the career, a man will tell us when we shall have justice, and when we shall have none; and he certainly deserves the censure of treason. "Great officers have much to lose, and it is an awe upon them," Finch said; but I am more afraid of an arbitrary judge, than of the Lords and five hundred Commons judgment. A man will be content to be hanged when the parliament says he is naught. (The House laughed.) He would be ashamed to live; he would have little comfort to live, especially in his own country where the parliament shall think him a traitor. In Husband's Collections of the Transactions of 1641, &c. the attorney-general exhibits articles of treason against the five members, for doing their duty in parliament, viz. "That they had endeavoured to alienate the affections of the people against the king." It is not said, "To alienate the affections of the king from the people, when they cannot have justice"—Those who were for ship-money, were for that to be treason, "To alienate the affections of the people, &c." "Subverting the fundamental laws" was as general an article then, as this is now. Now the question is, if any thing be unanswered—But it may be said, "But will you let the judges declare it treason in their judgments, when the parliament has declared it treason?" Certainly there is no danger at all in that.' In lord Strafford's case, by the 'Ne 'trahatur in exemplum,' people thought it was never to be done again—The judges may take the indictment in a doubtful treason, but must bring it to the parliament. All the mischief is a bill of attainder, and a 'Ne trahatur, &c.' If great offences as these escape without such judgment, how shall we come at other great men that shall offend, &c.? If this comes to the Lords, in their court, to judge, they will give a judgment suitable to the fact; our calling it treason will not make it so—An Englishman ought to be content with that judgment—But the question is, Whether the Lords will commit Scroggs upon this impeachment? I had rather such a man was tied up, than let loose. The commitment of lord Danby was by solemn entry in the Lords' Journal; and why should we suppose a difference with the Lords about his commitment? when a rule is settled in their journal, when the Lords shall, upon examining all due circumstances, find the charge not to be treason, we must be content. The judges, by thus discharging juries, take upon them a legislative authority, and power to muzzle men, and sew up their mouths against the laws; and shall not the parliament deal with them? The juries were discharged before they made their presentments. Shall they tell us we shall have no law? I would know, whether all the former offences men have been judged upon in parliament do come up to this? Having said this of the power in parliament of declaratory treason, the point is well settled, not to be shaken. Less crimes than these were formerly called treason. Let us not shrink nor be afraid in this; we have precedents on our sides. I have no prejudice against the gentleman, but pray let the articles pass.

Serjeant *Maynard*. What you have been told by a gentleman of 11 Rich. 2, is very particular, and very observable, "The Commons pray, that those who surrendered the castles, &c. may be put to answer to the articles thereupon." Richard Weston delivered the castle at Berwick to the king's enemies, when he had victual enough and munition to have held it out? He had judgment in parliament, to be hanged and drawn for delivering that castle, but embowelling was no part of the sentence. Commines, for delivering the castle at Arles; without leave of the king, he went away from keeping the castle: Ogle defended the place—He was judged to death because he left the castle. One was beheaded, the other was drawn and hanged, and yet the charge is not "*Proditoriè*," but by his default they left the castles, and were to answer it in parliament; and they

were punished as by award of the seignors and barons, and had judgment of treason; so that here is judgment of treason in one case of felony. In the other, 25 Edw. 3, we had much from the civil law of 'Crimen læsæ majestatis, 'et crimen perduellionis;' the one was an ordinary judgment, the other 'in campo martio,' to be judged by senate. So that when a particular case comes before the parliament, then it is fit to be judged. But in our time, when men come to destroy religion and the whole law!—I only speak this now, that we may not be deprived of this judgment upon a greater occasion.

Mr. *Finch.* I would know, whether the delivery of a castle was not felony before that judgment against Weston, &c.? It must have been tried by the lord constable, or lord marshal, or in parliament. I would know, whether the Lords can alter the judgment of high treason into another punishment? As for Rich. 2, I would not have precedents urged of that unquiet time. If the offence was treason before at common law, it is not necessary to be felony before. The Indictment of Empson and Dudley was not "Proditorie," but by an additional article in parliament it was, "For the adhering to the king's enemies," and that was treason. Lord Keeper Finch's crimes were not greater than lord Strafford's, and yet an act of parliament was made for that: I think it a hard case to enact a man out of his life. If every erroneous judgment given by a chancellor should make a capital offence, and every erroneous rule in the other courts of Westminster (that never was, nor ever ought to be high treason,) they sit there at the peril of their ignorance.

Mr. *Powle.* It is resolved, on all hands, that the declaratory power of treason remains in parliament; but it is objected, "That it was never declared treason but what was felony at common law." The word "felony" there imports no more than a great and enormous crime. In a judgment of maim, it is expressed *felonicè mayemavit.* A great and enormous crime is felony. But I shall speak to what Finch objected, "That it must be felony before it can be judged treason in parliament." The case of Thorpe's indictment was upon the statute 25 Edw. 3, I shall not much rely upon that, nor upon that precedent of Weston and Commines. I take it, to deliver up the king's castles or fortresses, whilst they are tenable, is aiding and adhering to the king's enemies. In that of 11 Rich. 2, four or five judges were impeached for signing an extrajudicial opinion against the parliament. No man could say that was felony. As for the objection against "the unquiet times of Rich. 2, and precedents not to be taken, &c." we must take precedents where we can have them, and I take them always to be unfortunate times when there is occasion of such precedents. I take all those precedents of 11 Rich. 2, to be legal precedents, and not to be excepted against. In 17 or 18 Rich. 2, sir Thomas Talbot conspired against the life of the king's two uncles, and that was not felony, and yet in that parliament it was adjudged treason, and not felony. Sir Thomas Hacksy, a priest, proffered to the Commons a restraint of the excess of the king's house; the king took it as derogatory, &c. judged—The case of the earl of Northumberland, 5 Hen. 4. He had given liveries, and had great retainers in the north; the parliament judged it only trespass, and not treason; it came to a dispute whether it was treason or felony, and it was judged trespass. The several judgments against Empson and Dudley, &c. The oppressive proceedings of the Court of Wards—and the word "Proditorie" is so: and the Lords did judge it. But if we may believe lord Herbert, in his History of Henry 8, the charge of Empson and Dudley was brought into parliament by bill against them, and it was rejected, as not being well formed, but when mended it never passed. The bill is extant of their restoration in blood, and it makes no mention of their being judged in parliament, but they were attainted by course of common-law, at Guild-hall in London, and at Northampton, Dudley. As to the business now before you, I never heard but that the subverting the fundamental laws was "Proditorie" in an impeachment. This is spoken of Scroggs as a small offence, and a single act, and therefore a hard case; but we are beholden to the shortness of his reign in the King's-Bench, for no more. The offence of Tresilian was but a single act, and ship-money but a single act, and riots, as Maynard said. But to destroy the whole government. The discharge of the grand jury, as if with intention to save all the Papists from conviction, is not this, for judges to make laws, as in the case of forbidding printing, &c.? And a general warrant to seize persons and goods by messengers, is not this a subversion of the government? I believe it was done with that intent. If Scroggs be not a good lawyer, he ought to be, and must answer for his fault of ignorance of the law, as well as the rest of his charge. You cannot in this go less than the word "traiterous;" else it is casting dirt upon former impeachments.

Mr. *Finch.* I am no advocate for Scroggs, much less for his crimes. I only said "We ought to be cautious how we construe treason in parliament." If every illegal act be treason, we are in an ill case. As for the case cited of earl of Northumberland, it was plain treason, and the Lords interposed for mercy to the King. As for Hacksy's case, it was repealed; and for Talbot's case, that was declared treason by the Lords alone, if you will allow that for a precedent.

Mr. *Paul Foley.* Sir, we are not going about to declare any thing treason, but to offer our articles, and leave it to the Lords; therefore most of these arguments would be more proper there: for we only impeach, they are to be the judges whether the matter be treason or no. It is true, we ought to be cautious what we do in it, because it is not proper that this House should impeach a man for treason, without having good grounds for it. But is not the order

about printing a kind of an act of state to serve instead of a law? Is not the use of grand-juries a very essential part of this government? And is not the dismissing of them, as this judge did, a way to render them useless? Are not his warrants to seize books and papers arbitrary? and doth not all tend to the subversion of the government? and what better grounds should we have for our proceedings? I think the articles are well drawn, and ought to be engrossed as they are.

Sir *Richard Temple*. Sir, I cannot admit that parliaments, by impeachments before the Lords can make any thing treason, but only such matters as were treason by common law, before the Statute of Edward the third. And I think we ought to be so cautious of our posterities, as not to press for such precedents, lest you put into the hands of the Lords a power, for which we may have cause to repent hereafter, but never get back again: for the Lords do not use to part with those powers they once get. There are precedents by which it appears, that the Lords have attempted to make declarative treasons alone, without any impeachment from the Commons. Have a care how you give them encouragement to proceed therein; better keep to the other way of making no declarative treasons but by bill.

The Articles were read, and question put:

Resolved, "That the said sir William Scroggs be impeached upon the said Articles; and that the said Articles be ingrossed, and carried up to the Lords by my lord Cavendish."

Ordered, "That the committee appointed to examine the proceedings of the judges in Westminster-hall, and to prepare impeachments against sir Francis North, Chief-Justice of the Common-Pleas; sir Thomas Jones, one of the justices of the court of King's-Bench: and sir Richard Weston, one of the barons of the court of Exchequer, do bring in such impeachments with all convenient speed."

House of Lords, *January* 7, 1681.

A message was brought from the House of Commons, by the lord Cavendish and others: who brought up Articles of Impeachment, against sir William Scroggs, kt. Chief-Justice of the court of King's Bench, for High-Treason and other high crimes and misdemeanors. Which said Articles were commanded to be read.

After these Articles were read, it was debated (the said sir William Scroggs being withdrawn) "Whether, upon this Impeachment from the House of Commons, he shall be committed or not?"

The question was propounded, "Whether sir William Scroggs shall be committed or not?" Then this previous question was put, "Whether this question shall be now put?" It was resolved in the negative.

"*Dissentiente*.

"1st, We that are of opinion, that he ought to be committed, are deprived of giving our votes, by putting only the question of bail, we being rather for bail than to let him go altogether free.

"2dly, We are of opinion, that this matter hath been twice adjusted betwixt both Houses, viz. in the case of the earl of Clarendon, and the case of the earl of Danby.

"Besides, we did think it very unsafe, and not agreeable to justice, that he should be at large and execute his place of Lord Chief Justice, whilst he lies under the charge of an Impeachment of high treason.

"Lastly, It may deter the witnesses, when they shall see him in such great power and place whom they are to accuse.

"Kent, Salisbury, Macclesfield, Huntington, Shaftsbury, F. Herbert, Monmouth, Essex, P. Wharton, Clare, Bedford, Manchester, Rockingham, Stamford, Cornwallis, Suffolk, Howard, Grey, Paget, Rivers, Crewe."

Ordered, That sir William Scroggs, Chief Justice of the King's Bench, do (in this House) enter into a recognizance to our sovereign lord the king, of 10,000*l*. with two sufficient sureties to be bound with him in 5,000*l*. a piece; upon condition, that he shall attend upon this court from time to time, till he be discharged of his Impeachment brought up from the House of Commons.

Then sir William Scroggs was brought to the bar; and after he had kneeled, the Lord Chancellor told him, "That the House had ordered, That he should enter into a recognizance of 10,000*l*. with two sureties to be bound with him in 5,000*l*. a piece, to attend to this House from time to time, until he was discharged of his Impeachment." And asked him, "Whether he could offer two sureties as were sufficient persons:" And he propounded the earl of Dorset and Midd. and the lord Hatton. Which the House accepted of; and accordingly, in open court, entered into a recognizance.

The question was propounded, "Whether there shall be now an address to the king, to suspend sir William Scroggs from the execution of his place, until his trial be over?" The previous question being put, "Whether this question shall be now put?" It was resolved in the negative.

"*Dissentientibus*,

"Kent, Salisbury, Shaftsbury, Huntingdon, Clare, Rivers, Essex, Stamford, Macclesfield, Grey, Manchester, Herbert, Howard, Suffolk, Pagett, P. Wharton, Carlisle, Rockingham, Crewe."

House of Commons, *January* 8.

Debate in the Commons on the Lords not committing Lord Chief Justice Scroggs, &c.

Sir *William Jones*. The charge against lord chief justice Scroggs is at common-law and statute-law both. I take it to be treason in one person, and not in another; an inferior person. And in one in high place, where he does obstruct justice, and change the law, is treason at common-law. We all know the plot was carried on, and that is treason To defame the evidence, and hinder the suppression of the

plot, I say, is treason by the statutes. I say not Scroggs is guilty; I wish he were not. The Lords, as appears by their Journals, have been pleased to read the Articles we sent up against him, and without hearing us, have given judgment already. The prayer of the impeachment is, "That the Lords would commit him." But instead of a previous question, they have bailed him; and likewise for suspending him his place, by their books it appears they would not put a question. That is, "he shall continue in his place notwithstanding your Impeachment." In lord Danby's case, his charge was not so plainly treason as these articles are, and the Lords, upon your demand, and upon conference, declared, "That of right he ought to be committed." How it came to be good law in lord Danby's case, and not in this, I am at a stand. I would not have any difference with the Lords, but out of fear of that I would not have our privileges torn from us; so that what was delivered in that conference relating to lord Danby, so pleasing to this House, has been, in one instance, blemished by bailing Scroggs, and in another by not suspending him his place. I would appoint therefore a committee to prepare the matter, that by Monday morning you may be able to go to Conference with the Lords about it.

Sir *Thomas Lee.* This is not the first time this question has been in this House: in the case of lord Clarendon's impeachment, the Lords would not commit him before the Articles were brought up. The Lords refused it, the Commons insisted upon it, and the consequence was, lord Clarendon ran away, made his escape, and to salve up all, the Lords sent down a bill of banishment. In the case of lord Danby, the Commons sent up articles of impeachment, which were not so directly treason within the statute, as the other, and after several Conferences, an expedient was found out; which was a prorogation of the parliament. Now the Lords tell you, that one parliament will correct the errors of another; and tell us, that the Commons have got a great point, that an impeachment shall continue, though the parliament be prorogued or dissolved. And if Scroggs's own modesty make him not withdraw, they have made a resolution that he must be continued (and some of the Lords differed at the Conference about it, as you have heard.) Now it seems, in this parliament, the Lords go about to correct an error they think they did in the other. I was loth, the other day, to oppose the articles passing, &c. But consider that, if this man be little, and therefore you quit it, resolve never to have impeachment in parliament more. The late duke of Buckingham, upon apprehension of his charge, dissolved two parliaments, and consider what a condition we were in whilst lord Danby held the staff. If we are in such a condition with so little a man as Scroggs, and have so much difficulty, and the Lords will not think it treason, unless immediately against the king, what condition shall we be in, if we have a popish successor, and such judges? I would appoint some gentlemen to search precedents to offer the Lords a Conference, with reasons, &c.

Mr. *Powle.* Since this matter is brought into dispute, I am the more glad that it is upon this person, with so many crimes upon him. It seems as if, right or wrong, the Lords will have disputes with you. The consequence every body sees. The Lords have acknowledged that they ought *de jure* to commit lord Danby, &c. At the beginning of the long parliament, twelve of the bishops made protestation against the proceedings of parliament, and this was then taken for High-Treason, and if my notes be true upon general accusation the Lords took commiseration on them, and bailed them, and the Commons sent up word to the Lords, "That they were not bailable but by their consent." This was February 16, 1641.

Sir *Fr. Winnington.* I concur with Powle, "That the management of this business in the Lords House relating to Scroggs looks like an industrious disposition to break us." These proceedings to me are wonderful. I would not invade the rights of the Lords in what they do. They are now in their judicial capacity as a court, and not in their legislative, and so we may search the record, and take out copies. The fact has ben stated, and I have been industrious to enquire into the reason. It is wonderful to all I speak with. It is said "Their reasons are, that this charge is not treason within the statute, and so it is discretionary with them, and they may alter their order." But the statute is out of their case. We shall show them they are in the wrong, as well as in Danby's case. But as for altering their order, we have as great right in the process and management of the impeachment as in the justice of it: The reason is, that the person is only answerable for the crimes, and I never heard that the persons that are to judge became bail for the person to be tried. We are like to have admirable determinations. Our inheritance is right of process of the law, as well as in the judgment of the law. For the king to sequester him from his place they would not address for it, but leave it to Scroggs's modesty whether he would exercise it, or no; but the Lords will not commit him. What makes me stand up is, that we should not now make a doubt of what was always no doubt. Therefore I would not search for precedents, whether it be our right or no, but to strengthen the opinion of the world, now the nation is upon its last legs, that we may avoid all cause of difference with the Lords; if it be possible, that thing may not receive the least doubt, nor the least delay. It is strange that lord Danby, who had so mighty friends, and made so mighty a contest, and held the white staff against us, should be committed by the Lords, and that such an inferior person as Scroggs should be so supported, as if he must still hold his place against us. I would not search precedents as a doubt, but to strengthen our right at a Confe-

Sir *John Trevor.* I had occasion to look upon the precedent of 50 Edw. 3, and it appears upon the rolls, that lord Latimer upon the impeachment of the Commons, was committed to the Marshalsea, and he was bailed by five bishops, three earls, fifteen barons, and thirteen Commons. Here appears a right in the Commons to his bailment, because the thirteen Commons became his bail by consent of the House. 4 Rich. 2, lord Ferrers was bailed, but it is not certain whether the Commons bailed him, but the Commons always had a part in consenting to it. But there is a difference when the charge is not from the Commons. In king James's time, in the impeachment against lord Bacon and sir John Bennet, &c. there were never any articles against them from the Commons; but complaint was made at a Conference against them, and the Lords formed the articles; but when any articles bordered upon treason, as these against Scroggs do, the Lords have always sequestered the person.

Ordered, "That a Committee be appointed to inspect the Journals of this House, and of the House of Lords, and precedents to justify and maintain, That the Lords ought to commit persons to safe custody, when impeached for high treason by the Commons in parliament."

In two days after the parliament was prorogued to January 20, and soon after was dissolved by proclamation, and a new parliament was summoned to meet at Oxford on March 21.

House of Lords, *March* 24.

The Answer of sir William Scroggs, knight, was read, as followeth:

"The ANSWER of Sir WM. SCROGGS, knt. Chief Justice of his Majesty's Court of King's-bench, to the Articles of Impeachment exhibited against him, by the Commons of England in the late Parliament assembled.

"The said sir William Scroggs, by and under protestation, that there is no manner of high treason, nor any overt act of high treason, particularly alledged or expressed in the said Articles of Impeachment, to which the said William Scroggs can or is bound by law to make any Answer unto; and saving to himself (and which he prayeth may be saved to him), both now and at all times hereafter, all and all manner of benefit and advantage of exception to the insufficiency of the said Articles in point of law, as well for that there is no overt act of treason expressed therein, as for all other the defects therein appearing: for plea thereto, he saith, That he is in no wise guilty of all or any the crimes, offences, or misdemeanors, of what nature, kind, or quality soever, by the said Articles of Impeachment charged upon him, in manner and form as in and by the said Articles is supposed; which he is ready to aver and prove, as this honourable House shall award: and humbly submitteth himself and the justice of his cause to this most honourable House; and prayeth to be discharged of the premises, and to be hence dismissed, and acquitted of all the matters, crimes, misdemeanors, and offences, in and by the said Articles of Impeachment charged upon him, &c.

"WILL. SCROGGS."*

After this, a Petition of sir Wm. Scroggs was read.

"To the Right Honourable the Lords Spiritual and Temporal in this present Parliament assembled. The humble PETITION of sir William Scroggs, knight, Lord Chief Justice of his Majesty's Court of King's Bench.

"Sheweth; That your petitioner, the last parliament,† was impeached before your lordships, by the House of Commons, of several Articles, stiled High Treason, and other great crimes and misdemeanors. To which your petitioner hath now, with the first opportunity, put in his Answer into this honourable House. Your petitioner humbly prays, that your lordships would be pleased to appoint some short day, for this present House of Commons to reply; that so a convenient day may be appointed for the hearing of the cause, that your petitioner may no longer lie under the reproach of the word high treason. And your petitioner, as in duty bound, shall ever pray, &c.

"WILL. SCROGGS."

Ordered, That the copies of this Answer and Petition shall be sent to the House of Commons.

But the parliament being soon after prorogued, this affair was dropped; however, it was thought proper to remove Scroggs from being Chief Justice; which was done with all the marks of favour and respect, being allowed a pension for life. But a parliamentary censure did not hinder the court from preferring others, who had been censured a little before; as may appear by these Votes of the House of Commons.

October 29, 1680.

Resolved, "That sir Francis Withens, by promoting and presenting to his majesty an address, expressing an abhorrence to petition his majesty for the calling and sitting of parliaments, hath betrayed the undoubted rights of the subjects of England."

Ordered, "That sir Francis Withens be expelled this House for this high crime; and that he receive his Sentence at the bar of this House

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* Mr. Hatsell (Notes to 4 Precedents, 117, 144, 145, 156, 199,) relies very much upon this case in refutation of Blackstone's position that a commoner cannot be impeached before the Lords for any capital offence. As to which, see the Case of Edward Fitz-harris, A. D. 1681, *infra.*

† As to the continuance of parliamentary impeachments notwithstanding prorogation, see the Case of the earl of Danby, *infra.*

upon his knees from Mr. Speaker."* (Which he received accordingly.)

November 13, 1680.

Resolved, "That sir George Jefferies,† Recorder of London, by traducing and obstructing petitioning for the sitting of this parliament, hath betrayed the rights of the subject."

Ordered, "That an humble address be made to his majesty, to remove sir George Jefferies out of all public offices."

* "The merit of this raised him soon to be a judge; for, indeed, he had no other merit." Burnet.

† The following is Roger North's account of this matter: "The next case, that came on, was that of sir George Jefferies, the Recorder of London, which had as poor a come-off. Our History [Kennet] here tells us that he was removed from his Recordership by vote, which was not so, as will appear. But there was a trick also in that matter; for the party had a great mind to get sir George Treby in to be Recorder of London; for he was a trusty confident of faction. It seems that, in conclusion, sir George Jefferies had a reprimand upon his knees at the bar, and so came off, for his crime of abhorring; which was thought a fair composition, after such discourse as had been of impeaching their heads off. But the preliminary article *sine quâ non*, was that he should surrender his place of Recorder, to which, in the end, he agreed, and did accordingly, and (as was concerted) Treby succeeded him. But this offence of his was, by the order of the House, intimated to the lord mayor and aldermen, that they might not want a cause to return upon a Mandamus, in case they should thereupon have turned him out; for if he had not complied, but stood on his right, he must have had all the defences the law allowed, and might have argued such a matter, returned, not to be a sufficient cause; and the judges would have done him right. This consideration made the party take up the intimidating process, and gain possession by a surrender without suit in law. The great difficulty, that lay upon the spirits of sir George Jefferies, was to come off well with the king; lest this compounding with the Commons should confound him at Court. Therefore he begged of his majesty that he would give him leave to surrender his place; which the king was loth to do, because he was of such an over-ruling genius, and stern behaviour towards men whom he pretended to awe, as enabled him to be very influential among the citizens, and, in other respects, could not be so well employed. He beseeched, entreated, and importuned the king so very much, that, at last, the king granted his request; so, having his majesty's leave to resign, he took his chiding, and was, as he thought, *rectus in Curia*. But the ever facetious king was pleased to laugh and say that sir George Jefferies was not parliament proof; and, however he found interest in corners about the court, the king never had a real value for him after." Examen, p. 550.

Sir John Reresby gives us the following particulars respecting Jefferies:

"The next day I happened to dine with sir James Smith, the lord mayor of London, whom I had formerly known intimately well, and who was of a very loyal club in the city, where I used to go, while the fanatic Plot was in agitation. This gentleman complained to me, that he enjoyed no more than the bare title of lord mayor, the lord chief justice Jefferies usurping the power; that the city had no sort of intercourse with the king, but by the intervention of that lord; that whatever was well done in the city, was attributed to his influence and management; and that himself and the aldermen were by the Court looked upon no better than his tools: that upon all occasions his lordship was so forgetful of the high dignity of the city as to use him and his brethren with contempt; in fine, that the lord chief justice was to be pitied; that his haughtiness would be the ruin of him; and that he actually intended to let the king into the mystery of these things; but that he thought the present time was not altogether so proper, seeing a remonstrance of this tendency might be construed into mutiny and disaffection. I answered, that the king was too well acquainted with the lord mayor's services and integrity to suspect him of that, and that, in my opinion, now was the fittest time for exposing a man in that credit at court; for that now the greatest notice would be taken of all such grievances. Indeed I was sorry at my heart to see such good men dissatisfied in any degree; but I was as glad to find this proud man seen through; for he had to my knowledge used the city of York as scurvily as it was possible for him to use the city of London. For at York he put out five aldermen though he had solemnly engaged to keep them in, and that, without so much as allowing them to be heard as to the crimes they stood accused of. The lord mayor said the very same had been frequently practised in London, and that many had been turned out of their employments without so much as being suffered to make their defence. In short, I was at the very same time told by one of the lieutenancy of the city, that should the duke of Monmouth give a blow to the king's forces, it was much to be feared there would be an insurrection in London."

"A few days afterward, I dined with the lord Chancellor, where the lord mayor of London was a guest, and some other gentlemen. His lordship having, according to custom, drank deep at dinner, called for one Mountfort, a gentleman of his, who had been a comedian, an excellent mimic; and to divert the company, as he was pleased to term it, he made him plead before him in a feigned cause, during which he aped all the great lawyers of the age, in their tone of voice, and in their action and

Sheridan, whose discharge by baron Weston gave offence to the House of Commons, appears to have been for breach of privilege, continued in custody to which he had been previously committed, but for what offence does not distinctly appear.

The House of Commons on December 9th, 1680, ordered that he should be forthwith brought in the custody of the Serjeant at Arms to the bar of the House. This was accordingly done, and he was examined concerning Dowdel, the priest, &c. After which it was ordered, that he should continue in custody of the Serjeant at Arms during the pleasure of the House. On the next day, Friday, the 10th, a report was made upon his papers and he was again examined. On Wednesday, the 15th, he was at his own desire again admitted to the House and examined.

On Thursday December 30th, 1680, and the next day, the following debates took place on his habeas corpus:

On Mr. Sheridan's Habeas Corpus.

Mr. *Boscawen*. Mr Sheridan stands committed, as a judgment of the House, for breach of privilege. It seems to me, that his commitment does run on the hinge of an act of court in a criminal cause, which we may suppose in execution, where a Habeas Corpus does not lie, and he is not bailable, and they will not discharge him in a court of criminal causes. I think his commitment stands good, and you are to consider the privilege of the House of Commons.

The *Speaker*. Give me leave to state the matter. The thing, in fact, stands thus. Sheridan and Day were committed by your order the ninth of December; they were brought to the bar the same day, and ordered to continue in custody during the pleasure of the House, and no person to be admitted to come to him unless it were with necessaries. Then that order was mitigated, and you ordered him to be taken into custody. Then you ordered a committee to examine him and Wilson. The act directs, "That the judges, within such a time, grant a Habeas Corpus, when desired, and they are required to bail where the act gives that liberty." Now the question is, whether a Habeas Corpus lies in case of any of your commitments, the parliament sitting? (And he reads the Act.) In the Act here is nothing relates to parliament-commitments. The "Head-Court" is the King's-Bench, and this seems not to relate to the parliament. This is a commitment of parliament, and if so, the judges cannot grant a Habeas Corpus.

Serjeant *Maynard*. You are going upon a sudden to give an opinion in a thing not thought of before. As I take it, his Habeas Corpus is granted: now what is to be done in this case? I desire not to be concluded in any thing I shall now say, but I will tell you my apprehension, where shall he go to be bailed, but to this House? Your remedy for breach of your privilege is commitment, and no action can be brought against either the Lords or Commons. When you commit a man, you do not always express the cause; if the judges bail him, he is gone, and there is an end of him. I would have this matter let alone till to-morrow.

Serjeant *Stringer*. This is a matter of great concern. I would consider whether a judge can deny a Habeas Corpus. By the act, the jailor is to pay the penalty of 500*l.* upon affidavit "That he is refused the copy of his commitment."—So far a judge may safely go. But the great point is, whether the judge can discharge him. If so, farewell all the privileges of the Commons! When the matter comes to a Habeas Corpus, the judges may be informed how he stands committed. It is said, "That this Sheridan is a second Coleman," and, if so, let him be hanged as he was. I would take time to consider this, and I believe the opinion of this House will go a great way with the judges.

Sir *William Jones*. This matter is of great concernment; it concerns the privileges of both Houses, and next, the liberty of the subject; and I would not have you do any thing in it hastily; but to appoint a committee to consider it, will seem to make the thing too difficult; but yet you are not ready to come to a resolution now. I must deny "that the judge must grant a Habeas Corpus to this man." This is not a case at common-law, but you see that sometimes in discretion formerly they required a copy of the commitment. But by this act, the judges grant a Habeas Corpus upon a copy of the commitment. In this case, the judge is in no danger upon refusing the Habeas Corpus. The serjeant says "Sheridan sent to him for a copy of his commitment," and the serjeant has not granted it to him; so the Habeas Corpus is not yet granted. If you please, I would not commit this, but adjourn the consideration of it.

Sir *Francis Winnington*. All I move for is this, "That no memorial nor entry be made

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gesture of body, to the very great ridicule not only of the lawyers, but of the law itself, which, to me, did not seem altogether so prudent in a man of his lofty station in the law; diverting it certainly was; but prudent in the Lord High Chancellor, I shall never think it." "To resume the Lord Chancellor once again, he had now like to have died of a fit of the stone, which he virtuously brought upon himself by a furious debauch of wine, at Mr. alderman Duncomb's; where he, the Lord Treasurer, and others drank themselves into that height of frenzy, that, among friends, it was whispered they had stripped into their shirts, and that, had not an accident prevented them, they had got up on a sign post, to drink the king's health; which was the subject of much derision, to say no worse."

See more concerning him in this Collection in those Trials in which he presided when Chief Justice.

upon your books for the present:" but upon the whole frame of the act, I see no Habeas Corpus lies upon a commitment of parliament.

Serj. *Maynard.* I am clearly of opinion that this is a cause out of the statute of Habeas Corpus. That law was never intended otherwise than for commitment from inferior courts, and not parliament. All bail is in order to trial; when an act of parliament says "A lower court," it never intends a higher. A commitment is not only a judgment of this House, but an execution: and though the statute does not mention the parliament, other courts shall not grant it in judgment and execution. There can be no trial of one committed from this House, but in this place, and this act is not intended for commitments from hence.

Sir *Francis Winnington.* It is plain the parliament is not to be included by this act; for the parliament was informed, that there was a Habeas Corpus to remove a man from the Tower, and they sent him to Jersey or Guernsey. So it plainly shows that it was for the growing evils of removing men out of the reach of Habeas Corpus, that this bill was formerly brought in; and that it was never intended against commitments of the House of Commons. A man is committed here in execution, and it was never intended that injustice should flow from this House. As Mr. Sheridan has repented himself of bringing this, I could wish he would of his other crimes also.

Sir *Thomas Lee.* Consider the advantage of putting this question, moved from the bar by Jones, viz. "That no Habeas Corpus does lie during the sitting of this House." This court is a superior court, and no inferior jurisdiction. I do not see why you should make any vote in this case. The judge has the law before him, and your vote cannot alter it. You may be prejudiced by subjecting your vote to the interpretation and scanning of the judges.

Sir *William Pulteney.* In this case, a vote is necessary, else the judges will not know what they ought to do, and what not. You have voted, "That the judges cannot grant a Habeas Corpus against the common privileges of this House." I would have the judges take notice of it, and therefore I am for a vote. I do not know that this House has power to commit but in case of breach of privilege, and I would so restrain it in the vote.

Mr. *Paul Foley.* I have looked over the act, and am of opinion that a Habeas Corpus does not lie in this case, and may be refused in case it should be required by this act. A Habeas Corpus was never granted upon a commitment by parliament formerly; no precedent can be shown of it. You commit for contempt, and it must be in such cases where the party is bailable. If you put a question, I would be loth to have our privileges (which is our only power) to be lodged in commitments upon impeachments, whereas we have power to send for all people commoners.

The *Speaker.* This case is particular as to Mr. Sheridan, and is out of the power of the act of Habeas Corpus; and why will you make any question upon it, upon general commitments of the House.

On the latter of the abovementioned days, his case was thus spoken of:

Serjeant *Maynard* supposed Sheridan should bring an action against the judge, if your commitment be for breach of privilege, no inferior court will judge of it; but if the commitment be not for breach of privilege, you may mend it.

Mr. *Harbord.* I appeal to you, if ever you discharge a man that does not acknowledge the jurisdiction of the House, and acknowledge his fault? Till he has done so, let him remain in custody.

The *Speaker.* If you should do as Maynard moves, your order for breach of privilege is, as if after commitment they should mend the record in Westminster-hall. Sheridan was in custody before the paper that reflected upon your members, and broke your privileges, was found. So the first order for commitment was upon another occasion.

Mr. *Paul Foley.* Though Sheridan was sent for in custody to the bar, yet the continuation of him in custody was for breach of privilege.

Sir *Thomas Lee.* I would have it considered how you will mend a commitment afterwards; if he has a copy of his commitment, general, and now comes an amendment of the commitment, for breach of privilege, a month after? The general debate ran, "That he held a dangerous correspondence with the duke of York, and was a second Coleman." Gentlemen were sent to search his papers, and found a paper in his closet not printed nor published. Pray let the thing stand upon its own foundation, without mending it.

Sir *Fr. Winnington.* The famous case of lord Shaftsbury, when upon a commitment by the Lords he was brought by Habeas Corpus to the King's-bench bar, there was no return made, and he was discharged *sedente Parliamento.* If a rule of court be ill-entered, I appeal to you, if it be not mended every day in an inferior court?

Mr. *Powle.* Whoever, in this place, speaks for limiting your power is not so favourably heard, as he that speaks to enlarge it. 'State 'super vias antiquas.' I am afraid we are about removing the ancient land-marks, which may return to their old bounds again. Your power is part of the judicial, and part of the legislative authority, and it is but part only. Anciently the judicial power of parliament was exercised by King, Lords, and Commons; but for some ages past, we, and the Lords, by tacit consent, have had a separate jurisdiction in that point, and they punish for their breaches of privilege, and we for ours. This case of Sheridan, I confess, goes beyond your ancient privilege; they took no jurisdiction upon themselves, but either did send to the Lords if the thing deserved an impeachment, or dismissed it to the law in the lower courts at Westminster. I do not take the words in the paper

found in Sheridan's study, to be a breach of privilege against your members, he having not published the paper. Here is neither actual force against your members, nor suits of law. If the courts below cannot reform your error, it is fit you should do it yourselves. If this man be not in custody for breach of privilege, I would release him, and all that are so committed, and reform your own error.

On Friday January the 7th, 1681, the House was informed, that a writ of Habeas Corpus had been directed to the Serjeant of the House, to bring the body of Mr. Sheridan to Mr. Justice Raymond's house in Chancery Lane.

Mr. *Boscawen.* The judge might not have gone so far as he has done. It may be, the Serjeant had other prisoners, and your commitment of Sheridan is not for breach of privilege. He is a Serjeant at Arms, though he attend the House; so it does not appear but that the Serjeant may have Sheridan in custody upon another warrant. I would be careful to preserve the privilege of the House on the one hand, and the Habeas Corpus on the other. I would have the Serjeant give the judge an account, "That he has Sheridan in custody, but that he knows not that he has him legally, &c."

Sir *Thomas Clarges.* Lord Shaftsbury was committed by parliament, and took out his Habeas Corpus, but the judges had the discretion to remand him; and a Habeas Corpus does lie unless for treason, felony, or in execution and convict persons, &c. Commitments of the Commons are in execution. As I now stand apprized of it, the Serjeant may carry Sheridan to the judge with the cause of his Commitment.

Sir *Francis Winnington.* I take this business to be worth your consideration. The case of lord Shaftsbury is not this case. The act of Habeas Corpus was made since that time. On the other hand it was rarely found, that a person, committed by either House, has been sent for by the judges. As I would do justice to the subject, so I would not, out of compliment, give up your privilege. I would adjourn this debate till to-morrow, and go upon the business of the day. I speak not to an order, but because there is a penalty in the statute, I would consider of it for the Serjeant's sake.

Grey says it was adjourned to the next day, but he does not make mention of any farther debate concerning it during the continuance of that parliament, which was shortly afterwards dissolved.

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277. Proceedings in Parliament against EDWARD FITZHARRIS, upon an Impeachment for High Treason: 33 CHARLES II. A. D. 1681. [Journals of both Houses. 8 Grey's Debates, 303. 4 Cobb. Parl. Hist. 1314.]

HOUSE OF COMMONS, *March* 25, 1681.

SIR George Treby acquaints the House, That he, together with sir Robert Clayton, had taken the Examination of Edward Fitzharris, relating to the Popish Plot: which he read in his place; and afterwards, delivered the same in at the clerk's table: where the same being read is as followeth;

The Examination of EDWARD FITZHARRIS, relating to the Popish Plot.

Who saith, That he was born in Ireland, and is the son of sir Edward Fitzharris; and that he was bred, and is, a Roman Catholic: That, in 1662, he went first out of Ireland; and then went into France, to learn the language, as an accomplishment, being then of the age of 11 years. In 1665 he returned thence, through England, into Ireland; where he continued till about 1668, when he went to Prague, in order to serve the emperor in his war in Hungary; but, there then finding a peace concluded, he came, by the way of Flanders, into England.

And then sir George Hamilton being about raising a regiment of 1,500 foot in Ireland, for the French king's service, this examinant obtained from sir George Hamilton a commission to be captain of one of the companies in that regiment to be raised; whereupon he went into Ireland, raised the company, and conducted them into France: and, soon after his landing there, he was reformed, and discharged of his said command: whereupon he went to Paris; and, having but little money, he lived there difficultly about a year.

In 1672, going about to take his leave of Father Gough, an English Priest at Paris, he saith to this purpose: "You are going for England: within these two or three years you will see the catholic religion established there, as it is in France." The examinant asking him how that could be, since the king was a protestant; he answered; "If the king would not comply there was orders taken, and things so laid, that he should be taken off, or killed: that the duke of York was a catholic; and, in his reign, there would be no difficulty of doing it." This examinant then asking him, how long the duke had been a catholic; he answered, "That the queen mother had made him so." He further said, "That the declaration of indulgence was in order to that, and of introducing the catholic religion in England: and that, to the same end, the war was made against Holland: for that Holland was a nest of heretics; and, if they were destroyed, the work would be easily done in England; because the English, or English Protestants, he said, would then have no assistance from abroad:" And he said, "That

Madame came over to Dover about this design."*

The Examinant, coming over about the end of October 1672 about February following, had a commission to be lieutenant of captain Sydenham's company, in the duke of Albemarle's regiment, which was then raised, being one of the regiments in the army, which was the summer following mustered at Blackheath: and he says, He knew many of the lieutenant-colonels, majors, captains, and officers of that army to be Roman Catholics.

That afterwards, the act passing to disable Roman Catholics to bear office, he and others of them were forced to quit their commands: and says, That the common intelligence and opinion among them was, That that army was raised with a design to bring in and settle the Roman Catholic religion in England; for which end the invasion of Holland, and the awing of the city of London, were fit means.

But the measures that were thus taken being broken by means of the peace, and by the duke of York's, as well as these, and other officers, quitting all commands; and the king failing in the expectations they had from him; the Roman Catholics, that were engaged in this council, came to a resolution to destroy the king, as Father Parrey, confessor to Don Francisco de Melo, the Portuguese ambassador, told this examinant in 1673; and if all other means failed, the queen would procure the doing of it.

And he says, That this Father used this confidence towards him, because he was well acquainted with him, and used to confess to him; and this Father repeated the same discourse to him in the summer 1678, with more assurance; adding then, "That the business was now near, and he should soon see it done."

About April 1679, Marquis Montecuculy, envoy from the duke of Modena, after having sworn him to secrecy, told him, that if he would undertake the killing the king, either in his own person, or by any other, that he should have 10,000*l.* which he refusing, the Marquis said, "If you will not, the duchess of Mazareene understands poisoning as well as her sister; and a little phial, when the king comes there, will do it."

And this Examinant had a great acquaintance with the said Marquis, having first met him several times at the duchess of York's Chapel; and afterwards let him a house, and sold him the furniture therein; and has very often eaten, drank, and walked with him: and the Marquis at the same time told him, That, upon killing the king, the army in Flanders, and parts adjacent to France, was to come over into England to destroy the Protestant party; and that money was levying in Italy, to recruit and supply forces, in the place of those that should so come over into England:

And that, after that time, there should be no more parliaments in England: and that the duke of York was privy to all these designs.

That, about April 1680 he met Kelly the Priest; who there, in discourse with him, owned, That he was one of the persons concerned in the murder of sir Edmundbury Godfrey; and that the same was done much in the manner as Prance* had related it.

This Examinant hath known Kelly about 12 years; in part of which time he has had intimate conversation with him, and hath sometimes confessed to him.

That he hath been acquainted 6 or 7 years with M. De Puy, a servant to the duke of York: and that, soon after the murder of sir Edmundbury Godfrey, this De Puy told this Examinant, That that murder was consulted at Windsor.

And, about the same time, said, That the duke was very desirous to come to the crown; for that the king was uncertain, and did not keep touch with them: and that De Puy said, there was a necessity of taking off the king; and that it would be soon done.

That the duke of York having an estate in Ireland, a part of which was this Examinant's father's; and this Examinant, being acquainted with Father Bedingfield, asked him, how he could give absolution to the duke, till he had made restitution. The Father said, "That every penitent was supposed to know his own sins, and to make them known to his confessor," To which this Examinant replying, with some warmth, "But, since you know it, you ought to take notice thereof;" the Father answered, "Be not angry; for, ere it be long you may be in a better condition."

March 1680, he went to Paris, to compound a debt he owed there, staying there about eight days: Where meeting Father Patrick, who well knew this Examinant's father and friends, and this Examinant talking of a rupture that might be between England and France; he said, "The French intended in such case, to send Marshal Belfonds into Ireland with an army of 10,000 foot, and 2,000 horse, with arms and ammunition for 30,000 men more, to be raised in Ireland:" and the Father promised this Examinant a regiment of the men so to be raised and armed in Ireland: and the design was, to restore that kingdom to its former owners, subject to the French.

He also desired him to send him all the libels that came out in London: and said, "That libelling the king, and the government, was a thing necessary to be done, in order to distaste the king, and make him afraid and jealous of his people."

That he knew Mr. Everard at Paris in 1665; and hath since continued and increased his acquaintance with him; that the opinion of Father Patrick was an encouragement to him to correspond and concur with Mr. Everard, as to the libel lately written by Mr. Everard. Capt'. 10 Martii, 1681, coram ROB. CLAYTON, GEO. TREBY.

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* See a Note at the end of Fitzharris's Trial.

* As to this man, see vol. 7, pp. 157, 228, of this Collection.

As soon as the Examination was read,

Sir *John Harlop* moved that it might be printed, to shew the world the devilish conspiracies of the papists.

Sir *William Jones.* I like the motion well. There is nothing in this paper, but what is fit to be printed; and what fully makes out what we have heard before, and because we all know, that, since lord Stafford's Trial, people have been preavailed upon to believe the plot not true. This paper confirms Oates's, Bedlow's, and Prance's informations; but I would not have that paper printed which reflects upon the king.

Mr. Secretary *Jenkins.* I will not trouble you, but with what part I had in this affair. The scandalous paper reflecting upon the king was read over to his majesty by Waller; whereupon I issued out warrants to apprehend Fitzharris, &c. and Waller saw the execution of them.

Sir *F. Winnington.* This is of great importance, and in it we ought to acquit ourselves like wise men. We, that come out of the country, hear that the treasonable paper should have been sent to many gentlemen, and then they should have been seized upon as traitors in the conspiracy in this plot. All is now at stake; therefore how long or short a time we are to sit here, (the trooper, Harrison, that was seized, said, "We should have other guards at Oxford than we had at Westminster,") let not our courage lessen. This being our case, let us go to the bottom of this business of Fitzharris. It has been moved, "That he should be sent for hither;" but we have experience, that, when once an accusation in parliament is against a man upon record, and in the greatest court in the kingdom made known, malefactors have not been cleared, and have not had justice; therefore I move, "That you will take care that this man be impeached of high-treason," and, it may be, then he will tell you all.

Sir *Rob. Clayton.* When Mr. Recorder and myself examined Fitzharris in Newgate, he asked us, "Whether he had said enough to save his life?" We told him, "We thought not; but if he would ingenuously confess what counsel he had for drawing and modelling his treasonable paper, and be ingenuous in the whole, we would take his farther examination;" and wished him to consider of it. But, the next day after he promised he would, he was removed out of our reach to the Tower.

Ordered. "That the said Examination be forthwith printed."

Resolved, "That Edward Fitzharris be impeached of high-treason, in the name of all the Commons of England; and that Mr. Secretary Jenkins do, to-morrow morning, go up, and impeach him at the bar of the Lords' House."

Secretary *Jenkins.* The sending me up with this impeachment reflects upon his majesty, my master, in the character I bear under him; and I will not go on the message.*

A great cry, "To the bar, to the bar."

Sir *Thomas Lee.* I would not have said one word, but that the very being of the parliament is in the case. It is to no end to sit here any longer, if this be suffered. Jenkins had no ground or reason to bring the king's name in question, nor was there any reflection upon his majesty, or Jenkins, in sending him with the impeachment. But, for Jenkins to say, "Do what you will with me, I will not go with the message!" Let his words be first asserted, and read to you, before he explain them, according to the order of the House.

Sir *George Hungerford.* I never heard such words uttered in parliament before, "That the whole House of Commons should reflect upon the king in sending him with the message," and "that he will not obey your commands." Pray call him to the bar.

At which there was a loud cry, "To the bar, &c."

Mr. *Trenchard.* The House will grow contemptible to the extremest degree, at this rate. Such a thing was never before in parliament;

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* Bishop Burnet gives the following character of him: "Jenkins, now made Secretary of State, was the chief manager for the court, against the Bill of Exclusion: he was a man of an exemplary life, and considerably learned; but he was dull and slow: he was suspected of leaning to popery, though very unjustly; but he was set on every punctilio of the Church of England to superstition; and was a great assertor of the divine right of monarchy, and was for carrying the prerogative high: he neither spoke nor wrote well." History of his Own Times, vol. 1, p. 481.—In Bulstrode's Memoirs, p. 372, there is a letter from sir Leoline Jenkins, dated the 31st of March, 1685, in which is the following account of himself: "His majesty hath, upon my most humble and even importunate suit, given me leave in regard of my health, to resign my post of secretary, and hath bestowed it upon Mr. Godolphin. My great concern is, that this being a pure effect of my most humble supplication, and even intolerable importunity, with his majesty and the duke, it may not be imputed to any surprize upon me at court, much less to my disliking of the present measures there. This I say, because I know the fanatics will put the most malicious constructions they can invent, upon an incident at court."—Upon this, Mr. Hatsell observes, "Whoever will recollect the proceedings, that were going on at this period, with respect to the surrender of charters throughout the kingdom, the criminal prosecutions at the Old Bailey, with other instances of the determination of the king and duke of York to establish absolute power in this country, will know how to appreciate the character of a statesman, who was fearful he should be suspected of retiring from office, from disliking the present measures of the court."

"That the whole House should reflect upon the king," and for him to say, "Do what you will with me, I will not go."

Secretary *Jenkins*. I said no such thing, "That the House reflected on the king," but "That I take it as a reflection upon the king, my master."

His words were thus stated, "This message had not been put upon me but for the character I bear—I value not my life or liberty; do what you will with me, I will not go."

Secretary *Jenkins*. I said "That this is put upon me, to my apprehension, for the character I bear; and do what you will with me, I will not go."

Sir *W. Jones*. I am sorry to see any member behave himself at this rate. This confirms me in the opinion of the design some men have to depress the honour of this House. A book has been written by a member of this House* (which, in time, I hope you will consider of) "That the House of Commons, in Hen. 3.'s time, sprung out of rebellion." This goes on this day in the same method. Let a man be of what quality he will, if he be too big to carry your message, he is too big to be your member, and not fit to be chosen for one. Thus to scorn the commands of the House, and to be too big for a messenger of the House of Commons! Secretaries are sent on messages every day, and is he too big for this, to accuse a person of the Popish Plot? If this be so, sit no longer here but go home. His character is great, but he may be privy to things hid from us, possibly, by this extraordinary carriage. Is it come to that pass, for us to be dealt withall as none of our predecessors ever were before? If my brother, or son, dealt with the House thus, I would have him made an example; and, for aught I see, he provokes you more by his explanation; therefore pray go on.

Secretary *Jenkins*. I am ready, and I think myself as much obliged as any man, to obey the commands of the House. The office I have under his majesty excludes me not; but the thing I stand upon is, That the motion was carried on in ridicule. I have an honour for this, and ever have had for all Houses of Commons, but in this message I must and will be excused.

Sir *Henry Capel*. "Ridicule" is not a word proper for a House of Commons: what is appointed by them is with all gravity, especially where the life of a man is concerned, as it is in an impeachment. We are in an unfortunate age; now things come to light, more than we were before; that now it must be said, "Impeachments of treason strike at the king," and "the bill of excluding the duke, &c. is levelled at the king," I am sorry it is said here, as well as in other places. This that we put upon Jenkins is an employment for the king's service, and he tells us, "It reflects upon the king, and he will not go." All the Commons do will be reversed, if this must pass for doctrine, "That what we do reflects upon the king." But, Sir, we are in a ship, and we have to do with the master, and he with us. If this gentleman would make any sort of excuse for himself, I would, for my share, pass it by; but he has not taken it off, but rather aggravated it. If he has nothing farther to say for himself, he must withdraw, and then I shall make a motion, for the honour of the House.

Sir *Thomas Meres*. I know no difference of any persons here; if Jenkins said "I thought sending me with the impeachment reflected on the king; and in case it be so, I will suffer any thing under that reflection," a man may be mistaken in his thoughts: but, as I take it, he said "It was his thoughts that the message was a reflection upon the king, and in that case he would suffer any thing rather than a reflection upon the king in the character he bears."

Sir *John Ernly*, after he had inspired Jenkins with a whisper, said, It is an ill thing to stumble at the entrance. I do hope that Jenkins intended no disservice to the House, in what he said, but on a perfect mistake. I did apprehend, and so did some others, that he was put upon it, by the gentleman that moved it, in jest (Mr. Coningsby.) But be it in jest, or in earnest, he ought to obey your order; but every man cannot subdue his own heart. But I would know of Jenkins, whether, upon farther consideration, he will undertake this service, or no? I am the worst advocate in the world for an obstinate person; but I humbly offer it to your consideration to put the gentleman upon it, whether he will go, or no, before he withdraw.

Secretary *Jenkins*. Since the House is so favourable as to hear me, I must say I did apprehend it a reflection upon the king, which was the reason why I refused the message: but if I apprehended it a reflection upon the king my master, I am heartily sorry I should incur the displeasure of the House, and I hope you will pardon the freedom of the expression, of reflection upon the king. I had no other consideration whatsoever that induced me to say the words.

Mr. *Fleetwood*. I look upon this as so great a reflection upon the House, from this gentleman, that he ought to come upon his knees, at the bar, to ask pardon.

Mr. *Boscawen*. We are all subject to infirmities. Seeing the thing is so, Jenkins could not apprehend any reflection upon the king in the message, but he might upon himself. The thing was a little smilingly moved; but since he has explained himself, I would have this passed by, as I should desire for myself, upon the like occasion.

Lord *Cavendish*. The gentleman's fault is a great one; but after he has now begged the pardon of the House, and that he is ready to obey the Order of the House, I am willing to pass it over. Though it be a great fault, yet

* Dr. Brady, who served for the University of Cambridge.

it is too little to give occasion for a breach, at this time.

Secretary *Jenkins.* I am ready to obey the orders of the House, I am very sorry that the words which fell from me, gave the House offence.

And so the thing passed over, and he carried the message.

Colonel *Birch.* For the discovery of this Plot of Fitzharris we ought all to give God thanks, next to the discovery of the Popish Plot. This is a great service to the nation, and it is not the first service that sir William Waller has done the nation. If ever the thanks of the House were deserved, it is for this discovery; therefore I move, "That he may have the thanks of the House."

HOUSE OF LORDS, *March* 26.

A Message was brought from the House of Commons, by sir Leolin Jenkins and others, in these words: "The Commons of England, assembled in parliament, having received information of divers traiterous practices and designs of Edward Fitzharris, have commanded me to impeach the said Edward Fitzharris of high treason: and I do here, in their names, and in the names of all the Commons of England, impeach Edward Fitzharris of high treason. They have further commanded me to acquaint your lordships, that they will, within convenient time, exhibit to your lordships the Articles of charge against him."

Mr. Attorney General gave the House an account of the Examinations taken against Edward Fitzharris; and said "He had an order of the king's dated the 9th of March instant, to prosecute the said Fitzharris at law; and accordingly he hath prepared an indictment against him at law."

And, after a long debate, the question was put, "Whether Edward Fitzharris shall be proceeded with according to the course of the common law, and not by way of impeachment in parliament, at this time?" It was resolved in the affirmative.

Memorandum, That before the putting the above question, leave was asked for entering Protestations; which was granted.

"*Dissentientibus;* Because that in all ages it hath been an undoubted right of the Commons to impeach before the Lords any subject, for treasons or any crime whatsoever; and the reason is, because great offences that influence the government are most effectually determined in parliament.

"We cannot reject the Impeachment of the Commons, because that suit or complaint can be determined no where else: for if the party impeached should be indicted in the King's Bench, or in any other court, for the same offence, yet it is not the same suit; for an impeachment is at the suit of the people, and they have an interest in it. But an indictment is the suit of the king: for one and the same offence may entitle several persons to several suits; as if a murder be committed, the king may indict at his suit, or the heir or the wife of the party murdered may bring an appeal;* and the king cannot release that appeal, nor his indictment prevent the proceedings in the appeal, because the appeal is the suit of the party, and he hath an interest in it.

"It is, as we conceive, an absolute denial of justice, in regard (as it is said before) the same suit can be tried no where else. The House of Peers, as to impeachments, proceed by virtue of their judicial power, and not by their legislative; and as to that, act as a Court of Record, and can deny suitors (especially the Commons of England) that bring legal complaints before them, no more than the justices of Westminster Hall, or other courts can deny any suit, or criminal cause, that is regularly commenced before them.

"Our law saith, in the person of the king, 'Nulli negabimus justitiam,' We will deny justice to no single person: yet here, as we apprehend, justice is denied to the whole body of the people.

"And this may be interpreted an exercising of an arbitrary power, and will, as we fear, have influence upon the constitution of the English government, and be an encouragement to all inferior courts to exercise the same arbitrary power, by denying the presentments of grand juries, &c.; for which, at this time, the chief justice stands impeached in the House of Peers.

"This proceeding may misrepresent the House of Peers to the king and people, especially at this time; and the more in the particular case of Edward Fitzharris, who is publicly known to be concerned in vile and horrid treasons against his majesty, and a great conspirator in the Popish Plot, to murder the king, and destroy and subvert the Protestant religion. Kent, Shaftesbury, Macclesfield, Herbert, Bedford, Stamford, Westmoreland, Salisbury, Paget, Cornwallis, Huntingdon, Clare, Sunderland, Essex, Crewe, P. Wharton, Mordaunt, Grey, Monmouth, J. Lovelace."

HOUSE OF COMMONS, *March* 26, *p. m.*

[Debate in the Commons on the Lords refusing to proceed upon the Impeachment against Edward Fitzharris, and directing that he should be proceeded against at common law.]†

* "Which was always to be preferred; and upon notice thereof, all prosecutions at the king's suit were to stop, till the prosecution at the suit of the party was determined." Note to former edition.

† "The Commons' Impeachment against Fitzharris was rejected by the Lords upon a pretence with which lord Nottingham furnished them. It was this: Edward 3 had got some Commoners [the six murderers of Edward 2] to be condemned by the Lords, of which when the House of Commons complained, an order was made, "That no such thing should be done for the future." Now that related only

Sir *Thomas Lee*. I see not what farther use there is of a parliament, if the House of Peers will be a Court, and not a Court, to serve a present purpose.

Sir *William Jones*. In a matter so very plain and conspicuous, as the refusal of this impeachment by the Lords, I am unwilling to make unnecessary doubts. If indeed an inferior court had proceeded to judgment in this matter of Fitzharris, then it might have been pleaded in bar against the impeachment of the Commons. There was an indictment against the Lords in the Tower, in the King's-Bench, found upon record, and yet that was no impediment to their trial by the impeachment of the Commons; but in this case of Fitzharris, here is no indictment or prosecution begun in any inferior court of law. We have a precedent fresh in memory of the impeachment of a commoner at the Lords bar, if the Lords doubt that, which was of my lord chief justice Scroggs; so that we need not spend our time to search for precedents to maintain our right at a conference with the Lords. Perhaps the Lords Journals are not yet made up into form; but some members have taken notes out of their minutes, and find that the Lords have dismissed the impeachment against Fitzharris, and left him to trial at common law, and have ordered it so by the Lords "spiritual" as well as "temporal;" and in this case they have determined a great point, "That the Lords spiritual have power to judge in an impeachment of capital matters," which we never own, nor ever shall, and here we are denied justice by those who have no right to vote it. In this the Lords have done a double act of injustice. Seeing then that the Lords have taken upon them to throw out this impeachment, &c. let us assert and declare our right of impeaching in capital causes, and that the Lords have denied us justice in refusing the impeachment against Fitzharris; and then, after having asserted our privilege, let us draw up our reasons to maintain it, and make it part of our Conference to show the Lords, how unreasonable the Lords actions have been in their proceedings.

Sir *Fr. Winnington*. If this refusal of the Lords was an ordinary Impeachment of monopolies, or the like, I should not press you in the matter; but this is not an ordinary consideration, but that which relates to our religion and property; and how the bishops come in to stifle this impeachment, let God and the word judge! I would know if there be an impeachment against a man from the Commons, and no indictment upon record against him in the courts below, only the attorney general told the Lords, that the king gave him directions to prosecute Fitzharris, and there is no record against him. If the Lords vote, "That the House of Commons shall not impeach this man," they may as well vote, that we shall not be Protestants. But yet we will be Protestants. I take this to be a new Plot against the Protestant religion, and we impeach this man, and the Lords fairly say, "We will not hear it." If this be the case, I desire you will come to some vote. You are willing to discover this Plot if you could. If the attorney-general had prepared the prosecution of Fitzharris, and, as Jones said, if the inferior courts had proceeded to judgment against him, then that judgment is pleaded in bar against an impeachment. But if our time be short to be here (as I believe it is) pray do not delay discharging your part in this matter. If the House be satisfied in it, pray make a vote, to assert your own right. A little while ago, we knew, that the judges of the King's-bench discharged the grand jury whilst the indictment against the duke of York, for a popish recusant, was depending: This proceeding of the Lords, in rejecting the impeachment of Fitzharris, seems as if the House of Lords intended to justify that proceeding of the judges by their own. It is a just reflection of weakness to doubt in a plain matter. If no gentleman doubts of our right of impeaching, pray vote it so.

Sir *Robert Howard*. I am glad we are off from one great thing, viz. "the exclusion of the duke of York from the succession of the crown as the best means to preserve the Protestant religion." I cannot believe but that, in this matter of rejecting the impeachment of Fitzharris, the Lords have cause for what they do. In this matter, precedents you need not search; you have instances of very late date: But this of Fitzharris seems to me to be a more dangerous breath than usual, a breath fit to be stifled. There is something in this more than ordinary. If this be a sacred respect in the Lords to the common trials of England by juries in the inferior courts, it is strange that, in the case of Skinner, the Lords should contend with the Commons about the trial of it, though an original cause. This refusal of the Lords seems to me to be no great value of the law of England, but a value of Fitzharris to keep him from us. When I have seen, in all the speeches to-day relating to the duke's exclusion, that the duke goes not single, but all along associated with popery. I have heard such excellent discourses to day of that matter, that I am loth to mingle my weakness with them; but these are

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to proceedings at the king's suit; but it could not be meant, that an Impeachment from the Commons did not lie against a Commoner. Judges, secretaries of state, and the Lord Keeper were often Commoners. So if this was good law, here was a certain method offered to the Court, to be troubled no more with impeachments, by employing only commoners. In short, the Peers saw the design of this Impeachment, and were resolved not to receive it, and so made use of this colour to reject it." Burnet.

"On this occasion a protest, with reasons, was admitted for the first time, signed by the duke of Monmouth, and 18 other Lords, which, by the means of the Press, for which it was originally calculated, became the subject matter of political controversy all over the kingdom." Ralph.

such counsels from the Lords, that I believe hereafter the king will have no cause to thank the Lords, or those that were the originals, for involving him in the fatality of them. They will make the traiterous libel of Fitzharris the copy of their counsels. Dangerfield was a man reputed most infamous, yet if he would discover what he knew of that sham Presbyterian Plot, nothing of mercy was too big for him: but Fitzharris, a man of no infamy, must be hurried away from Newgate to the Tower, when he was disposed to confess the whole Plot to those gentlemen who examined him. Are you so lost, that there is no mercy left for the Protestant religion? If the terror of his condition incline him to discover all, must he now be taken out of our hands? We hear of other things too; that the French ambassador had a hand in the contrivance of this Plot with him, and can that be enquired into by a common jury, who are to concern themselves in no more, than whether Fitzharris be guilty, or not guilty? I must confess, that with the carriage of this, I have enlarged my suspicion, and I must always suspect unusual ways. We see that the worst of mankind has been pardoned, with all his villainies about him, upon an ingenuous confession; but what provocation has there been from Fitzharris, to be thus hurried away to trial at common-law in a disposition to confess all, and so be out of the reach of pardon, should that disposition continue upon him? But I am persuaded something depends upon this man, as well as upon the bill we ordered to day. When I saw the temper of the House, when Jenkins refused your Message [See p. 228.] (and there was something in that too) that the House would make no breach upon it and passed it over with great temper, that now we must lay down all prosecution of the Plot, and that the Protestant religion shall have no mercy! Fitzharris may merit by his confession where he may reasonably hope for the same intercession for his pardon, that much blacker offenders have obtained; but if his breath be stopped, I am sorry the people should have occasion to say, "If it were not for the Lords, the Protestant religion might have been saved." Therefore I move, that, in the wording of your vote, you will not only say, "That the Lords rejection of this impeachment is not only a subverting the constitution of parliament," but "of the Protestant religion" also; and I hope you will do this with the same calmness of mind that every man does wish that loves his religion.

Serjeant *Maynard*. This damnable popish plot is still on foot in England, and I am sure in Ireland too; and what arts and crafts have been used to hide this plot! It began with the murder of a magistrate [Godfrey,] then with perjury and false subornation, and this of Fitzharris is a second part of that. We sent up an Impeachment to the Lords against Fitzharris, and told the Lords, "That, in due time, we would bring up articles against him," and the Lords refuse to try him. In effect, they make us no parliament—If we are the prosecutors, and they will not hear our accusation, their own lives, as well as ours, are concerned. This is a strange way of proceeding; the same day we impeach Fitzharris, they vote we must not prosecute him: now, when all is at stake, we must not prosecute. If this be so, Holland must submit and let the French run over all. This is a strange breach of privilege of parliament, and tends to the danger of the king's person, and the destruction of the Protestant Religion. and I hope you will vote it so.

Sir *Thomas Player*. I shall make you a motion, but first I shall say we have had a considerable discovery of the former plot I call it the old plot, but this of Fitzharris has been new upon us. This is still a confirmation of the intention of murdering the king, the duke consenting to destroy his own brother and our king—I have often heard it whispered, that the design of Madame's voyage to Dover was to promote the popish religion, but it is plain that Justice Godfrey was murdered by the papists, and that the army mustered on Blackheath was raised with intentions to destroy the Protestants in Holland, and to awe the City of London—When Fitzharris gave intimation, that he would discover what he knew of this plot, and that two or three honourable members of this House had examined him, this man was fetched the next day to Whitehall, and from thence hurried away to the Tower, and so we were deprived of all farther hopes of discovery from him. We now revive the information from an Impeachment, and now this man must not be brought hither to be tried: He must be tried in an inferior court, that his mouth may be stopped, and put out of capacity to discover. This being the case, I move, "That if any judges, justices of the peace, juries, &c. shall proceed upon the trial of this man, that you will vote them guilty of his murder, and betrayers of the rights of the Commons of England."

Hereupon the House came to the following Resolutions:

Resolved, "That it is the undoubted right of the Commons, in parliament assembled, to impeach before the Lords in Parliament, any peer or Commoner for treason* or any other crime

* "Mr. Justice Blackstone, 4 Commentaries c. 19, lays it down, "That a commoner cannot be impeached before the Lords for any capital offence but only for High Misdemeanors:" And to prove this position he cites the case of Simon de Beresford, from Rot. Parl 4 Ed. 3. No. 2, and 6.—This case is as follows: "When in 4th Ed. 3, the king demanded the earls, barons and peers, to give judgment against Simon de Beresford, who had been a notorious accomplice in the treasons of Roger earl of Mortimer, they came before the king in parliament, and said all with one voice, that the said Simon was not their peer; and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect

or misdemeanor; and that the refusal of the Lords to proceed in parliament upon such Impeachment is a denial of justice, and a violation of the constitution of parliaments.

Resolved, "That, in the case of Edward Fitzharris, who, by the Commons, has been impeached for High-Treason, before the Lords, with a declaration, "That in convenient time

to the notoriety and heinousness of his crimes, to receive the charge and to give judgment against him, the following protest and proviso was entered on the parliament roll. 'And 'it is assented and accorded by our lord the 'king, and all the great men, in full parliament, 'that albeit the peers, as judges of the parlia-'ment, have taken upon them, in the presence 'of our lord the king, to make and render the 'said judgment; yet the peers, who now are 'or shall be in time to come, be not bound or 'charged to render judgment upon others than 'peers; nor that the peers of the land have 'power to do this, but thereof ought ever to be 'discharged and acquitted: and that the afore-'said judgment now rendered be not drawn to 'example or consequence in time to come, 'whereby the said peers may be charged here-'after to judge others than their peers, contrary 'to the laws of the land, if the like case happen, 'which God forbid.'—Rot. Parl. vol. 2, p. 53, 54. See this case, in the original language, with the opinion of the judges thereupon, in the Appendix to this vol. No. 10.—How far the conclusion drawn by sir W. Blackstone from this case, which was a prosecution at the suit of the king, has been admitted to be law, with regard to prosecutions, brought before the Lords by impeachment at the suit of the Commons, will appear from the great number of instances, which occur in the following part of this volume, (subsequent in point of time to this of Simon de Beresford in the year 1330) where commoners have been impeached before the Lords for capital offences, and in which the Lords have not made this objection. Lord Hollis in his work, concerning the judicature of the House of Peers, published in 1669, speaking of the case of Simon de Beresford, gives it as his opinion, 'That the protestation of the Lords, not to sit in judgment upon any but peers, was a mere order of the House of Lords, alterable at pleasure.'—On the 2nd of July, 1689, (See the Case of sir Adam Blair and others in this Collection) a doubt arose in the House of Lords, Whether this record of the 4th of Ed. 3, was a statute? And the question being put to the judges, they answer 'As it appears to them by the aforesaid copy, they believe it is a statute; but, if they saw the roll itself, they could be more positive therein.' It was then proposed to ask the judges, Whether the Lords, by this statute, be barred from trying a commoner upon an impeachment of the House of Commons? But the previous question being put, it passed in the negative.

"In the 1st vol. of the Lords Debates (See Appendix to 4 Cobb. Parl. Hist. No. xv. p. clxiii.) is a pamphlet written by sir William Jones, and published in 1681, in which this question is discussed, 'Whether, by the law and custom of parliament, the Lords ought to try commoners impeached by the Commons in parliament?"

"When Simon de Beresford is charged by the king in aiding and advising with the said earl Mortimer in the said treasons and felonies, the said earls, barons, and peers, came before the king in parliament, and said, 'That the said Simon was not their peer, and therefore they were not bound to judge him, as a peer of the land.' —This accusation against Simon de Beresford was at the king's suit. Rot. Parl. vol. 3, p. 53, No. 4.—Notwithstanding the declaration of the Lords, they afterwards condemn the said Simon de Beresford and others, not peers, to be executed for the said treasons and felonies—But immediately declare, 'That though they had from this time proceeded to give judgment upon those that were no peers, hereafter these judgments should not be drawn into example or consequence, so that they should be called upon to judge others than their peers, contrary to the law of the land.' Rot. Parl. vol. 2, p. 54, No. 6—In the 29th ch. of Magna Charta, 9th Hen. 3, it is said, 'Nec super eum ibimus, 'nec mittemus, nisi per legale judicium parium 'suorum, vel per legem terræ.' That is, says sir Edward Coke, 2nd Inst. p. 46. 'No man shall be condemned at the king's suit, either before the king in his bench, where the pleas are, *Coram Rege*, (and so are the words, 'nec super eum ibimus,' to be understood) nor before any other commissioner or judge whatever, (and so are the words 'nec super eum mittemus,' to be understood).' And again, 2 Inst. p. 48, in commenting upon the words, 'Per judicium 'parium suorum,' sir Edward Coke says, 'Note, as is before said, That this is to be understood of the king's suit; for if an appeal be brought against a Lord of parliament, which is the suit of the party, there he shall be tried, not by his peers, but by an ordinary jury: For that this statute extendeth only to the king's suit.' So in the lord Dacre's case, in the 26th of Henry 8th, on a question, Whether he might wave his trial by his peers, and be tried by the country, the judges all agreed, that he could not. 'For the statute of Magna Charta is in the negative, 'Nec super eum ibimus, nisi 'per legale judicium parium suorum,' that is at the king's suit upon an indictment.' Kelyng's Rep. p. 56. And, in the tract cited before in the note, p. 54, sir William Jones says, 'It is evident from the roll itself, in the case of Simon de Beresford, and the other records, that the Lords did judge those commoners contrary to the law of the land, that is, at the instance of the king; so that judgment was given at the king's suit, in a way not warranted by the law and custom of parliament, or any other law of the kingdom: but there is not a word in that record, which imports a restriction of that lawful jurisdiction, which our constitu-

they would bring up the Articles against him;" for the Lords to resolve, "That the said Edward Fitzharris should be proceeded with according to the course of common-law," and not by way of Impeachment in parliament, at this time, is a denial of Justice, and a violation of the constitution of parliaments, and an obstruction to the farther discovery of the Popish Plot,

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tion placet in the Lords to try commoners, when their cases should come before them lawfully, that is, at the suit of the Commons by impeachment." 4 Hats. Prec. pp. 54, 67.

Mr. Hatsell, in support of his doctrine, that commoners may be impeached of High-treason before the House of Lords, cites the case of Chief Justice Scroggs, as to which he notices that the Chief Justice did not as a commoner plead to the Lords' jurisdiction, and that though several members expressed their doubts how far the Commons ought to impeach for High-Treason a person as guilty of crimes which are not declared to be such by the statute of treasons, 25 Edward 3, no person doubted but that if the crime charged did amount to High Treason, sir William Scroggs a commoner was an object of impeachment though for a capital offence. He also cites the case of the earl of Tyrone, ordered to be impeached Jan. the 6th, 1681 (See 4 Cobb. Parl. Hist. 1278), and he mentions that sir W. Jones, in the debate, says,

"There is no question, but a peer of Ireland is but a commoner in England; and no question but he may be proceeded against by impeachment, as well as by common trial. You cannot mistrust your managers, nor a common jury; but the accusation of lord Tyrone arising in parliament, it is properest he be tried in parliament." Mr. Boscawen says, 'No commoner can be tried by the Lords, but by impeachment of the Commons.' It appears that sir J. Trevor, sir Francis Winnington, and serjeant Maynard, concurred in this proceeding." 4 Hats. Prec. p. 110.

So judge Berkley was impeached for High-Treason, see his Case, vol. 3, p. 1283, of this Collection, see too the Case of Jermyn, Piercy, and others, mentioned 4 Hatsell 134, where a reference is made to lord Clarendon's account of their plot and also to the queen's representation of it. There is likewise an account of it in May's History. Mr. Hatsell also cites the Case of Daniel O'Neile impeached of High-Treason in the year 1641, and he quotes from sir William Jones's pamphlet, "If this (that the Lords could not try a commoner upon an impeachment for High-Treason) was so, it would be in the power of the king, by making only commoners ministers of state, to subvert the government by their contrivances when they pleased. Their greatness would keep them out of the reach of ordinary courts of justice; or their treasons might not perhaps be within the statute, but such as fall under the cognizance of no other court, than the parliament; and if the people might not of right demand justice there, they might, without fear of punishment, act the most destructive villainies against the kingdom; it would also follow, that the same fact, which in a peer is treason, and punishable with death, in a commoner is no crime, and subject to no punishment." 4 Hats. Prec. 200.

"Sir Matthew Hale, in the Jurisdiction of the House of Lords, ch. 16, p. 92, says, 'Some have thought this declaration of the 4th of Ed. 3, being done thus solemnly, in 'pleno parliamento,' was a statute or act of parliament. But that seems not so clear. It was certainly as solemn a declaration by the Lords as could be made, less than an act of parliament; and it is as high an evidence against the jurisdiction of the Lords, to try or judge a commoner, in a criminal cause, as can possibly be thought of: (1.) Because done by way of declaration to be against law; and, (2.) Because it is a declaration by the Lords in disaffirmance of their own jurisdiction; which commonly judges chuse rather to amplify, if it may be, than to abridge." 4 Hatsell, Prec. p. 285.

For more precedents see lord Rochester's Report in the Case of sir Adam Blair and others, in the year 1689, in this Collection.

Roger North has a passage on this subject very well worth consideration:

"At the Oxford parliament, when the black-rod knocked at the door, sir Wm. Jones was in the midst of a speech to inflame the House upon the subject of Fitzharris; proving that the House might impeach commoners, and answering the objections from Magna Charta, viz. ——'per judicium parium,' he was coming to the 'Lex Terræ,' and was interrupted by the dissolution. I could have been content it had staid a little longer, that his whole argument might come to us; because the strength of the objection, which he was a going to answer, lies in this, viz. that *Lex Terræ* is not contrary to, nor doth repeal or restrain the 'Judicium 'parium,' but both are of absolute extent, the former as to fact, and the other as to the law, when the fact is stated. The former is Guilty or Not Guilty, that is 'per ju-'dicium parium; but there may be other pleas, as misnomer, demurrers, exceptions, pardons, and confessions, upon which the issue is wholly to the court; as also the punishment after verdict of the peers, and all that refers to the *Lex Terræ*. So as, by that distinction in Magna Charta, the offices of the jury, and of the court, one for fact, and the other for law, are kept distinct. And another objection was to be answered, which is that, by an impeachment and judgment of the Lords, a commoner is deprived of his legal challenges." Exam. 508.

The differences of opinion which have prevailed respecting this matter strongly illustrate the unsettledness of the 'Lex et Consuetudo 'Parliamenti,' (See the Case of Shirley and Fagg, vol. 6. p. 1121 of this Collection. See too Mr. Hatsell's uncertainty as to whether the

and of great danger to his majesty's person, and the Protestant Religion."

Resolved, "That for any inferior court to proceed against Edward Fitzharris, or any

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Commons Journals are public records, Precedents, vol. 3, c. 4.

Sir John Reresby, after noticing that the impeachment of Fitzharris was not done to destroy, but to serve him in opposition to the court, says,

"The Lords refused to receive Fitzharris's impeachment; observing that, he being already indicted at common law, and in a way of trial by his peers, as Magna Charta directed, they could not perceive how their House could take notice of his offence. The Commons hereupon grew angry with the Lords, and voted that such their lordships proceeding was a delay of justice, a breach of the privilege of parliament, and a bar to the further discovery of the Popish Plot; and that for any inferior court to proceed therein, while an impeachment was depending, was an high breach of the privilege of parliament. The heats grew, in short, to an excess in both Houses, both as to this, and the Bill of Exclusion. The Commons, however, were of opinion, that the king would give way to them, he having already made such advances towards their measures, and being in such thorough distress for money, besides that many who were near the king, urged them to persist still in their endeavours.—I was at the king's couchée, as I was three times in one week; his discourse ran generally upon the impossibility of any thing like the Popish Plot, and the contradictions of which it was made up: that he intended Fitzharris should come upon his trial immediately: that in all affairs, relating to himself, the laws should have their regular course; and that, whatever his own private opinion might be, he would govern by them, and by them only.—Fitzharris was arraigned at the King's-bench bar, where by his counsel he refused to plead; because he stood in parliament impeached for the crimes he there was to be indicted for; though the impeachment specified no particular treasons, which the indictment did. The counsel for the king said, his plea was evasive, it not appearing whether the same crimes were intended by the one, as by the other.

"This point was argued at the bar, but the case being quite extraordinary, both in its own nature, as well as because of the severe vote of the Commons at Oxford, the judges took time to consider of it, but two days afterwards pronounced judgment for the king; and in the end, Fitzharris received sentence of death, for his treason, and was executed accordingly."

Mr. Hatsell observes, That the period at which the instance happened of the Impeachment of Fitzharris, and the circumstances attending it, render any arguments or conclusions that may be drawn from that proceeding of very little weight.

other person lying under an Impeachment in parliament for the same crimes for which he or they stand impeached, is an high breach of the privilege of parliament."

Immediately after these proceedings, namely, on Monday the 28th of March, the parliament was dissolved.

This last parliament of king Charles the Second, he dissolved at Oxford, on March 28th, 1681. [See the particulars of the dissolution in Roger North's Examen, p. 104]. After which event he governed without a parliament, [See a note to the case of Richard Thompson, *supra*, p. 7.] during the remaining four years of his reign "with a sort of legal tyranny, or abuse of the legal powers with which the constitution had invested him, employing his court of King's-bench, (as his father had employed the court of Star-chamber) to persecute his subjects under the forms of law, by taking away the Charter of the city of London, and procuring the surrenders of the Charters of several other corporations that sent members to parliament, and thereby making the elections of members of parliament less free and popular than before; and by over-severe punishments, enormous fines, and verdicts for excessive damages, given in civil actions by corrupt juries, packed by the sheriffs for the purpose." See Mr. Baron Maseres's Preface to the Debates in the year 1680, on the Exclusion Bill, edition of 1807. Of this period Mr. Fox says, "The whole history of the remaining part of the reign exhibits an uninterrupted series of attacks upon the liberty, property, and lives of his subjects. To give an account of all the oppression of this period, would be to enumerate every arrest, every trial, every sentence, that took place in questions between the crown and the subjects."

And Blackstone speaks thus: "The point of time at which I would choose to fix the theoretical perfection of our public law is the year 1679, after the Habeas Corpus act was passed; and that for licensing the press had expired: though the years which immediately followed it were times of great practical oppression."—"It is far from my intention to palliate or defend many very iniquitous proceedings, contrary to all law, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestable is this; that by the law, as it then stood, (notwithstanding some invidious, nay dangerous branches of the prerogative have since been lopped off, and the rest more clearly defined) the people had as large a portion of real liberty, as is consistent with a state of society; and sufficient power, residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign. For when king Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could, and did, re-

sist him; and, in consequence of such resistance, obliged him to quit his enterprize and his throne together." B. Comm. B. 4, c. 33, s. 5.

Upon this Mr. Fox exclaims:

"What a field for meditation does this short observation, from such a man, furnish! What reflections does it not suggest to a thinking mind, upon the inefficacy of human laws, and the imperfections of human constitutions! We are called from the contemplation of the progress of our constitution, and our attention fixed with the most minute accuracy to a particular point, when it is said to have risen to its utmost perfection. Here we are then at the best moment of the best constitution that ever human wisdom framed. What follows? A time of oppression and misery, not arising from external or accidental causes, such as war, pestilence, or famine, nor even from any such alteration of the laws as might be supposed to impair this boasted perfection, but from a corrupt and wicked administration, which all the so much admired checks of the constitution were not able to prevent. How vain then, how idle, how presumptuous, is the opinion, that laws can do every thing! and how weak and pernicious the maxim founded upon it, that measures, not men, are to be attended to."—Fox's Hist. of the Reign of James 2, p. 21.

Proceedings against EDWARD FITZHARRIS in the King's-Bench, upon his Arraignment and Plea* to an Indictment for High Treason: 33 CHARLES II. A. D. 1681.

ON Wednesday April 27, 1681, the Grand-juries for the county of Middlesex were sworn; and after the Charge delivered by Mr. Justice Jones, his majesty's Attorney-General (sir Robert Sawyer) desired, That some of that Grand-jury which served for the hundreds of Edmonton and Gore (that for Ossulston hundred being immediately adjourned for a week) might

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In Macpherson's "Life of King James," written by himself, (see Introduction to lord Clarendon's Case, vol. 6, p. 291, of this Collection), is the following passage: "April 27, 1681, Fitzharris's indictment before the Grand-Jury to-morrow. The king was confident it would be found; and though all the practices imaginable were used to pack a petty jury, yet the proofs were so clear against him, that they would hardly find twelve men so wicked, as to perjure themselves so impudently, against law and justice in the face of the world."

"A few days before the king went to Oxford, Fitzharris, an Irish Papist, was taken up for framing a malicious and treasonable libel against the king and his whole family. He had met with one Everard, who pretended to make discoveries, and as was thought had mixed a great deal of falsehood with some truth: but he held himself in general terms, and did not descend to so many particulars as the witnesses had done. Fitzharris and he had been acquainted in France: so on that confidence he shewed him his libel: and he made an appointment to come to Everard's chamber, who thought he intended to trepan him, and so had placed witnesses to overhear all that past. Fitzharris left the libel with him, all writ in his own hand: Everard went with the paper and with his witnesses and informed against Fitzharris, who upon that was committed. But seeing the proof against him was like to be full, he said, the libel was drawn by Everard, and only copied by himself: but he had no sort of proof to support this. Cornish the sheriff going to see him, he desired he would bring him a justice of peace; for he could make a great discovery of the plot, far beyond all that was yet known. Cornish in the simplicity of his heart went and acquainted the king with this: for which he was much blamed; for it was said, by this means that discovery might have been stopt: but his going first with it to the court proved afterwards a great happiness both to himself and to many others. The secretaries and some privy counsellors were upon that sent to examine Fitzharris; to whom he gave a long relation of a practice to kill the king, in which the duke was concerned, with many other particulars which need not be mentioned; for it was all a fiction. The secretaries came to him a second time to examine him farther: he boldly stood to all he had said: and he desired that some justices of the city might be brought to him. So Clayton and Treby went to him: and he made the same pretended discovery to them over again; and insinuated, that he was glad it was now in safe hands that would not stifle it. The king was highly offended with this, since it plainly shewed a distrust of his ministers: and so Fitzharris was removed to the Tower; which the court resolved to make the prison for all offenders, till there should be sheriffs chosen more at the king's devotion. Yet the deposition made to Clayton and Treby was in all points the same that he had made to the secretaries: so that there was no colour for the pretence afterward put on this, as if they had practised on him.

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said, he was resolved to maintain the succession of the crown in the right line; but for quieting his people's fears he was willing to put the administration of the government into Protestant hands. This was explained by Ernley and Littleton to be meant of a prince regent, with whom the regal prerogative should be lodged during the duke's life. Jones and Littleton managed the debate on the grounds formerly mentioned: but in the end the proposition was rejected; and they resolved to go again to the Bill of Exclusion, to the great joy of the duke's party, who declared themselves more against this than against the exclusion itself. The Commons resolved likewise to take the management of Fitzharris's affair out of the hands of the court: so they carried to the Lords bar an impeachment against him, which was rejected by the Lords upon a pretence with which lord Nottingham furnished them. It was this: Edward the third had got some commoners to be condemned by the Lords; of which when the House of Commons complained, an order was made, that no such thing should be done for the future. Now that related only to proceedings at the king's suit: but it could not be meant, that an impeachment from the Commons did not lie against a commoner. Judges, Secretaries of State, and the Lord Keeper were often commoners: so if this was good law, here was a certain method offered to the court, to be troubled no more with impeachments, by employing only commoners. In short, the peers saw the design of this impeachment, and were resolved not to receive it: and so made use of this colour to reject it. Upon that the Commons past a vote, that justice was denied them by the Lords: and they also voted, that all those who concurred in any sort in trying Fitzharris in any other court were betrayers of the liberties of their country.

"Fitzharris's trial came on in Easter Term: Scroggs was turned out, and Pemberton was made chief justice. His rise was so particular, that it is worth the being remembered: in his youth he mixed with such lewd company that he quickly spent all he had; and ran so deep in debt that he was cast into a jail, where he lay many years: but he followed his studies so close in the jail, that he became one of the ablest men of his profession. He was not wholly for the court: he had been a judge before, and was turned out by Scroggs's means: and now he was raised again, and was afterwards made chief justice of the other bench: but not being compliant enough, he was turned out a second time, when the court would be served by none but by men of a thorough paced obsequiousness. Fitzharris pleaded the impeachment in parliament: but since the Lords had thrown that out it was over-ruled.

"Fitzharris was tried next: and the proof was so full that he was cast. He moved in court that I might be ordered to come to him, upon what reason I could never imagine: a rule was made that I might speak to him in the presence of the lieutenant of the Tower. I went to him, and pressed him vehemently to tell the truth, and not to deceive himself with false hopes. I charged him with the improbabilities of his discovery; and laid home to him the sin of perjury, chiefly in matters of blood, so fully, that the lieutenant of the Tower made a very just report of it to the king, as the king himself told me afterwards. When he saw there was no hope, he said the lord Howard was the author of the libel. Howard was so ill thought of, that, it being known that there was a familiarity between Fitzharris and him, it was apprehended from the beginning that he was concerned in it. I had seen him in lord Howard's company, and had told him how indecent it was to have such a man about him: he said he was in want, and was as honest as his religion would suffer him to be. I found out afterwards, that he was a spy of the lady Portsmouth's: and that he had carried lord Howard to her: and, as lord Howard himself told me, she brought the king to talk with him twice or thrice. The king, as he said, entered into a particular scheme with him of the new frame of his ministry in case of an agreement, which seemed to him to be very near. As soon as I saw the libel I was satisfied that lord Howard was not concerned in it: it was so ill drawn, and so little disguised in the treasonable part, that none but a man of the lowest form could be capable of making it. The report of lord Howard's being charged with this was over the whole town a day before any warrant was sent out against him; which made it appear, that the court had a mind to give him time to go out of the way. He came to me, and solemnly vowed he was not at all concerned in that matter: so I advised him not to stir from home. He was committed that night. I had no liking to the man's temper: yet he insinuated himself so into me, that without being rude to him it was not possible to avoid him. He was a man of a pleasant conversation: but he railed so indecently both at the king and the clergy, that I was very uneasy in his company: yet now, during his imprisonment, I did him all the service I could. But Algernoon Sidney took his concerns and his family so to heart, and managed every thing relating to him with that zeal, and that care, that none but a monster of ingratitude could have made him the return that he did afterwards. When the bill against lord Howard was brought to the Grand-Jury, Fitzharris's wife and maid were the two witnesses against him: but they did so evidently forswear themselves, that the Attorney-General withdrew it. Lord Howard lay in the Tower till the Michaelmas term; and came out by the Habeas Corpus. I went

sist him; and, in consequence of such resistance, obliged him to quit his enterprize and his throne together." B. Comm. B. 4, c. ', s. 5.

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be present at the swearing of the witnesses upon an Indictment for High Treason, to be preferred against Edward Fitzharris, prisoner in the Tower of London, which was granted; but the Grand-jury being under some scruples against receiving of the bill, desired the opinion

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said, he was resolved to maintain the succession of the crown in the right line: but for quieting his people's fears he was willing to put the administration of the government into Protestant hands. This was explained by Ernley and Littleton to be meant of a prince regent, with whom the regal prerogative should be lodged during the duke's life. Jones and Littleton managed the debate on the grounds formerly mentioned: but in the end the proposition was rejected; and they resolved to go again to the Bill of Exclusion, to the great joy of the duke's party, who declared themselves more against this than against the exclusion itself. The Commons resolved likewise to take the management of Fitzharris's affair out of the hands of the court: so they carried to the Lords bar an impeachment against him, which was rejected by the Lords upon a pretence with which lord Nottingham furnished them. It was this: Edward the third had got some commoners to be condemned by the Lords; of which when the House of Commons complained, an order was made, that no such thing should be done for the future. Now that related only to proceedings at the king's suit: but it could not be meant, that an impeachment from the Commons did not lie against a commoner. Judges, Secretaries of State, and the Lord Keeper were often commoners: so if this was good law, here was a certain method offered to the court, to be troubled no more with impeachments, by employing only commoners. In short, the peers saw the design of this impeachment, and were resolved not to receive it: and so made use of this colour to reject it. Upon that the Commons past a vote, that justice was denied them by the Lords: and they also voted, that all those who concurred in any sort in trying Fitzharris in any other court were betrayers of the liberties of their country.

"Fitzharris's trial came on in Easter Term: Scroggs was turned out, and Pemberton was made chief justice. His rise was so particular, that it is worth the being remembered: in his youth he mixed with such lewd company that he quickly spent all he had; and ran so deep in debt that he was cast into a jail, where he lay many years: but he followed his studies so close in the jail, that he became one of the ablest men of his profession. He was not wholly for the court: he had been a judge before, and was turned out by Scroggs's means: and now he was raised again, and was afterwards made chief justice of the other bench: but not being compliant enough, he was turned out a second time, when the court would be served by none but by men of a thorough paced obsequiousness. Fitzharris pleaded the impeachment in parliament: but since the Lords had thrown that out it was over-ruled.

"Fitzharris was tried next: and the proof was so full that he was cast. He moved in court that I might be ordered to come to him, upon what reason I could never imagine: a rule was made that I might speak to him in the presence of the lieutenant of the Tower. I went to him, and pressed him vehemently to tell the truth, and not to deceive himself with false hopes. I charged him with the improbabilities of his discovery; and laid home to him the sin of perjury, chiefly in matters of blood, so fully, that the lieutenant of the Tower made a very just report of it to the king, as the king himself told me afterwards. When he saw there was no hope, he said the lord Howard was the author of the libel. Howard was so ill thought of, that, it being known that there was a familiarity between Fitzharris and him, it was apprehended from the beginning that he was concerned in it. I had seen him in lord Howard's company, and had told him how indecent it was to have such a man about him: he said he was in want, and was as honest as his religion would suffer him to be. I found out afterwards, that he was a spy of the lady Portsmouth's: and that he had carried lord Howard to her: and, as lord Howard himself told me, she brought the king to talk with him twice or thrice. The king, as he said, entered into a particular scheme with him of the new frame of his ministry in case of an agreement, which seemed to him to be very near. As soon as I saw the libel I was satisfied that lord Howard was not concerned in it: it was so ill drawn, and so little disguised in the treasonable part, that none but a man of the lowest form could be capable of making it. The report of lord Howard's being charged with this was over the whole town a day before any warrant was sent out against him; which made it appear, that the court had a mind to give him time to go out of the way. He came to me, and solemnly vowed he was not at all concerned in that matter: so I advised him not to stir from home. He was committed that night: I had no liking to the man's temper: yet he insinuated himself so into me, that without being rude to him it was not possible to avoid him. He was a man of a pleasant conversation: but he railed so indecently both at the king and the clergy, that I was very uneasy in his company: yet now, during his imprisonment, I did him all the service I could. But Algernoon Sidney took his concerns and his family so to heart, and managed every thing relating to him with that zeal, and that care, that none but a monster of ingratitude could have made him the return that he did afterwards. When the bill against lord Howard was brought to the Grand-Jury, Fitzharris's wife and maid were the two witnesses against him: but they did so evidently forswear themselves, that the Attorney-General withdrew it. Lord Howard lay in the Tower till the Michaelmas term; and came out by the Habeas Corpus. I went

of the court therein; which Mr. Justice Jones alone thought not fit to give, but ordered them to attend next day when the court was full.

And accordingly on Thursday, April 28, the said grand jury came to the bar, and Mr. Michael Godfrey (brother to sir Edmundbury Godfrey), who was their foreman, addressed himself thus to the Court:

Mr. *Godfrey.* My lord, I have an humble request to make to the Court on the behalf of myself, and another on the behalf of the grand jury for the county of Middlesex, of which I am foreman. This gentleman, Mr. Ward, I did beg of when I was sworn, to chuse another man that was fitter for the service, as being more experienced, but he would not; and I beg your pardon, if I should commit any failure for want of experience. But I desire, before we proceed upon this Indictment before us, that this same Fitzharris may be examined about my brother's death, of which I suppose he may know much, because in the printed Narrative he does speak of one De Puy, who was a very active man about that murder; and how ill a man soever he hath been, we do hope he hath so much truth in him, as to tell what he knows of that horrid murder. Therefore I pray your lordship, that you would grant an Habeas Corpus to fetch him before your lordship to be examined upon that point before we do proceed; that is all as to myself. My lord, as to the Jury, we do all of us humbly present this Paper, and desire it may be read in Court.

L. C. Justice. (Sir Francis Pemberton.) What is it? a petition?

Cl. of Crown. It is not subscribed by any body.

Jurors. But we do all own it, my lord.

L. C. J. What is it? Read it.

Cl. of Crown. "We Michael Godfrey, &c. being sworn to serve in the grand inquest for the hundreds of Edmonton and Gore, in this county of Middlesex, &c. and being yesterday sent for into the Court of King's-bench, by a messenger from the said Court, to be present at the swearing of several witnesses produced on the behalf of our sovereign lord the king, to prove the truth of some Indictments, then in the hands of the Clerk of the Crown; and observing, that sir William Waller, Smith, and others, were sworn to give evidence against Edward Fitzharris, now prisoner in the Tower, who in the late parliament at Oxford, was impeached by the honourable House of Commons, in the name of themselves, and of all the Commons of England; of which, we the said Michael Godfrey, &c. are part, and as jurymen, be his judges also.—We therefore humbly desire the opinion of this honourable Court, whether it be lawful and safe for us, the said Godfrey, &c. (in case an Indictment of the said Fitzharris should be brought before us) to proceed to examine any witnesses in reference to the said Indictment, or any way to meddle with it, or proceed upon it, notwithstanding the said Impeachment, and Votes pursuant to it by the said honourable House of Commons? And this being a great point in law, and of so great a consequence for us to undertake in a point of right not settled by conference, and remaining yet undetermined in the high Court of Parliament.—We therefore humbly desire the opinion of this Court upon the whole matter, Whether legally and safely we may proceed to find the indictment of Fitzharris, or no."

Mr. *Godfrey.* My lord, we do humbly desire the resolution of the Court in this matter, as a thing of weight; for we are between two millstones, as we apprehend it, and shall be ground between them.

L. C. J. Look you, gentlemen of the jury, we do not apprehend so.

Attorney General. (Sir Robert Sawyer.) My lord, be pleased to spare me one word: this Indictment was tendered to this grand jury yesterday, and this gentleman was against accepting the bill, till he had your judgment, and so were two more; but for all that, the body of them carried it, (all but these three) to hear the Evidence: whereupon Mr. Solicitor and myself did go on upon the evidence, and spent some time in opening it to them, and it was all given to them; and truly the gentlemen did seem to be abundantly satisfied what an horrid villainy it was, and we did think they would have found the bill: but it seems they have prevailed to put these scruples into the others heads.

L. C. J. Look you, Mr. Attorney, we will now enquire into that. Gentlemen of the jury, you seem dissatisfied in this matter, and desire the opinion of the Court in it, whether you

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no more to Fitzharris: but Hawkins the minister of the Tower took him into his management; and prevailed with him not only to deny all his former discovery, but to lay it on Clayton, Treby, and the sheriffs, as a subornation of theirs, though it was evident that was impossible to be true. Yet at the same time he writ letters to his wife, who was not then admitted to him, which I saw and read, in which he told her, how he was practised upon with the hopes of life. He charged her to swear falsely against none: one of these was writ that very morning in which he suffered: and yet before he was led out he signed a new paper containing the former charge of subornation, and put it in Hawkins's hands. And at Tyburn he referred all he had to say to that paper, which was immediately published: but the falsehood of it was so very notorious, that it shewed what a sort of man Hawkins was: yet he was soon after rewarded for this with the deanry of Chichester. But when the court heard what letters Fitzharris had writ to his wife they were confounded; and all further discourse about him was stifled. But the court practised on her by the promise of a pension so far, that she delivered up her husband's letters to them. But so many had seen them before that, that this base practice turned much to the reproach of all their proceedings." 1 Burnet, 497, 502, 503.

may lawfully proceed to find this indictment or not? We did hear yesterday of some scruples you made to my brother Jones when you were sworn, and he sat in Court to give you the charge, which he thought not fit then to answer, but left it till to-day. Truly we would have all things fairly and clearly done, that we may understand how we go all along in this matter. Your scruple is this; Here was, you say, an Impeachment offered against Fitzharris by the Commons to the Lords, and that Impeachment was of high-treason, which was not received, and thereupon there was a Vote of the House of Commons that he should not be tried by any other inferior Court: you desire now to know whether you may enquire concerning this treason, notwithstanding these things that have passed thus?

Mr. *Godfrey*. Yes, my lord.

L. C. J. We are very ready and willing to satisfy any of the king's subjects in any matters in judgment before us, that they may see there shall be nothing but fair proceedings in all cases: we do tell you it is our opinion, that notwithstanding any thing of this matter that you suggest in the case before you, it is fit for you to enquire upon the Indictment; and you are bound to enquire by virtue of your oaths, if an indictment be exhibited to you: you cannot, nor ought to take any notice of any such votes of the House of Commons afterwards, if any such there were, for they will not excuse you (who are sworn to enquire of the matters given you in charge), in case you do not your duty; and therefore if you have evidence enough given you, to satisfy you that the Indictment is true, you are to find it. And likewise we ought to proceed according to justice, in cases that are brought before us. Neither you nor we can take notice of these things, in case there be any such as you suggest; nor will they excuse us before God or man for the breach of our oaths, if we should do the contrary. And this we declare to you, not only as our opinions, but as the opinion of all the judges of England. For when we did hear there was a scruple made by you the gentlemen of the jury, because we would make the way fair and clear, all the judges did assemble to debate the matter for your satisfaction; not that we were dissatisfied at all in it ourselves, but that it might appear to you and the kingdom, that there is nothing but fairness used in this case, as in all others; and all the judges, *nem. con.* were all of opinion, that you are not to take notice of any of these things; but if the Indictment be exhibited, and you have evidence enough, you ought to find it. This we have endeavoured for your satisfaction, to make your way clear.

Jurors. We humbly thank your lordship.

[Then the jury went away, and afterwards found the bill.]

On Friday, April 29, 1681, sir Tho. Stringer, the king's serjeant at law, moved for an Habeas Corpus, to bring up the body of Edward Fitzharris, to be examined by the Court about the death of sir Edmundbury Godfrey. The Court granted the writ, and said, he should be arraigned upon the indictment against him, and then they would examine him.

Saturday, April 30, Edward Fitzharris was brought with a strong guard to the King's-bench Court.

Serj. *Stringer*. Your lordship hath been pleased to grant an Habeas Corpus for Fitzharris, and he is brought up, and attends here.

L. C. J. We will send for Mr. Attorney, brother.

Serj. *Jefferies*. I beg this of your lordship, that you will be pleased to stay a little; I know not how he comes to be brought up here; Mr. Attorney, it seems, says, he knows nothing of it.

L. C. J. Well, well; send for Mr. Attorney, brother, and hear what he says.

Which being done, and Mr. Attorney come in, the prisoner was brought to the bar.

Serj. *Stringer*. My lord, I would humbly move he may be brought into Court to be examined before he be arraigned.

L. C. J. Why so?

Serj. *Stringer*. My lord, we would have him examined concerning sir Edmundbury Godfrey's death.

L. C. J. What matters it? That may be done after as well as before.

Cl. of Cr. Edward Fitzharris, hold up thy hand.

Fitzharris. My lord, I have been a close prisoner these ten weeks, and have not had the liberty to see any one in the world: I desire I may have liberty to see my friends, and speak with them, before I do answer to any thing.

Mrs. *Fitzharris*. My dear, plead to the jurisdiction of the Court; here is a plea drawn by counsel for you.

L. C. J. You had best consider well what you have to do.

Fitzh. My lord, I desire this Paper may be read by the clerks.

Justice *Jones*. No, no: that cannot be till you have answered to your indictment.

Cl. of Cr. Pull off your glove, and hold up your hand.

Fitzh. My lord, I desire leave to plead to the jurisdiction of the Court.

L. C. J. You shall have it.

Fitzh. I desire this plea may be allowed.

Justice *Dolben*. Hear your Indictment first, and plead afterwards.

L. C. J. Look you, Mr. Fitzharris, let us thus far direct you: your holding up of your hand, and hearing the Indictment read, will not hinder you from any manner of plea which you may have to make afterwards; but you can plead nothing before.

Cl. of Cr. Pull off your glove, and hold up your hand (which he did). And then the Clerks of the Crown read the substance of his Indictment to him in English. And then speaking to him, said, How sayest thou, Edward

Fitzharris? Art thou Guilty of this high-treason whereof thou standest indicted, and hast been now arraigned, or Not Guilty?

Fitzh. My lord, I offer this Plea to be read first, before I answer.

L. C. J. That plea? Take his plea: let us see what it is. We take it to read it now.

Justice *Jones.* Not to allow it.

L. C. J. Only to see what it is.

Cl. of the Crown reads,

'Et præd. Edwardus Fitzharris in propria 'persona sua venit et dict. quod ipse ad Indict'ament. præd. modo versus eum per jurator. 'præd. in forma præd. compert. respondere 'compelli non debet, quia dicit quod ante In'dictament. præd. per jurator. præd. in forma 'præd. compert. scil. ad parliam. Dom. 'Regis nunc inchoat. et tent. apud Oxon. 'in Com. Oxon. 21 Die Martii, Anno Reg. 'Dom. Caroli Secundi nunc Regis Angliæ, '&c. Tricesimo Tertio, ipse idem Edwardus 'Fitzharris per Milites, Cives, et Burgens. ad 'idem Parliament. ad tunc et ibid. convocat. et 'assemblat. de et pro præd. prodition. Crimini'bus et Offens. unde ipse idem Edwardus Fitz'harris per Indictament. præd. modo indictat. 'existit secundum Legem et Consuetudinem 'Parliamenti accusat. et impetit. fuit coram 'Magnatibus et Proceribus hujus Regni An'gliæ in eodem Parliamento per Summonition. 'ipsius Dom. Regis ad tunc et ibid. assemblat. 'Quodq; impetitio præd. in plenis suis robore 'et effectu adhuc remanet, sicut per record. 'inde in Cur. Parliament. præd. remanen. ple'nius liquet et apparet. Et idem Edwardus 'Fitzharris ulterius dicit, quod si quis in aliquo 'Parliamento Dom. Regis hujus Regni Angliæ 'de aliquibus Proditionibus, Criminibus, et Of'fensis, per Milites, Cives, et Burgens. ad hu'jusmodi Parliament. convocat. et assemblat. in 'hujusmodi Parliament. accusat. et impetit. fuit 'coram Magnatibus et Proceribus hujus Regni 'Angliæ in eodem Parliament. per Summonit. 'ipsius Dom. Regis assemblat. tunc hujusmodi 'Prodition. Crimina et Offensa de et pro quibus 'hujusmodi persona in hujusmodi Parliament 'accusat. et impetit. fuit in Parliament. Dom. 'Reg. hujus Regni Angliæ audiri, triari, et ter'minari debeant, et semper hactenus consue'verunt, et de jure debuerunt, et non alibi in 'aliqua Curia infer. quam in Parliament. Et 'hoc idem Edwardus Fitzharris parat. est ve'rificare, unde non intendit quod Dominus Rex 'nunc velit in Cur. nunc hic de et pro Prodi'tion. Criminibus, et Offens. præd. responderi, 'et petit. judic. si ipse ad Indictament. præd. 'per jurator. præd. in forma præd. compert. ul'terius respondere compelli debeat, &c. Cum 'hoc quod præd Edwardus Fitzharris verificare 'vult quod Proditio, Crimina, et Offens. præd. 'in Indictament. præd. per jurator. præd. in 'forma præd. compert. specificat. et mentionat. 'et pro quibus ipse idem Edwardus Fitzharris 'per Indictament. ill. modo indictat. existit, et 'proditio, crimina et offens. pro quibus ipse 'præd. Edwardus Fitzharris in Parliament. 'præd. in forma præd. accusat. et impetit. fuit, 'et existit, sunt unum et eadem Proditio, Crimi'na et Offens. et non al. neque diversa, quodq; 'impetit. præd. adhuc in plenis suis robore, vi'gore, et effectu remanet.'

L. C. J. Look you, Mr. Fitzharris, as for this pleading here, we use not to receive such pleading as this without a counsel's hand to it.

Fitzh. I desire your lordship to assign me counsel.

L. C. J. Who would you have assigned counsel?

Fitzh. Sir William Jones, sir Francis Winnington, sir George Treby, Mr. Williams, Mr. Pollexfen, Mr. Wallop, and Mr. Smith.

L. C. J. Here are a great many you name; we will not enjoin any counsel to serve you farther than they are willing themselves. As for sir William Jones, one of them you desire, he does not practise now in Westminster-hall, and therefore we cannot assign you him unless he please.

Fitzh. Then I desire sir Francis Winnington, Mr. Williams, Mr. Pollexfen, Mr. Wallop.

L. C. J. Let them be assigned of counsel for him. We do assign you them for counsel. And now, look you, Sir, you had best consider how you plead this matter. You will do well to think of it, lest it be more fatal to you than you expect; therefore we will give you time to plead the matter you rest upon, let it be what it will: we will give you time to have advice upon it, and you shall be brought hither again on Tuesday morning by rule. And in the mean time things shall stand as they do; Mr. Attorney will consider upon the putting in of your plea, what is fit to be done upon it.

Fitzh. My lord, I humbly desire the liberty to see my wife and friends in the mean time.

L. C. J. Mr. Attorney, why may not he see his wife, so it be done in the presence of some person entrusted by the lieutenant, to see that nothing be done that is prejudicial to the king?

Att. Gen. I cannot oppose it, my Lord.

Fitzh. I desire my counsel may come to me.

L. C. J. Mr. Fitzharris, we will admit counsel to come to you, or else it will do you no good to assign them; all we can do shall be done.

Att. Gen. My Lord, with submission, I conceive you will not allow any body to come to him, to be alone with him; that would be the way to prevent the discovery of the practices he is accused of: I hope, if your lordship shew him favour, you will do the king justice.

Fitzh. My Lord, I beg that any of those that have been named may come to me.

L. C. J. Yes, these four. And Mr. Attorney, they are gentlemen of fair credit and reputation in the world; we have no suspicion that they will do any thing unfairly: what we can reasonably do for any man in his condition, we must do.

Att. Gen. My Lord, I am not against that, but I would have all done safely and securely for the king.

Fitzh. My Lord, I have one thing more to beg; the time your lordships have set is so soon, that they cannot come to me perhaps.

L. C. J. It is long enough, Mr. Fitzharris.

Fitzh. If I cannot get them to come to me in that time, what shall I do?

L. C. J. You must do what you can; we cannot enjoin them to come to you.

Att. Gen. This motion of his, I fear, is designed to put off his trial.

L. C. J. It shall not, Mr. Attorney. It is true it is a busy time, the middle of the term; but they will sure find time to dispatch this business within the time we have allotted. On the other side, some time they must have to consider of it: I do therefore tell him, it may be fatal and preremptory to him for aught I know. Indeed if we would insist upon it, we might compel him to be ready presently, but that we will not in this case.

Fitzh. Pray, my lord, give me till Thursday, if you please.

L. C. J. I know it is time enough for counsel to draw up a plea between this and Tuesday.

Fitzh. To-morrow is Sunday, my lord, and they cannot come to me then; so I shall have but one day.

L. C. J. Mr. Fitzharris, it is time enough; we must not waste the term; for as we would shew you all the favour we can in equity and justice, so we must not deny the king justice neither. And you hear Mr. Attorney say, that these things (if they should delay the business too long) would be prejudicial to much of the king's business. It may be, that this dilatory plea may spend so much time of the term, that we cannot try it; and therefore if we do give a just favour, you must not grow upon us.

Att. Gen Mr. Fitzharris knows this plea hath been well advised on: There went a whole club to the making of it.

Fitzh. How should I know? I never saw nor heard of it till now. I have had the severest measure in the world: I have had no body suffered to come to me.

L. C. J. Do not complain of severity, Mr. Fitzharris. I do not believe any such thing hath been used towards you.

Fitzh. Pray, my lord, give me a little longer time.

L. C. J. Mr. Attorney, what if we do this? He giving you the plea upon Tuesday, he may come upon Wednesday morning to put it in.

Att. Gen. I cannot oppose it, if your lordship think fit so to order it.

Justice *Dolben.* It is fit you should have it to see it, Mr. Attorney, before-hand.

Justice *Jones.* And have some reasonable time for consideration what to do upon it.

L. C. J. Well, delivering of the plea on Tuesday morning to Mr. Attorney, [illegible] give till Wednesday to bring it hither; and [illegible] you shall come by rule again.

Fitzh. My lord, I hope I shall have the liberty to see my wife this day.

L. C. J. Yes, at seasonable hours, when there may be somebody by, to see that nothing be done to the king's prejudice. and your wife must do this; she must submit to be searched, that she carry nothing with her that may be prejudicial. And with these cautions we will admit her to come to you.

Lieut. of Tower. Will your lordship please to give us a rule, to let his wife and counsel come to him?

L. C. J. We do make such a rule.

Cl. of Cr. My lord, we will make it part of the rule.

Lieut. of Tower. We desire such a rule for our discharge.

L. C. J. Sir, this is our rule, and we have declared it to this purpose. Then as to your matter, brother Stringer, this we will do; Let the lieutenant of the Tower keep Mr. Fitzharris safely till we return out of the Exchequer, and then we will examine him.

Serjeant *Stringer.* My lord, we think it will be a short business and soon over, if you please to do it first.

Fitzh. My lord, I may see my wife in the mean time, I hope.

L. C. J. Do you insist, brother, that we should examine him presently?

Serjeant *Stringer.* My lord, Mr. Godfrey desires it.

L. C. J. Then we will presently.

Lieut. of Tower. Must his lady speak with him?

L. C. J. Yes, after he is examined. Lieutenant of the Tower, bring Mr. Fitzharris into our little room, where we will take a clerk and examine him.

Mrs. *Fitzharris,* to her husband, (the court being just risen.) My dear, do not confess any thing about the death of sir Edmundbury Godfrey, nor the Plot, for you will be betrayed: speak only to little things.

[Then the Prisoner was carried away to be examined, and after that to the Tower.]

On Monday, the 2d of May, sir Francis Winnington and the other three gentlemen assigned of counsel for Mr. Fitzharris, came to the bar, and moved the court for an explanation of the rule concerning themselves, and the business they were assigned for.

Mr. *Williams.* My lord, I am to move your lordship in a case, wherein I am, with three others of the gentlemen that attend this bar, assigned of counsel for Mr. Fitzharris; and that which I would beg for myself and them, is this: There is one thing we desire may be explained a little in the rule. I humbly apprehend your lordship gave leave to the counsel, whom you so assigned to come to Mr. Fitzharris, and entrusted them with the liberty of speaking with him alone; but by the penning of the rule, we apprehend that the same restraint is put upon them, that is upon other persons, to have somebody by at their being with him.

L. C. J. The lieutenant sent to me on Saturday about it, and I told him it did not extend to you.

Sir *F. Winnington.* We think it may have a construction either way; but we desire it may be made plain, as you meant it.

L. C. J. We tell you it is plain, and it was so intended.

Sir *F. Win.* Therefore we taking it that your lordship pronounced and meant it so, do desire it may be so expressed. We are satisfied that it was your lordship's intention; we desire the clerk may make it in plain and intelligible words. And there is this farther in it, my lord——

L. C. J. We declare it now to you, it was so meant and intended.

Sir *F. Win.* My lord, there is this further in it: We four have met, and we desire as much as may be to expedite this matter as far as we can, for our own reputation, and doing our duty to the person we are assigned of counsel for. But truly, so soon as is appointed by your lordship, it is impossible for us to prepare things so, as to be ready by Wednesday morning. The plea I never saw, nor did I ever hear of it, till it was brought and read here; but since that, I have not seen it till this time. The rules were brought but last night to our chambers; there is no solicitor in the cause that may attend us. The indictment I have not seen that we are to plead to, and truly I think the course is to have a copy of the indictment.

L. C J. We deny that, sir F. Winnington.

Mr. *Williams.* It is impossible for us then to get ready in this time, I humbly move you will assign some convenient time, I know your lordship will not put an hardship upon us that are of counsel, to plead such a matter so quickly. It is a matter of difficulty, and there are not many precedents in it; and therefore it will require more care than ordinary.

Sir *F. Win.* My lord, we ought to present things to the court as they are in fact, that we may not lie under any reflection from the court, nor any body else. You made a rule on Saturday, that I should be of counsel for him, (which I submit to) but I knew not of this till afterwards. I never saw the plea, nor any paper in this cause as yet. The rule was left at my chamber this last night; and when I saw it, Mr. Williams and we got together in the hall this morning: we could not do it till just now, and we come now to wait upon the court, to acquaint them how the matter stands. I was not in court, when you gave your directions about this matter; but when I find what the nature of the case is, I shall be ready to do my duty to the court, and to him who is upon his life. It is a mighty cause, it is a cause that may bez if we do not acquit ourselves as we ought, have reflection upon our posterity, if we do not do it as well as we can. Therefore we desire some seasonable time, that we may have copies of the papers and things concerned in this cause, as the court shall direct. And we are assured your lordship is so well acquainted with the usual method in such cases, that you will give us all the favour in it you can.

Mr. *Wallop.* For my part, my lord, the notice I had was but very lately: I was by indeed when this person Fitzharris did desire counsel, and your lordship assigned me amongst the rest; but nothing of the order was brought to me till this morning: so that I know nothing of the matter less or more, than what I heard upon the reading of the paper here on Saturday. I do not desire time for time-sake, or for delay; but we think the nature of the thing is such, as will require great consideration, and we desire convenient time to prepare it for the court.

L. C. J. Look you, sir Francis Winnington, you must consider here the nature of your case: This is an indictment of high treason, and there is nothing I see that is so greatly considerable in the case, but the height of the crime. It is an extraordinary crime indeed, if he be guilty of it (for I speak not to prejudice your client, but of the thing itself.) It is a treason of a very high nature; and then what have we to consider in this case? We might have taken your client at advantage here, and it had been no injustice if we had made him plead immediately as he would stand by it: and we are not to consult your leisure, but your client's cause: he hath pitched upon you for his counsel; we have given him three days time to plead as he will stand by it, Saturday, Monday and Tuesday, and he is to come with his plea upon Wednesday. We have appointed for conveniency sake, that you should give a copy of the plea to-morrow morning to Mr. Attorney; but we do not tie you so peremptorily to that copy, that you may not vary in words from that form. Give him but the substance of the plea, and we will not tie you to the particular formal words. Peradventure Mr. Fitzharris could not have expected three days time, in course of law, upon such a crime, to put in such a plea, when he tells us, he will plead specially to the jurisdiction of the court. But we have done it in this case, to shew, that all the fairness that can possibly be used shall be used. On the other side, we must not spend all our time so, as to let the term slip for his neglect of waiting upon you, therefore if he will delay to send to advise with you, he must suffer for it. Suppose he did not come to you till to-morrow, what can we help it?

Mrs. *Fitzharris.* There is no solicitor, my lord, to go to the council.

L. C. J. Well, we must not spin out the term to please him: he must take more care. I believe he would by dilatories be glad to put it off all the term. If Mr. Attorney gives consent for more time, well and good.

Mrs. *Fitzharris.* I hope your lordship will give leave for a solicitor; without your lordship's leave none will dare to venture. And I had the rule so very late—

Cl. of Crown. They had it at three of the clock in the afternoon, as soon as it could be drawn up.

Mrs. *Fitzharris.* That copy was brought to the lieutenant of the Tower, and he sent it away immediately.

Cl. of Crown. Another copy they had from me that evening.

Mrs. Fitzharris. I never saw my husband in the Tower till yesterday in the afternoon, and I am an ignorant person, and know not what to do in it without a solicitor. As soon as I could get copies of the rule writ out I carried them to these gentlemen.

Mr. Pollexfen. My lord, I think it will be very hard upon us that are of counsel, to be so straitened in point of time; for my part, the rule was left under my door the last night, and I had it not till this morning: It will be a mighty hard matter for us to get the plea ready, without a sight of the indictment. Things must be averred to be the same; which we cannot, unless we see what is there alledged. This man hath been kept close prisoner, and no body suffered to come at him to instruct him: and we have not so much as copies of any thing that we must make use of. We have no concernment, my lord, in this matter, but what is assigned us by the court; and we do not know by any papers, if there be any, how we should put it into form; and that is it, my lord, which may lie heavy upon us; if this man's business should miscarry for want of putting it into due form, the blame will lie upon us, who are assigned his counsel. Therefore if your lordship please, under these considerations, to give us time and leave to see the indictment we are to plead to, we may be the better enabled to do our duty.

Sir F. Win. Really, my lord, I ought to deal clearly with the court; without a copy of the indictment, I know not how we shall be able to plead as we should do.

Mr. Williams. My lord, I do really move, not in favour of Fitzharris, but for my own reputation: I cannot put my hand to a plea of this consequence, without time to consider very well of it; and unless in truth, I can see the indictment, and compare the plea with it, to put it into form fit for the judgment of the court. And if these things cannot be granted, I desire to be excused.

L. C. J. Why, gentlemen, see what you ask: Where do you find any precedent of a man indicted for High-Treason, that would plead to the jurisdiction of the court, that had more time given him than is in this case?

Sir F. Win. We do not know what his plea will be, my lord, till we have seen it and considered it.

L. C. J. Your client told us all, and we know all of us very well, that it is to the jurisdiction of the court, and can be no otherwise.

Just. Jones. Any thing else you may give in evidence upon not guilty; and it would be considered on your trial.

Sir F. Win. My lord, it may happen to be not so properly pleadable to the jurisdiction of the court; we know not what it will be till we have seen the things necessary to draw it into form. It is true consequentially, it is the concern of our client; but the ground of our motion at this time is for ourselves. I did apprehend by the rule, his special plea was to be admitted if he tendered one, let it be what it will: We must consider many things in a case of this nature; and at last, whether it will be to the jurisdiction, or what it is, we cannot tell as yet. And till we have seen the nature of the thing, and what is necessary to prepare it for the court, I cannot venture to give it its proper term. But our time is so short, if your lordship will afford us no longer, that we know not how to be ready for it. Your lordship does speak of Mr. Attorney's being attended with the substance of the plea, not tying us to the form in the copy delivered to him. Mr. Attorney was here upon Saturday, when this matter was first started, and he knew the substance then: We know not what it is more than by report. It is a plea that so rarely happens, that we must be cautious in what form we put it. It is, as your lordship hath been pleased to say, an horrible treason that in the indictment is specified. We must not speak, nor do not mitigate the heinousness of the crime; nor do we speak it because it is term-time, and may hinder our other business: We shall all of us, I am sure, not at all consider our own time, or loss in the matter; but it being of so great weight, we desire reasonable time to do our duties: we name no time, nor dare do it; we submit that to the court. But, my lord, under favour, for the copy of the indictment, we do conceive it is necessary that we should see a copy of it; and when the court is pleased to admit the party to give in a special plea to the matter he is accused of, and assign him counsel to plead it, I take it to be very rational and consonant to law, that we have a copy of the charge.

L. C. J. Sir Fran. Winnington, for you to come and say these things here, methinks is very strange. I think you can shew us no precedent, that ever so long time was given to any man to plead to the jurisdiction of the court, nor that ever a copy of the indictment was granted in High-treason; and for you, because of the greatness of the treason, therefore to go about to make us believe, that it is more reasonable that a copy of the indictment should be granted in this case than in another; that the greatness of the crime should be meritorious, and deserve a favour of the court, not granted in other cases, is a thing extraordinary.

Sir F. Win. I do not press it that way; I pray I may be understood aright. Upon what appeared the other day, upon the nature of the plea, I present it to your consideration, whether or no, when you have been pleased to admit a special plea, you will not let us see that which we are to plead to?

L. C. J. No, it was never thought of surely.

Just. Dolben. No, it hath been constantly denied in cases of felony and treason; and so you will find the practice to have always been. But I will tell you what hath been done sometimes; they have granted some heads out of the indictment, that should enable the party to fit his plea to the charge; and that was done in Wittypole's case, upon a plea of *Auter-fois acquit*,

They gave him the times, and some other circumstances, to fit his plea to his case; but never was there a copy of the indictment granted.

Mr. *Wallop.* My lord Coke, in his preface to the third Report, declares, That it was the ancient law of England, and so declared by act of parliament in Edward 3d's time, that any subject may, for his necessary use, have access to records and copies of them, be they for the king or against the king; and that the practice to the contrary is an abusion.

L. C. J. So then, Mr. Wallop, you take it that we are bound when any man is indicted of felony or treason, or any capital crime, if he say he must have a copy of the Record, we must grant him a copy of the indictment: if you think so, the court and you are not of the same opinion.

Mr. *Wallop.* I inform the court what I have read and seen, and where it is to be found.

Mr. *Williams.* My lord, it may be necessary, for aught we know, for him to plead over to the fact laid in the indictment; not guilty, as sometimes it is requisite for the party to do. Now if we should mistake for want of having what is necessary, and thereby preclude him of the advantages he might have had if the plea had been rightly drawn, for aught I know, it will lie upon me for ever. My lord, I do it merely out of caution, and for my own reputation sake: If any legal advantage should be lost by my unwariness, it will be a perpetual reflection upon me; and therefore I am so earnest in this case. And, my lord, I can tell you what was done in a case wherein I was of counsel; it was not a case of treason indeed, but it was murder, the next crime to it; it was the case of King and Thomas. Thomas was indicted of murder in one county, and found guilty of manslaughter; and afterwards was indicted for the same murder in another county, and being to plead this matter I did insist upon it, that we ought to have a copy of the indictment. There was some debate about it; but at last we had a copy, and we alledged there, as here, it was impossible to plead without it: and the cause was removed hither into this court for judgment.

Just. *Dolben.* The first indictment you might have a copy of, for you were to plead the whole record.

Mr. *Williams.* Nay, we had a copy of that to which we pleaded.

L. C. J. Mr. Williams, you tell us, you may peradventure have occasion to plead over when you know it is High-treason that you are indicted of, in framing and publishing a treasonable paper, cannot you direct your client to plead over without a copy? Certainly what you alledge in that, for a copy of the indictment, is 'non causa pro causa.'

Just. *Jones.* What prejudice will it be to your client to plead over?

Sir *F. Win.* My lord, we only offer these things for ourselves, and we hope we shall not be pressed to do such a thing as this, without having reasonable time to consider and deliberate of it, and without having what is necessary in order to do it.

[Then Mr. Attorney being sent for, came into the court.]

L. C. J. Look you, Mr. Attorney, these gentlemen that were assigned of counsel for Fitzharris, do move the court here, and say, they would have longer time to draw up his plea, for they must make use of several copies of papers, and they cannot so soon obtain them, nor find out those records they must use, or other things as ingredients to this plea, in so short a time; and they say likewise, that they desire a copy of the Indictment. Now, in truth, they ought to have given you notice of this, that you might have been here likewise to hear what they say: If you do consent to give th[em] longer time, we shall be ready to do it: but witho[ut] it, we shall not be willing to delay it.

Att. Gen. I think your lordship and the court gave them a very just and reasonable time, when you allowed them four days; and these gentlemen are mistaken, if they think they are assigned as counsel to all events. They are only to draw up a plea upon that matter that is alledged by the prisoner, and to the jurisdiction of the court.

Sir *F. Winnington.* No, my lord, I beg your lordship's pardon: The rule is to plead the special matter without more saying.

Att. Gen. My lord, under favour, it is as I say, and so is the course of law; for the prisoner ought to acquaint you with the points he desires his counsel to be heard to: And in this case, Fitzharris did acquaint the court before he would plead, that he had something to object to the jurisdiction of the court; and so his wife directed him when she gave him the paper I suppose she had other advice upon it; for she could not draw it up in that form it was herself; and he did acquaint the court, he had matter to plead to the jurisdiction of the court, and concluded so in the paper that was read. And thereupon, according to his prayer, he had counsel assigned him these gentlemen. I consented to it, as it was just I should; but that they should think, that they are to advise him in other matters than that particular upon which they are assigned, I know they know their duty better than to offer at any such thing. Now since then there is but one single point, the jurisdiction of the court and nothing else, for they are not to advise in other matters, I think it was more than strict justice, nay it was a very great favour, for all men ought to be ready to plead such pleas immediately.

L. C. J. Yes, in strictness, we might have required him to plead, as he would stand by it presently.

Att. Gen. The law is, that he must have all ready, 'in Poigne,' to make it appear that what he avers in his plea is so; therefore you needed not have given him any longer time: but because all the world might see the court and king's counsel dealt fairly in this matter, and

did not mean to take advantage of any thing that looked like a surprize, I consented to that time that your lordship was pleased to set: And as for the copy of the indictment, I know not any reason they have to desire it; for they are not to advise in that, what defence he shall make, but only upon this matter he hath alledged.

L. C. J. Look you, gentlemen, what Mr. Attorney tells you is so, and we do expect that you should conform yourselves to it: We have given you three days time, which is sufficient for such a thing as this. And Mr. Attorney, we told them thus when we did direct them, That they should deliver you a copy of the plea to-morrow morning. We are not so critical with them, as that we will not receive their plea, if it be variant in form from that which they deliver to you. That that we intended by it is this, That they should deliver to you a plea, the same in substance as that which they do plead here: If they would alter it in the form, we can give them leave to do that without any prejudice.

Att. Gen. We will never pinch them in form; I think I have matter enough.

L. C. J. I tell you truly, I do believe some friends of his had counsel to draw up this plea for him.

Att. Gen. A great cabal, no doubt of it, my lord?

Mr. *Wallop.* My lord, I desire that counsel may be assigned in my place.

L. C. J. We assigned him those that he required, excepting sir William Jones; and we did not deny to put in sir Wm. Jones's name, because we would not assign him, but because he hath declined the bar, and does not practise here.

Mr. *Williams.* We do not draw in the name of sir Wm. Jones, or decline him: We submit to your order about ourselves; but we desire that person that did draw this plea may be added to us.

L. C. J. If his wife desire it, and will name him, it shall be so.

Mr. *Williams.* I desire to be put out, and he put in.

L. C. J. Sir, he understands what he would have, sure! and we cannot discharge you upon any such account.

Mr. *Wallop.* Here are many particulars and many averments, which cannot so suddenly be set right as the time allotted.

Mrs. *Fitzh.* My lord, there is not half those gentlemen assigned that I writ to my husband to ask for: I directed him eight.

L. C. J. Who else would you have?

Mrs. *Fitzh.* There was in the paper sir William Jones, his majesty's late Attorney General, sir Francis Winnington, Mr. Williams, late Speaker of the House of Commons, sir George Treby, Recorder of London—

Mr. *Pollexfen.* Your lordship may easily perceive by this gentlewoman's carriage, how we are like to be instructed in this cause, when nobody follows it but she.

L. C. J. Do you desire sir George Treby should be added?

Mrs. *Fitzh.* Yes, I do.

L. C. J. Let it be so then.

Mrs. *Fitzh.* And sir William Jones; I will do what I can to get him to come.

L. C. J. We will not enjoin him; but if he pleases, we leave him to his liberty.

Just. *Dolben.* Why, mistress, you are got into the hands of gentlemen that are as learned and able in their profession as you can have; you need no more.

L. C. J. Do you desire Mr. Smith?

Mrs. *Fitzh.* Yes, my lord.

L. C. J. Then add him.

Mr. *Pollexfen.* We desire that there may be leave for a solicitor, one that may carry papers in the presence of the Lieutenant.

L. C. J. We have confidence in you, but not in other persons; therefore we must consider of that: But what think you of it, brothers? We may permit, I think, one to come from the counsel to him with that caution.

Judges. Yes, my lord.

L. C. J. Let the papers be then inspected before by the Lieutenant of the Tower, and be from one of the counsel; and so they have liberty to do it.

Att. Gen. There is no need of any papers, my lord—

L. C. J. Mr. Attorney, do not oppose that: Let them have liberty to carry any papers that any of their counsel, these gentlemen we have assigned, shall send to him, or any from him to them; so as the Lieutenant may have first the sight and perusal of them.

Att. Gen. There is no great harm in that, though I see not that they will need any papers.

L. C. J. Yes, their plea to the jurisdiction must arise upon fact, which may be out of some papers.

Att. Gen. You are assigned, gentlemen, but to one point, the jurisdiction of the court; remember that.

Mr. *Pollexfen.* Your lordship is pleased to say, That we may vary in form from what we deliver to the Attorney General; and Mr. Attorney is pleased to say, he will not pinch us as to form: How shall we be secure no advantage shall be taken of the form?

L. C. J. It is only as to that particular. You shall not be tied up to the form you deliver to him. What advantages there may be concerning the form of the plea you bring hither, we will see shall not be taken.

Sir *Fr. Win.* Will your lordship please to afford us no longer time?

L. C. J. When you are to plead to the jurisdiction of the Court in a case of high-treason, and such a treason as this is, what reason is there that so much time as is granted already should be given you?

Sir *Fr. Win.* Shall not we have a copy of the Indictment neither?

L. C. J. You will offer things that are not to be granted to you, 'ad captandum populum;'

that you may say you are hardly used, and mightily straitened in this case.

Sir *F. Win.* No, my lord, we do not offer it for any such end.

Att. Gen. Gentlemen, remember you have not liberty to plead any thing, but to the jurisdiction of the court.

Sir *Fr. Win.* We must submit to what your lordship orders in it.

Upon Wednesday the 4th of May, 1681, Edward Fitzharris was brought from the Tower to the King's-bench-bar.

Cl. of Crown. Edward Fitzharris, hold up thy hand (which he did): thou hast been indicted, and arraigned for high-treason; how sayest thou? Art thou Guilty of the high-treason whereof thou standest indicted, and hast been arraigned, or Not Guilty?

Fitzharris. I have made a plea, my lord, which I desire may be received and allowed.

Mr. *Wallop.* May it please your lordship, I desire to be heard a few words.

L. C. J. Would you not have the plea read?

Mr. *Wallop.* I have but a few words to say before it be read, if your lordship please, for ourselves, or at least for myself. According to the best instructions we have had, we have drawn up this plea, and I pray it may be entered so. But, my lord, I humbly conceive we have not had, or for my own part I have not had those instructions that were fit to direct me in this case. It is a special plea, and of a matter that rarely happens; and the nature of this special plea is, that the matter contained in the indictment and in the impeachment, is one and the same matter. Now I have not yet seen, nor could I come at a sight, though I desired it, of the impeachment, nor of the indictment: but I humbly conceive, that by the law, as this case is upon a special plea, the prisoner ought to have a copy of the indictment. And I do not say, that every one may demand a copy of his indictment to find faults; but upon a special plea, and particularly upon this, I humbly conceive he ought to have a sight and a copy of his indictment.

L. C. J. What, would you not have your plea received?

Mr. *Wallop.* Thus, my lord: if we can have no farther instructions, nor can by any other means come to a sight of these things, then it is the best plea we can make in such a case, and I avow the plea: but if any thing should fall out amiss to the prisoner for want of such a sight, I pray it may not lie upon me.

L. C. J. Read the plea.

Cl. of Crown. "Et prædictus Edwardus Fitzharris in propria persona sua ven. et dic. quod ipse ad indictament. prædict. respondere compelli non debet, quia dic. quod ante indictament. præd. per Jur. præd. in forma præd. compert. scil. ad Parl. Dom. Reg. nunc. incohat. et tent. apud Oxon. in Com. Oxon. vicesimo primo die Martii Anno Regni dict. Dom. Reg. nunc tricesimo tertio, ipse idem Edw. Fitzharris per Milites, Cives et Burgenses in eodem Par. assemblat. nomine ipsor. et omnium Com. Angliæ, secundum legem et cons. Parl. de alta Proditione coram Magnat. et Procerib. hujus Regni Angl. in eodem Parl. assemblat. impetit. suit; quæ quidem impetitio in plenis suis robore et effect. adhuc remanet et existit, prout per Record. inde inter Recorda Parliamenti remanens plenius liquet et apparet. Et præd. Edw. Fitzharris ulterius dic. quod alta Proditio in Indictamento præd. per Jur' præd. in forma præd. compert. specificat. et mentionat. et alta Proditio unde ipse prædict. Edw. Fitzharris in Parl. præd. modo ut prefert. impetit. fuit et existit, sunt una et eadem alta Proditio, et non alia neque diversa; et quod ipse præd. Edw. Fitzharris in Indictamento præd. nominat. et præd. Edw. Fitzharris in impetitione præd. nominat. est una et eadem persona, et non alia neque diversa: et hoc parat. est verificare, &c. Unde ipse præd. Edw. Fitzharris petit Judicium si Cur. Dom. Reg. hic super Indictamentum præd. versus ipsum ulterius procedere vult, &c."

Mr. *Williams.* My lord, we humbly pray, being assigned of counsel for this gentleman, Mr. Fitzharris, that this Plea may be received.

L. C. J. Mr. Attorney, have you been attended, according to the rule of Court, with this plea?

Att. Gen. No, my lord.

L. C. J. What is the reason of that?

Att. Gen. Here is no more in effect, than what was offered four days ago, when counsel was allowed him. I sent last night late to them for a copy of the plea: indeed yesterday at noon they sent me this note, that Fitzharris intends to stand upon his plea, that he stands impeached in the House of Peers. I sent to know of them whether they would plead this to the jurisdiction, or in abatement, or in bar: they declared, they would not plead to the jurisdiction, but now I see it is to the jurisdiction.

L. C. J. It is so; and that he proposed to plead at first.

Att. Gen. It is true, my lord; but thus they sent me word.

L. C. J. And as a plea to the jurisdiction, so it concludes.

Mr. *Williams.* My lord, we have done all that is possible for us to do in this case. The Court directed us to attend Mr. Attorney with the substance, and so we have done; but the form, we had liberty to do as we pleased in.

L. C. J. You need not go about to excuse it, that you have not done it; we charge you with nothing.

Mr. *Williams.* I do not go about to excuse it; we do not take it as a charge upon us.

L. C. J. All we say is this: if Mr. Attorney had had it, peradventure he might have considered of a replication by this time, or what he would do concerning it; but if he hath not had time, we cannot expect it from him.

Sir *Fr. Win.* My lord, I only beg one word as to matter of fact, and it is material as to ourselves to urge it. We did send several messengers to get, if it were possible to be obtained, a copy of the Impeachment in parliament. We sent to the House of Lords clerk to get it; but they that went down, tell us the clerk is not in town, or else we had sent Mr. Attorney the whole plea at that time.

L. C. J. I only ask the question, to see whether Mr. Attorney hath had time to think of it.

Att. Gen. My lord, I think I need not any time in this case.

L. C. J. Pray go on, Sir.

Att. Gen. My lord, I do pray your judgment upon it; for it is a plea that is insufficient: nay, it is no plea to bar you of your jurisdiction. First, I observe that whosoever will plead a plea to the jurisdiction, if he have any record to plead, must have it 'in poigne,' must produce it in a Court, or at least must produce a copy sworn, that the Court may see there is nothing dilatory in the case. And for this matter, it will appear upon examination to be a plain frivolous plea; for there is no such matter depending as this plea alledges. But I speak of it as a plea to the jurisdiction of the Court; and such an one as will plead such a plea, he must have the record ready, to shew it to the Court, and by the course of law ought to have it ready to assert to the Court, that they have not jurisdiction: so then it is certainly naught. That is the first thing. Another thing is this; with submission, I say, they have pleaded no record at all, nor any impeachment at all, as this case is; for the notes that I have taken, my lord, are, they say he was impeached by the Commons *de alta Proditione;* but that is naught. He ought in his plea to have set forth his impeachment, and for what crime particularly; for either an indictment or an impeachment *de alta Proditione*, or felony, or any other crime, is naught, the law allows it not. He ought to set forth, and must not aver upon a record, but set it forth *in hæc verba*, or in the substance of it; and so ought to plead the record entirely as it is. And for those necessary averments that cannot otherwise be made, the law allows of them. But in this case he cannot come and aver upon this record; for he hath set forth the impeachment not as it was, but only barely *de alta Proditione* in general, which the record must shew, so as the Court may judge of it, and it must not be intended. But as they have set it forth, in this case there is nothing of treason specified in the record averred, that can intend this to be the same; and, my lord, so are all the precedents. Whosoever pleads a private act of parliament, must plead it as it is, not in general that it is for the same matter; for I take it then it is naught: and we are in your judgment, that this is no plea to the jurisdiction upon that point.

L. C. J. Mr. Attorney, do you think it prudent to argue it this time, or will you take a day? Pray consider of that a little.

Att. Gen. My lord, I think delay is very dangerous and mischievous in this case.

L. C. J. We can give you as short a day as you please.

Att. Gen. But to satisfy the Court, the clerk will be ready with the Journals, to shew that the fact is not as they plead it.

L. C. J. Look you, Mr. Attorney, we must go on in a legal and formal way, when we have a plea put in; therefore whether you will not take time for a day or two to consider of this plea: you had the substance of it, but nothing concerning the manner of the pleading; they would not tell you whether they would plead it in abatement, or in bar, or how: therefore whether you will not take time to consider of this pleading for a day or two, pray consider with yourself.

Then the King's Counsel consulted one with another.

Att. Gen. My lord, not only for what I have already offered, but for many other reasons, we can see this can be no way a plea to the jurisdiction of this Court; for upon any impeachment or indictment, the king hath election to proceed upon which he will: and if there were ten indictments for one and the same thing, if none of them are come to a judgment the king may proceed upon which he pleases, as in that case of Ireland yesterday; though the party were arraigned and ready to be tried in Ireland, yet the king might, if he pleased, try him here; and the king hath ordered it so to be. But, my lord, I take it, that this is not only apparently a false plea, but a frivolous plea in itself, being to the jurisdiction of this Court: for there was never any thing of a crime so great, but this Court of King's-bench, which hath a sovereign jurisdiction, for commoners especially, could take cognizance of it; and I put it upon that, my lord. Never was such a plea pleaded to your jurisdiction; and therefore we pray your judgment upon it.

Sol. Gen. My lord, before we come to that which is the question, if there were such a plea pleaded to the jurisdiction as they would have this to be, we humbly pray the judgment of the Court, whether this be any such plea at all as can bear any debate: for it will not be a question now, how far an impeachment depending is a bar to your jurisdiction? But the question is, first, whether this be such a plea? For, my lord, I do take it, no man can plead any record in another Court, any indictment or acquittal upon it, by pleading it in this form as this is pleaded, by saying generally, that such a time in such a Court, he was indicted for the same offence, and was acquitted; yet thus this plea is, and no more. But he that will plead *auter fois acquit*, must plead that such a time he was indicted in such a Court, and set forth the indictment and all the proceedings of that Court upon that record, and then it is proper for judgment; such a plea is formal, and requires an answer, and it will be proper for us to give it an answer: and

when such a plea is put in, we shall either demur to it, or give it the answer that it requires of *null tiel record*. But this does not require any particular answer, because it sets forth no record at all that we can answer to: for it is not sufficient to say in general, that he was indicted and acquitted, or impeached, and then aver that it was for the same offence; but he ought to shew forth the impeachment, and set forth in the plea the record. that upon it you may pass a certain judgment. Therefore we hope you will set this aside, as not being at all formal, or requiring any answer to it.

Serj. *Maynard.* My lord, if you please to consider in this case what is the question, and what not. At present it is not the question, whether if a man be impeached of high-treason by the Commons before the Lords, and this impeachment stands unreversed in the Court of parliament; I say, it is not the question, whether this Court have jurisdiction over this man for that offence? but the question is, Whether he hath put in such a plea before you, as will put that in question? Under favour, it is not sufficient for him that will plead a particular record, in bar or other way, and make use of it, that he pleaded it in general terms, but he must set forth that record as it is; he must not give you the title only, or say, he was indicted for such a thing generally; but he must so set it forth to the Court, that if issue be taken, the Court may, by comparing the record with the plea, judge whether it be the same matter or no. Now when he pleads he was impeached for the same treason, he must set forth what that was, that it may appear it was for the same treason, and if that be particularly set forth as it ought, upon *null tiel Record*, the question will be, is there such a record or not? Now if he comes and says he was indicted or impeached, and not for what in particular; the two things that upon the issue are to be compared, are not made so fit for your judgment. In our law, my lord, if a man will plead, he need not set forth a general act of parliament; but if he will plead a particular act, he must set forth the matter of it, to bring his case under the judgment of the Court; and whether this be so pleaded or no, we submit it to you.

L. C. J. Pray let me speak two or three words to you: do you speak it against our receiving of the plea?

Att. Gen. Yes, my lord, we hope you will not admit such a plea.

L. C. J. That will be hard. Pray then consider with yourself, whether if it be an insufficient plea (for we will say nothing at present to that) and if the plea be such that no issue can be taken upon it (admitting it were so), whether you should not demur to it, before you demand our judgment, that we may have somewhat upon the whole before us to judge upon? And I speak it to you, Mr. Attorney, to this purpose, that you may consider, whether you shall think fit to demur to this plea, or whether you shall think convenient to take issue upon it, or to reply to it, that it may come judicially for our opinion; for in a regular way, if a plea be admitted, it must be either demurred to, or replied to. Pray consider of it in this case; and we will give you time to consider, if you please.

Serj. *Maynard.* Under favour, my lord, if a plea be apparently vicious when it is upon record, we need not demur to it, nor take issue; for else the mischief will be, we shall admit all that is well pleaded to be true.

Serj. *Jefferies.* My lord, if your lordship please, I do confess that according to the usual course and practice, if there be a doubt upon a plea that is read, whereon any point in law may arise, you do put the party to demur or take issue: but according to the common course of this court in common cases, and much more in extraordinary cases, and especially in capital cases, and most of all in a case of High-Treason, such as this, if it do appear to the court and your lordship, that the plea is in it's nature a frivolous plea, you do usually refuse to admit such a plea, and give judgment upon it. Now we would acquaint your lordship with our apprehensions in this case, and we would pray you to consider what the danger may be upon us to demur, if this plea be frivolous, as it appears to be: for whether an indictment in this court, or an Indictment in another court be for one and the same offence, and so a bar to the jurisdiction, we are not so much as admitted into the question of that, as this plea is. Whereas according to the course in other pleas, we pray you would be pleased to see the inconvenience if we should be put to demur to it; for then we do admit by this demurrer, that this Impeachment is for one and the same thing; and we humbly conceive, my lord, that is a little dangerous. How then will it be possible for you ever to judge, that the Impeachment (which in fact is otherwise) and the Indictment is for the same thing, unless you will put them to pursue the common methods, how it was in the House of Lords, by shewing forth the record? And what can we do otherwise (it being apparently against the common form of pleas, and manifestly for delay only) than pray the judgment of the court, which we hope will be to reject this plea?

L. C. J. Brother Jefferies, you need not be afraid, that you shall be concluded by this demurrer, that there is such an Impeachment in the Lord's House, for the same offence: there will be no colour for it. And brother Maynard, formerly I confess, when they pleaded pleas Ore tenus, and took their exceptions Ore tenus too, they would demand jugment of a plea presently; and so it was in the bishop of Winchester's Case, 3 Edw. 3. where there was an Indictment against the bishop here in this court, for going away from the parliament at Shrewsbury without the leave of the Lords: there Shard comes in, and pleads Ore tenus this matter, and says, This is a thing that concerns the Lords in Parliament, of which they have

cognizance only, and so prays the judgment of the court presently, whether they have jurisdiction of the cause or no? And he pleads it in abatement. There they over-ruled him presently without any more to do, because their pleadings were not as now they are; now they are grown into a formal way, all entered upon record, or at least written in paper: and what should be the reason why you should not do according to the common course of the court, I leave it to you to consider of it.

Serj. *Maynard.* It is very true, my lord; anciently the course was so, my lord, and the law was so too, to plead Ore tenus; but pleading in paper is the same thing; and the course of the court hath been, when they saw it in paper to be a frivolous plea, to give judgment presently: and you have the same privilege upon this account, as they had when pleas were by word of mouth. If there be a demurrer, it may hang longer than is convenient this cause should do.

L. C. J. Do not speak of that, brother Maynard; as to delay, you shall take as short a day as you will.

Att. Gen. I have looked upon all the precedents, and could never meet with one demurrer where the plea was to the jurisdiction: but I pray your judgment upon the first matter, whether whosoever pleads to the jurisdiction ought not have the record in poigne to justify his plea? In a plea in bar indeed it may come in by Mittimus. [illegible] a [illegible] ment, the party ought always to be ready with those matters that are to out th[illegible] their jurisdiction; and besides, th[illegible] to maintain their own jurisdiction, t[illegible] counsel have nothing to do to assert that, but they ought to avoid all things that may be to the King's prejudice, and therefore it ought to be by the judgment of the court in this case set aside. But I do think you will never find a demurrer that was to a plea to the jurisdiction.

L. C. J. Pray consider of that.

Att. Gen. But if it appear to be a frivolous plea in the form or in the matter, you will not put us here to demur.

L. C. J. If you do insist upon it, that you won't demur, nor do nothing, we will give judgment; but we will take time to consider it, if you won't demur, nor take issue, or reply.

Sir *Fr. Withins.* Will your lordship please to spare me one word? As it hath been observed to your lordship, this is a plea to the jurisdiction of the court; and if they do plead a plea of that nature, the court always expects the plea should be substantially good, otherwise it is not to be received. Now it is not substantially good here, for it says, that Fitzharris was impeached of High-Treason: Now such an Impeachment is naught, for nobody can be impeached for High-Treason generally. It ought to come and set forth the particular acts that make up the treason; for the calling of a thing so, does not make it so: therefore they that would plead this plea, must come and shew that there is an Impeachment that hath such matter in it as does amount to treason; so that then it being a naughty plea in the substance of it, and the end of it to put this court out of a jurisdiction, we hope for that reason you will not receive it.

Mr. *Sanders.* One word farther, if your lordship please, on the same side, for the king. As for this plea that he hath pleaded here, if it had had substantial matter in law whereupon to ground a debate, we should not press your lordship not to receive it, but we must get off it as well as we could; but when it is manifestly pleaded merely for delay, and it so appears to your lordship upon the reading of it, and that there is nothing of substance in it, then we hope you will not receive it, nor put Mr. Attorney to demur to it, or take issue upon it. Now for the plea the case is thus: Here is an indictment for treason against Mr. Fitzharris, for conspiring the death of the king, compassing of it, and declaring such his intention by a venomous libel. Now he comes and pleads to out this court of their jurisdiction; and what does he plead? He says he was formerly impeached of High Treason in the Parliament, that is all he says concerning the impeachment; then he does come and make an averment, without shewing more, that this high treason, and that for which he was impeached, is the same; and takes upon himself to judge, whether the court will or not, and will not submit it to the court, which certainly is not the right way of pleading. If Mr. Fitzharris should come and plead *auter foitz acquit,* that he had been tried at another time for the same offence and acquitted, he should not have said generally he had been formerly indicted and acquitted, and this for the same thing; but he must have shewed the record, and then averred upon the record that it was for one and the same crime. For suppose in this case, which would have appeared perhaps to be so, if he had done as he should have done, shewn that there was such an impeachment, whereby he was impeached of high treason, and which impeachment did charge him with treason for levying of war against the king, and then have made a conclusion as he does now, with an averment, that the impeachment and the indictment was for one and the same offence: under favour, notwithstanding his averment, the court would have judged them not to be the same; for if so be the reason do not appear upon the record to be the same, his averment will signify nothing; why then his pleading now thus insufficiently for want of the record, will be better for him than if he had pleaded it sufficiently. Why then if he had now pleaded, that there is a record of the former impeachment, and set forth the record, and then averred this was for the same, Mr. Attorney might take issue either there was no such record, or said it was another treason, and traversed it that it was not for the same; and so there would either have been one trial by the record, or the other upon the fact by the country. But now as he hath made it, this trial both upon the record, and upon the fact, is only triable by the country, not by the record.

For if Mr. Attorney take issue that there is no such record, then all the record is, that he was impeached for high treason, and then a record of impeachment for any high treason would serve the turn; which if it be not for the same, it ought not: so then the issue of *null tiel Record* could not be taken. Why then now, my Lord, as to the fact: If Mr. Attorney take issue, that it was not the same treason, then the record must be tried; that is, whether there was such a record that does contain an impeachment for the same treason for which he stands indicted; this, I say, must be tried by the country. And if he have pleaded it so, that matter of record upon issue must be tried by the country, for that reason his plea is naught; and if that be so, then the court may be satisfied, and it is apparently pleaded only for delay, because he would not come to the principal matter, and plead Guilty or Not Guilty, which is the matter of fact most proper for the country. I rather hope he is not guilty than that he is: but if he be guilty, it is the most horrid venomous treason as ever was spread abroad in any age. And for that reason your lordship will not give countenance to any delay. And therefore we pray the Plea may be rejected, and he may answer over.

Att. Gen. He hath not pleaded 'prout patet 'per Record.'

L. C. J. Yes, it is 'prout patet in Rotulis 'Parliamenti.' He does say that he was impeached of high treason by the Commons before the Lords, as appears by the records thereof among the records of parliament.

Att. Gen. I did not truly remember that; but I beg your pardon if it be so, for I had not a view of the plea till now; but I am ready thus far to satisfy the court, it is a pure false and frivolous plea. And then with submission I offer it to your consideration, whether you will give any time, or presently reject it.

L. C. J. We will give them no time, that is sure. But the question is, Whether time should not be taken, not in favour of the prisoner, but of the king and of the court?

Att. Gen. I am ready to make out, if it were necessary, that there is nothing of all this true; it is all fiction that is pleaded, and nothing in the record to warrant it: I have a copy of the whole journal, and of the transactions in the House of Lords, the book is close by and ready to be shewn; but when it is a frivolous plea, I hope there will be no need of that trouble.

L. C. J. But, Mr. Attorney, whether we can take notice of the Journal-book now, you had best consider, as this case stands.

Att. Gen. They ought to have it here ready, they ought to have it here *in poigne*.

Justice *Jones.* There have been very many good arguments urged by you, upon which perhaps the plea will be judged insufficient; but the question is, Whether you are now in any such form as we can pass judgment upon this plea or no? Therefore it being offered to you to consider of it, what you will do in it; 'sure it is reasonable you should consider of it, and when you are agreed, then you may ask our judgment.

L. C. J. We cannot put you to it to give a final answer to bind the king: therefore let it stand as it is; we will consider of it.

Att. Gen. Then, my lord, I will demur immediately.

Sol. Gen. And we pray they may join in demurrer immediately.

Serjeant *Jefferies.* If they do not mean it for delay, now Mr. Attorney hath demurred, I suppose they will join demurrer immediately.

[Then the Clerk of the crown drew up a general Demurrer, which Mr Attorney signed, and it was read in the court by the clerk of the crown.]

Att. Gen. We pray they may join in demurrer.

Mr. *Williams.* My lord, we that are assigned of counsel for this gentleman, the prisoner at the bar, (that your lordship may be satisfied, and all that hear us, that we do not design or desire to delay one minute in this cause) do declare, that we will join in demurrer with them immediately.

[Then the clerk drew up the Joinder in Demurrer, which being signed by the four gentlemen of counsel with Mr. Fitzharris, was also read in court.]

Att. Gen. My lord, I pray your judgment; here is an indictment for framing a treasonable libel——

Mr *Williams.* My lord, we hope we shall not be put——

Att. Gen. Pray, Sir, hear what I pray. My lord, I desire your judgment, that the plea may stand over-ruled for a plain fatal error in it. This is a particular indictment for the framing a most pernicious scandalous libel against the king and the government, for treason in that particular; and I think there is no person does doubt, but that this is a matter within the jurisdiction of this court to try: There is no difficulty in that. What do they do to out this jurisdiction? They come and plead, that Fitzharris was impeached *de alta Proditione*; that is all they plead of high-treason in general, to out the court of a jurisdiction of a particular treason, for framing a malicious traitorous libel; and this is a particular treason upon the statute of the 13th of this king. Now they have pleaded no particular treason upon that statute they were impeached for, nor upon the statute of the 25th of Edw. 3. which hath a general clause of a declaratory power, and it may be he was impeached upon that, and we shall not intend it otherwise, that being the general law, the other but a particular law for this king's life. Now in all pleas to the jurisdiction, they ought to be the strictest and most certain of any pleas whatsoever. And as I offered before to you, so I do now again, they ought to be ready with the record to justify their plea: but this in short I insist upon,

that to out a court of its jurisdiction for a particular treason, it is not a good plea, by saying he was impeached or indicted generally of high-treason, and no averment can possibly help it. For it appears by the impeachment it is not for the same, and it is rather to be intended that it was not; but the impeachment being general, that they went upon a declaratory power, in the statute of the 25th of Edw. 3. which reserves to them the power of declaring treason at large, and not upon that which may be tried here in an inferior court upon a particular statute: I say, my lord, they ought to have pleaded it certainly, which they having not done, it is fatal; and I pray your judgment upon it: and I hope they are ready to make good their plea.

Sol. Gen. My lord, that which we do say to it, is, That this plea is neither good in matter nor form; and if it had been pleaded never so formally, perhaps we would have demurred to it: but as now it is pleaded, it is not formal, and therefore we pray it may be over-ruled. The exception, we take it in point of form, we think is fatal; for there is no man that pleads an indictment or an impeachment in another court, but must set forth the indictment in the plea, which is not done in this case, and we take that to be fatal to it. For a man that will plead *auter foitz acquit*, must set forth the indictment, and all the proceedings of the court upon that indictment; this is the constant pleading in all cases, and particularly in Vaux's case, the fourth report. Whoever will plead *auter foitz acquit*, must set forth the record, before it will require an answer to be given to it.

L. C. J. What do you say to it, gentlemen, for the maintaining of your plea.

Mr. *Williams.* This is that we say, my lord: We hope your lordship, and the court, in this case, will not tie us up presently to come and argue this matter. One thing I would mention, because it hath been said there never was such a precedent; I think, to this purpose, the precedent of Elliot's case is very full in it. Mr. Attorney is pleased to say, he never found that any plea to the jurisdiction did ever require a demurrer, but was over-ruled or allowed by the court presently; but that case is plain to the contrary upon that very matter. It was an indictment brought against Elliot, for some misdemeanors committed by him in the House of Commons; this being pleaded to the jurisdiction of the court, the Attorney-General at that time said it was not to be received; that was the matter he insisted on then, that it should be rejected: but the court did then, as you do now, over-rule the attorney in it, and put him to demur.

L. C. J. We have done the same for you.

Mr. *Williams.* Then, my lord, here is a precedent that Mr. Attorney hath not seen: Now for time, the court in that case did not tie counsel up to argue the plea presently, but gave them time till the next term. We ask not so hard a thing of the court, as so long a time in this case, only here is a man's life in question; it is indeed for treason, and so it is of consequence to the king; and there is also the privilege of parliament consequently concerned in it. What time your lordship and the court shall think reasonable for us to be ready in, we leave it to your lordship; we design not to delay at all, only we desire a reasonable time. Your lordship did in the case of Plunket give him time for his trial till next term, which is as high a treason as this, I am sure.

L. C. J. You would have people think you have strange measure in this case, that you have not the same time given to you that was given to Plunket: Pray consider, you object these things as though the court were hard upon you, to tie you up in point of time. Is your case like Plunket's? Pray give us leave to clear our accounts as we go along: He is brought from Ireland hither, is indicted for what he did in another kingdom, and it is by law he is so indicted indeed; for he being kept close prisoner, and not knowing what time he should be brought to a trial, he desires time to send for his witnesses, who are to be brought over to clear him of the treason. Could we in justice deny it him, or could there be shorter time than next term, given him, when his witnesses are in another kingdom, and it would be a fortnight or three weeks before possibly he could have his witnesses here? This I mention, because you will needs make use of such a case, that is no more like yours than any thing that is the farthest different from it; yet you will have the case to measure with your case.

Mr. *Williams.* My lord, I know it is in the discretion of the court; and as your lordship did what was just for Plunket, so you will to this person: I know you will do what is right to every body. We are counsel assigned by your lordship, and we doubt not but your lordship will be just to us, and give us a reasonable time to argue it.

L. C. J. Look you by the way, Mr. Williams, I must tell you, when we assigned counsel to Mr. Fitzharris, we expected that counsel should consider the plea, so as to be able to maintain it, when they come to plead it here; for that reason we gave him time to plead it, so as he would stand by it: What needed we else to have assigned him so much counsel in such a case as this is, but that he should be ready? And why you should now hope that we will give you a longer time for argument in such a case, I see not. Consider, whether in discretion you think longer time ought to be expected upon such a plea as this is?

Sir *F. Win.* My lord, we will not take upon us to prescribe, nor to mention any time in particular, we leave that to the discretion and judgment of the court; but this, I think, we may pray, according to the duty we owe to our client, upon your lordship's assigning us of counsel. We could not foresee till to-day, what the king's counsel would do; whether

Mr. Attorney would take issue upon us of *nul tiel Record*, or upon any of our averments. We could not foresee whether he would demur to us, or not. I know your lordship will be as favourable to us as you can; not having those papers, or sight of those records that were necessary, and would have expedited this matter, our time was all spent in forming of the plea, and we could not prepare particular matter in law to defend it. We are as ready as can be expected, and we have been as industrious to prevent any delay, as any persons could be in our condition; therefore, it may be, we have had a general consideration of the plea: but now we see where the doubts do lie upon it; it is a matter of law pleaded to the jurisdiction of the court. I do not indeed love to cite precedents upon what is plain; but withal, I do not love to say things upon a sudden are plain without consideration: but this I will say, as it is now upon this demurrer joined, it is a case well worth our taking care of, and yours too; I must say it with your lordship's leave. Therefore, if in the case of my lord Hollis, which was but upon an information, and that but for a misdemeanor, and though it was a plea directly to the jurisdiction of the court, and certainly they came prepared; for they were all at liberty, and had resort to all papers and books before the plea pleaded, which we could not have; yet the court was pleased to assign them time, and give them a large time, I hope we shall have some reasonable time. I do not speak it, that we should have so long time; but I humbly beseech your lordship, that we may do our duty to the court, and to our client, that we may have a little time. It is true, it is a great and a horrid treason; but it is as true, here is the life of a man concerned in it: we affect not delay at all, but hope you will not deny us what time is reasonable.

L. C. J. Look you, I will tell you; you might, if you had pleased, have entitled yourselves better to have had time to speak to the plea, if you had pleaded over to the treason; then we could have given you time to have spoken to it, and not delayed the king at all: but you have thought fit not to plead over. I must confess, I did expect you would have pleaded over, as you might have done, and I thought you would; therefore having not done it, it is in our consideration, whether we will give you time, and what time we will give you.

Mr. *Wallop.* It is under your lordship's favour, according to the usual course of modern practice. I have been an unprofitable attendant here near forty years, and, for my part, I did never yet see so swift a proceeding as this is now; it is as swift as lightning. It is a very extraordinary thing; we might well conceive, that nothing more should be expected from us than what is usual, and that we should not be put out of the ordinary proceedings. Anciently indeed, as your lordship did observe the other day, they pleaded *ore tenus*, and then the proceedings were very quick: now indeed it is otherwise; modern, and what we may call ancient practice too, hath made an alteration from that method: and we humbly pray we may not proceed, but according to the rate of modern practice. My lord, whereas they are pleased to call it a frivolous plea, I believe it is a plea of the greatest import that ever these gentlemen came here about, whatsoever they are pleased to say. But your lordship knows the life of a man is the greatest favourite in law; and that to be a most ancient and wise rule, 'De morte hominis nulla est cunctatio 'longa.' And since we could not reasonably expect to be thought to come provided in this case, we humbly pray, that your lordship will allot us such a reasonable time as your lordship shall think fit.

L. C. J. Come, let me propose this to you, Will you plead over?

Mr. *Pollexfen.* My lord, I will give you an answer to that, We cannot do it. When we were together, we did consider, whether if we should plead over, it would not destroy the plea, and we were of opinion that it would destroy the plea: we cannot plead over, but we give up the jurisdiction. It is as indifferent and light to me, as any body, to be forced to argue it now; but as to the matter of it, I believe nobody can say they ever saw many instances of the like nature: Therefore, pray, my lord, let us not go on so hastily with it, for we could not foresee, what since we know, how it would be with us. I did not think they would have demurred; but now it is come to that, we must make the best of it. We have pleaded this plea; if you will not be pleased to give us leave and time to be prepared to argue it, you must take it as we are able, since we cannot have time to make ourselves able.

L. C. J. Certainly, Mr. Pollexfen, *in favorem vitæ*, it would not hurt the plea to plead over.

Att. Gen. My lord, if your lordship pleases to favour me a word in this case; I hear several things urged, particularly instancing in modern practice. If that gentleman will shew that in any case the king and the court were so indulgent to give four days to plead to the jurisdiction of the court, then he will shew me something of modern practice, which I know not; but if that gentleman will remember modern practice in a great nobleman's case, for whom he was of counsel, it was told him, if he would debate the point of law, he must do it presently: they never would give him time to prepare for his argument, there was no such modern practice then. I would desire him to give me one instance, that when gentlemen are assigned of counsel to plead a matter to the jurisdiction, and deal so with the king's counsel as they have dealt with us, not to let us see the plea till now; the modern practice hath been to give them any time. For them to say, that they could not foresee what we would be at; could they not foresee the points of law? Could they not foresee a plain case? but they do not take off the great matter, that he that

doth plead to the jurisdiction, ought to have the record ready in his hand; but, my lord, we lay our thumb upon that which is our exception; they have pleaded no impeachment of any crime, that can appear to be the same with that for which they are indicted, that is the point. Is there such difficulty? Did not these learned gentlemen think? Could they not foresee that we should look into their plea, that it should be legal? therefore I did, and do pray your judgment. If they had pleaded, and set forth the record truly, as it is, and as it ought to be set forth, in case they would have any benefit by it, we would have given them another answer; but if it be done purposely, as it is done with artifice, I am bold to say, for these gentlemen know how to plead a record as it ought to be, and how this ought to be pleaded to, to out the court of a jurisdiction of a particular crime. They say, the life of a man is concerned, and so is the peace of the kingdom concerned too, in the life of as great a traitor as ever was tried in Westminster-hall. For if his treason had taken effect, certainly the kingdom had been very near embroiled in civil wars by this time; therefore the whole peace of the kingdom depends upon his life, and it depends upon the clearing of the whole matter. And I challenge them again, if they can shew me any instance of the like nature. That of Eliot's case that was mentioned, it was an information; and to pleas upon informations there have been demurrers, but to indictments, found by twelve men, we do not meet with any demurrer any where to a plea to the jurisdiction. But I pray your judgment, that he may plead in chief; for it is but a *respondes ouster*, and if these gentlemen desire to take time I hope you will not delay the king by giving countenance to such a plain imperfect plea; for those high matters they talk of, that will be the consequence, they can never come in question upon this plea.

Solicitor General. My lord, I have but one short word to that which is now in question. Our exceptions to the plea we offered and opened before; the question is now, whether they shall have time to argue this plea? And the arguments they use for longer time, is, the life of a man, and they could not be prepared on a sudden, because they knew not what we would do. For the hasty proceedings that have been in this case, which they clamour of, I think they have little reason to speak so, since that hath been done in this case that never was done in any other. He hath had three days time to consider, whether he will plead to the jurisdiction of the court, which never was done to any, and so great a favour, that he is scarce entitled to any farther favour. Does any man believe that they are not prepared? Do not gentlemen, when they consider of a plea, consider upon what grounds they plead? And does not that let them into the whole matter, where the weak parts of the plea are, and what may be objected against it? I am sure that these gentlemen are of that consideration, that no man does believe they would put in this or any plea, without having considered beforehand what to do. And then, when they have put in a plea upon great consideration, no man is to think that they are unready to maintain it. Our exception is short, and they do but talk in general terms that they are unprepared; and they have no reason to expect this kindness from the court, especially since they used Mr. Attorney at this rate: They gave him not the plea, but only a note to tell him they would do that which they said four days before, and no more. If they had done regularly, they should have brought Mr. Attorney the plea, and left a copy with him, and desired him to consider of it. But we do not pretend we are surprised for all this usage, we see the plea here, and we see the faults of it, and we have demurred to it, and tell them our exception; sure they are better prepared than it is possible for the king to be, yet we are ready; and we hope you will grant them no longer time.

Serj. *Jefferies.* Will your lordship be pleased to spare me one word: I wonder at what Mr. Wallop seems now to urge concerning the life of a man that is concerned in this case; it is true, the life of a man is concerned, which is a dear thing to the law; but certainly the life of the government is more dear to the government, and all courts of justice, than the life of any one single person: And I am sure this one person hath done as much as in him lies to strike at the life of the government, in case this be true that is laid to his charge. Now to make this case like to Plunket's the other day, is strange: I think your lordship hath given an account of that: For hath he pleaded to the fact, not guilty, as Plunket did? We that are of the king's counsel would in common charity hope, that he is not guilty; but I am sure, if he be guilty, no Englishman can think that he deserves to live: Why then should we be so fond of a man's life, that hath been guilty of such a fact as this? For example sake; surely if that be the thing in question, we ought to have speedy justice executed upon a man that deserves no mercy. Your lordship was pleased to take notice of another circumstance in the case of Plunket; He was indicted, he was arraigned and was to have had his trial in Ireland, and was to fetch his witnesses from thence; all these things were in that case. He desired time to consider what he should plead; but your lordship, finding an indictment found against him, according to the rules of justice, overruled that matter he suggested, and made him plead not guilty, before ever you admitted him to debate any thing of that fact. And then it appearing to your lordship to be in another kingdom, and that it was impossible in regard of the hazards of the winds and seas, to get over his witnesses in a little time, your lordship gave him time; but you gave him as strait a time as could be consistent with the rules of justice and as his case would bear. Now, my lord, this being offered in a case of that expectation which the case before you seems to have, we desire the dispatch of it as much as we can. In case

the man be innocent, God forbid but he should be acquitted; but if he be guilty, God forbid he should live a minute.

L. C. J. Surely you don't take the case, gentlemen, to be a case of so much difficulty, as to deserve long consideration; we did expect truly that you would have been ready to have maintained your plea.

Mr. *Williams.* My lord, we do not desire any long time; be pleased to give us a day, or two, or three, as you please.

L. C. J. It is said, it is in a case wherein the life of a man is concerned! it is true, here is the life of a man, of whom, till he be found guilty, we ought to have consideration, as we would of any other whatsoever: For we have to reason to conclude him guilty till we hear him, and we are to be indifferent till we hear the evidence; therefore notwithstanding the indictment, we ought to weigh his life as we would another man's, till he be found guilty. We in ourselves do not see there is any so great matter of necessity for time to consider of this case; yet I must tell you, since they pray it, Mr. Attorney, we are inclinable to give them a day or two's time to consider of it, and see what they can say to maintain this plea. But then gentlemen, if we do so, you must take notice we will call you to plead presently after our judgment upon the plea.

Mr. *Williams.* My lord, we have nothing to do with the fact of this case; we are only to speak to the plea.

Serj. *Maynard.* Pray how then is your life in question upon the decision of this plea?

L. C. J. Brother, they do not speak as to this plea, that it hazards his life, but the *subjecta materia*, upon the decision of it, supposing judgment be against the plea. Therefore, Mr. Attorney, we do think fit to give him till Friday morning, and that he shall be brought hither then again by the lieutenant of the Tower; then we will hear these gentlemen: and if they do not shew us any considerable matter to maintain the plea, they must expect judgment presently.

Att. Gen. That certainly will be too long a time; pray, my lord, they ought to have been ready now: if they will be pleased to be ready to-morrow morning, I pray it may go off to no farther time.

Justice *Jones.* There is a necessity, my lord, I think that it should be so; for there is a long trial at the bar here on Friday.

Mr. *Williams.* That is a very short time, indeed.

Justice *Jones.* You must be ready to-morrow morning.

Mr. *Williams.* Unless, my lord, you will give us a little more time, you had as good give us no time.

L. C. J. It seems the business of the Court is such, on Friday morning you cannot be heard.

Justice *Jones.* Either it must be to-morrow morning or Saturday, and that is Exchequer-Chamber day.

Sol. Gen. My lord, I believe they are not in haste.

L. C. J. Mr. Attorney, We would give them a reasonable time; but yet we would do nothing that might make unnecessary delays in this case.

Att. Gen. I pray, my lord, let it be no longer than till to-morrow, and that is more than ever was given in such a case. I know it was denied in my lord Stafford's case; they would not give the counsel any time, but would make them argue presently.

L. C. J. As to that, Mr. Attorney, every case stands upon its own bottom.

Serj. *Jefferies.* My lord, we have your direction for to-morrow morning.

Sir *Fr. Win.* No, no, my lord, we hope not so.

L. C. J. Look you, gentlemen, to accommodate you, the Court does think fit thus to do: we will be here on Saturday by seven o'clock in the morning. On Friday we can do nothing, for there is a long trial at bar that will take up our time; but on Saturday we will be here by eight o'clock sitting, and expect you to be here by that time: and we cannot afford you then long time to argue in, because it is an Exchequer-Chamber day.

Att. Gen. If judgment be against the plea, they must plead presently then, that we may not lose the term for a trial.

L. C. J. You must take notice of that, by the rules of the Court they must do it, Mr. Attorney. If our judgment be against them, the course of the court is so, we cannot rule it one way or other.

Serj. *Jefferies.* But then they ought not to pretend they have no notice, their witnesses are out of the way, and so hinder the trial.

Justice *Jones.* No, No.

Fitzharris. My lord, I desire I may have these lords come to me; my lord of Essex, my lord Salisbury, my lord mayor, your lordship, and sir Robert Clayton, to perfect my discovery. I have something to discover to your lordship and them.

L. C. J. Your discovery of what, do you mean?

Fitzh. Of the Plot, and of the murder of sir Edmundbury Godfrey.

L. C. J. We did examine you about the murder of sir Edmundbury Godfrey.

Fitzh. Your lordship went away in haste, before I had told all I could say.

L. C. J. We asked you ten times, whether you had any more to say, and you said, No.

Fitzh. My lord, I was in confusion and consternation; I scarce knew what your lordship said to me.

L. C. J. We were not in haste; we asked you often that question.

Fitzh. It was haste to me, because I was not provided of the questions you asked me.

Justice *Dolben.* To some of the questions we asked you, you answered readily and freely; but to some we could not get a positive answer by any means.

Att. Gen. My lord, he told me he was not in England then, and that he knew no more than what he had discovered.

Fitzh. Did I say so, Mr. Attorney?

Att. Gen. Yes, you are the man.

Fitzh. I can bring 20 witnesses, I did not tell you so; and I can bring 500 witnesses, that I was in town then.

L. C. J. Lieutenant of the Tower, take your prisoner, and be here before eight o'clock on Saturday morning.

Sir *Fr. Win.* My lord, now I desire we may have a copy of the whole record.

L. C. J. Not of the indictment, but of the plea and demurrer you may.

Sir *Fr. Win.* But, my lord, I hope you will let the indictment be read upon Saturday, because Mr. Attorney had fixed his exception upon part of the indictment, which is the libel that he calls the particular treason, and I desire it may be in Court.

L. C. J. It shall be, and if you have any occasion of reference to it, we will look upon it; we are all upon our oaths, and must take heed that no prejudice be done to the king, as well as to see the prisoner have no unfair thing put upon him.

Then the prisoner was carried back to the Tower.

On Saturday the 7th of May, 1681, Mr. Fitzharris was brought to the bar of the Court of King's-bench, about eight o'clock in the morning.

Mr. *Williams* May it please your lordship, I am assigned of counsel for this person, Mr. Fitzharris, the prisoner at the bar.

Att. Gen. My lord, if you please, I will only briefly acquaint them with what our Exceptions are, that they may apply themselves to them.

L. C. J. Look you, gentlemen, I must tell you all our time is strait enough for this matter, for we are all of us to be by and by with all the Judges in the Exchequer-Chamber; therefore we pray this of you, we will abridge no man's speaking what is material for this client, but we desire you will keep to the matter, and the points in question between you, and save our time as much as you can.

Att. Gen. That is the reason, my lord, why I would lay my finger upon those points that will be the questions between us. Now the Exceptions I take to the Plea are these: this is a plea to the jurisdiction of the Court, and some of our Exceptions are to the form, and one is to the matter. To the form, my Exceptions are these: first, we say that the general allegation that he was impeached *de alta Proditione* is uncertain, and too general; it ought to have been particularly set out that the Court might judge, whether it be the same crime, and it is not helped by the averment. And the next exception I take to it, is, here is no impeachment alledged to be upon record: I mentioned this the last time, and looking more strictly into it, I find it is so as I said: for they come and make a general allegation, that Fitzharris, such a time, was impeached, 'Impetitus fuit,' by the Commons before the Lords, 'Quæ quidem impetitio, in pleno robore existit, 'prout per recordum inde,' &c. Now, my lord, there is no impeachment, mentioned before: and 'quæ quidem impetitio' is a relative clause, and if there be no impeachment mentioned before in the plea, then there is nothing averred upon the record, to be continued or discontinued; for Impetitio does not actively signify the impeaching, or passively the person impeached, but it signifies the indictment or impeachment, that instrument which contains the accusation, and which is to be and remain upon record. Therefore, when they come and say he was impeached, and afterwards alledged, 'Quæ quidem Impetitio' remains upon record, that cannot be good. If a plea should be 'Indictatus fuit,' and afterwards they say 'quod quidem Indictamentum,' &c. it cannot be good, for the relative there is only illusive. These are our exceptions to the form. For the matter of it, it is a plea to the jurisdiction of the Court; and, with submission, there the point will be, whether a suit depending, even in a superior Court, can take away the jurisdiction of an inferior Court, who had an original jurisdiction of the cause, of the person, and of the fact, at the time of the fact committed. What use might be made of it, as a plea in bar, might be of another consideration; but whether this be enough to make it amount to such a plea, as will take away the jurisdiction of a Court, that had an original jurisdiction, that is the question before you. These are the exceptions I take, and do insist upon: and I desire, my lord, the counsel will apply themselves to these exceptions, to answer them; and when we have heard what they can say, I hope to give them an answer.

Mr. *Williams.* My Lord, I am assigned of counsel for the prisoner at the bar, Edward Fitzharris, who is indicted here for high-treason, and hath pleaded a special plea to the jurisdiction of the court: and I must crave leave to state his case upon the indictment, the plea to the indictment, and the demurrer to the plea. And the case, my lord, upon the whole record stands thus: he was indicted this term, by one of the grand juries for this county, of High-Treason. As to the Indictment, it cannot be expected I should state the parts of it, it being an Indictment I never saw. To this Indictment thus presented, Fitzharris hath pleaded thus: That he ought not to be compelled to answer to this indictment because that before the Indictment, was found, at a parliament held at Oxford the 21st of March last, he was impeached by the knights, citizens, and burgesses of the House of Commons in parliament assembled, in the name of themselves, and of all the Commons of England, of High-Treason; and that this was before the court of Lords in that parliament. He says farther, that this impeachment is remaining in full force and effect before the Lords in Parliament, 'prout per recordum, inde int'

Record. Parliamenti remanens plenius liquet et apparet.' These are the words of the plea: and then he avers, that the High-Treason mentioned in the Indictment, and the High Treason specified in the Impeachment, are one and the same. And he further avers, that he is the same Fitzharris named in that Indictment, and mentioned in the Impeachment. And after the averments, he concludes, to the jurisdiction of the court: whether upon all this matter they will proceed any farther against him upon this indictment; and demands the judgment of the court to that purpose.

Upon this plea, Mr. Attorney hath demurred generally, and we that are of counsel for the prisoner have joined in demurrer with him. Now in this case which thus comes before you for your judgment upon this plea and this demurrer, I take these things to be admitted.

First, That the prisoner stands impeached, by the Commons of England in parliament assembled, of High-Treason. Secondly, That the impeachment thus made by the Commons in the name of themselves, and of all the Commons, of England, before the Lords in parliament, for treason, is now in being. Thirdly, which I omitted in the opening of the plea, that this was done 'secund. legem, et cons. parliamenti;' and being so remains 'in plenis suis robore et effectu.' And more particularly this plea does refer to the record, for the parts and circumstances of the Impeachment itself, 'prout patet per record. inde inter,' &c. So that it does refer the Impeachment itself to the record, and tells you this is among the other records of that parliament: all this is admitted by the plea. Fourthly, And moreover, that this treason, for which he stands impeached before the Lords, and the treason for which he stands indicted before this court, are one and the same treason and no way diverse; and so they are the same numerical thing, and there is no manner of difference: and that this person Fitzharris, now indicted, and the Fitzharris impeached, are one and the same person, and no way diverse. And withal, my lord, it appears plainly upon the record, that this Impeachment was depending before: the Indictment found for the parliament was the 21st of March, and it appears by the record this is only an Indictment of this term. And another thing I must intreat you to observe, my lord, it does not appear but that this parliament is still in being, for any thing to the contrary in the record, and as I take the case, then it must be admitted so to be.

So then, I take the plea to be in substance thus, though Mr. Attorney was pleased to except to both the substance and the form; but in substance the case is thus: here is a person impeached in parliament, by the Commons in Parliament, for High-Treason, before the Lords in Parliament, and for aught appears that Parliament still in being, and this Impeachment still depending; then here is an Indictment for that very treason: whether your lordship now will think fit in this court to proceed upon that indictment, is the substance of the case. I shall speak to the form by and by.

My lord, By the way I think it will not be denied, but that the Commons in parliament may impeach any Commoner of treason before the Lords in parliament; I take that to be admitted. And I do not find that Mr. Attorney denies it, or makes any doubt of that; for I think that was the case of Tresilian and Belknap, who were impeached in parliament by the Commons before the Lords: I am sure my Lord Chief Justice Vaughan does, in his Reports in Bushel's Case,* say so; and upon that Impeachment of the Commons, one of them was executed, and the other banished, in parliament. My Lord, I cite it not merrily, but I cite it as authority. Indeed I do not go so far as to cite the Parliament Roll, it was in the time of Richard II. I have not seen the Roll of late truly, but I am sure it is upon the Roll, and there it is to be found.

Since then Impeachments of Commoners will lie in parliament, here then, my Lord, will be the question, Whether this court may proceed upon an Indictment for the same offence the parliament was for? And here I shall distinguish upon Mr. Attorney: he does allow the parliament to be a superior court; but admitting that, he says, though it be so, yet the inferior court having original jurisdiction of the person and the cause, it may proceed notwithstanding an indictment in the superior court; and, ergo, he does infer that this court may proceed upon an Indictment, notwithstanding an Impeachment in parliament.

My Lord, I will compare a little the case of an Indictment and an Impeachment, and shew how manifestly they differ. I do take the case of an impeachment not to be the case of an indictment, and so the principle that Mr. Attorney hath taken is wrong, and the ground of that argument wrong. I cannot say it is like the case of an appeal, but I may say the case of an appeal is like the case of an impeachment. For in an appeal of murder, though the indictment be capital, and the same that is given upon criminals prosecuted for the king, yet it is at the suit of the party, as in this case it is at the suit of the Commons; and so it is an intimation of, and analogical to, and bears the resemblance of an impeachment in parliament; I will not compare an impeachment to an appeal, but I will say an appeal imitates an impeachment. And it is as plain as can be, because appeals are proper to courts in Westminster-hall, and it is at the suit of the party, the prosecution and all the process is 'ad instantiam partis;' so is an impeachment at the suit of the Commons. An indictment is found upon the presentment of a Grand-jury, who are sworn 'ad inquirendum pro Domino 'Rege pro Corpore Com.' and it is a mistake in the form, when it is said, 'et pro Corpore 'Com.' for it is not for the king and the body of the county, but for the king for the body of

* See vol. 6, p. 999, of this Collection.

the county. But now an impeachment in parliament is otherwise; it is not in the name of the king, but in the name of the Commons in Parliament, and of all the Commons in England, wherein it suits with an appeal, which is at the suit of the party; so that it is like an appeal, and not like an indictment: an indictment is for the king, an impeachment for the people. And as it is in its nature and constitution different, so it is in the prosecution also, for that is by the Commons of England, they are the prosecutors in effect; but now in all indictments they are prosecuted always by the king's attorney, or by some person in the name of the king. We are now arguing upon the methods and forms of parliament, therefore I must crave leave to insist upon those methods more particularly. The Commons they bring up the impeachment to the Lords, the Commons they prosecute the impeachment, they manage the evidence upon the trial; and when the Lords have considered of it, and have found the fact, the Commons come and demand judgment, and judgment is given at the prayer of the Commons, and no otherwise, and there are no proceedings by the attorneys. Indeed there have been attempts by attorneys to prosecute persons in parliament, by exhibiting informations in the parliament; but what success they have had, I leave to them to consider that are concerned, and have read the Rolls of Parliament. But it is not safe to alter the old ways of parliament, therefore I take it under correction, that it is out of the road of comparisons, when they will compare an indictment and an impeachment together; for they do not agree, but differ extremely.

I would then offer you some reasons why this court ought not to proceed upon this indictment. I take it, it does not become the justice of this court to weaken the methods of proceedings in parliament, as this court will certainly do: for if you will admit this to be the course that I have opened, your proceedings will alter it. When there is an impeachment depending in parliament for treason, if your lordship will admit there may be an indictment here afterwards in this court, and proceedings in this court upon that indictment, it is to alter the method of parliament-proceedings, and to subject the method of their proceedings there to the proceedings of this court; and what the mischief of that will be, I must leave to your lordship. As I opened it before, the methods of both courts are different, and their proceedings very much vary, I think, I need not trouble your lordship with that; we all know it very well in the main. Indictments in this court are to be tried by a jury, where a verdict must be given presently: there is but very little time for giving the evidence, or for making observations for the crown, or for the public; and in order to bring it to the trial, there must be an immediate plea of Guilty, or Not Guilty. Now if the proceedings of parliament were so sudden, there might be a great surprize, and great offenders pass unpunished, because the prosecutors had not greater time to inspect the records that might be of avail in the case: therefore in parliament it is quite otherwise; there is time for deliberation and consideration, there are many references, and many examinations, which are matters of deliberation and consideration, which take up a great deal of time; but here you are straitened not only in time, but bound up to strict rules, and so are straitened in your methods and forms of proceedings, as Mr. Attorney would here tie us up to the forms of little courts: but it is not fit that the justice of the kingdom, and high court of parliament, should be cramped by the methods of an inferior court, and a jury. So you will then subject the methods of proceedings in parliament to the courts in Westminster-hall, and what the consequence of that will be, is worth the consideration.

Another reason I would humbly offer, is this, my lord: The parliament is the supreme court certainly, and this court is every way inferior to it, and it will be strange that that supreme court should be hindered by an inferior: for the highest court is always supposed to be the wisest; the Commons of England in Parliament are supposed to be a greater and a wiser body than a Grand-jury of any one county. The Peers, who are the judges in that court, are supposed to be the wisest judges, as the Commons the wisest inquest. Will the law of England now suffer an examination, impeachment and prosecution for treason, to be taken out of the hands of the greatest and wisest inquest in England? And will the law of England suffer the judicature upon this prosecution to be taken out of the hands of the wisest and greatest judicature, and put it into the power of a smaller number of judges, or of an inferior jury? I do think it does not stand, my lord, with the wisdom of the government.

Another thing is this, my lord, the common argument in any extraordinary case, there is no precedent for this way of proceeding; it is my lord Coke's argument in his Comment upon Littleton, fol. 108, and in the 4th Inst. fol. 17, in his Comment upon the High Court of Parliament. And he takes occasion to speak it upon the account of that precedent, the case of the indictment against the bishop of Winchester, and of that against Mr. Plowden; and he says, This was never practised before; therefore it ought not to be: so he infers, and puts a black mark upon it, by saying it is a dangerous attempt for inferior courts to alter or meddle with the law of parliaments. For the words I refer myself to the book, I dare not venture to repeat them upon my memory. So in this case, in regard that it never was done from the beginning of the world till now, the 33d year of this king, I may say, it being without precedent, there is no law for it.

My lord, there is another mischief that will certainly follow upon this, and that too runs upon this comparison of an appeal and of an indictment. In the case of an indictment, it is in the power of the prince to pardon that in-

dictment, to pardon the punishment, and to pardon the offence; but in case of an impeachment, I take it to be otherwise, as it is in the case of an appeal. And, my lord, if your lordship will take this case out of the power of the parliament, and bring it into this court, where the offence may be pardoned, you do by that means subject that offence, and that method of proceedings, which would make it, without consent of the party prosecuting, not pardonable by law, to a pardon: and this may be of dangerous consequence to the public, that crimes that are heinous and great in themselves, mighty bulky crimes, fit for the consideration of a parliament, be they never so great, never so dangerous to the government, yet should, by giving this court a jurisdiction, and possessing it of these causes, expose them to the will of the prince; and so those crimes, which are unpardonable by methods of proceedings in parliament, would become pardonable by prosecution in this court.

Now my lord, for my authority, that impeachments are not pardonable, I would only hint a little to compare it to the case of an Appeal, as Penryn and Corbet's case in 3 Croke, Hill. 38 Eliz. fol. 464. There was an appeal of murder; upon which he is found guilty of manslaughter, and not guilty of the murder. Then there was a pardon pleaded of the burning in the hand, or of the punishment: It is not plain in the book, whether the pardon was after the verdict, or before (that I cannot be clear in); but however, there was a question whether the queen could pardon the burning in the hand; however, it was there allowed: But there was an exception, my lord Coke, who was then Attorney-General, took, that the king could not pardon, if it had been an appeal of homicide; and he concurred with the court in that opinion. But that appeal being for murder, and the verdict of manslaughter, they passed over the question, for this reason that I have mentioned, That the appeal was not for manslaughter, it was for murder; and if he had been found guilty of the murder, it was not in the power of the king to pardon him, it being at the suit of the party: So the opinion of that book is, and of the then Attorney-General.

Thus I have stated the thing, and the consequences of it, and it is not fit for me to dwell upon it: You will consider of it, I am sure.

Another thing I would say, is this: If your lordship should meddle with this way of proceeding, it will invert the law in another thing; for it is a principle with us, that no man's life is to be put twice in danger for one and the same thing. I will then put the case thus: If your lordship should proceed upon this indictment, and this person should be acquitted upon it, I am in your lordship's judgment whether that acquittal will bind the Lords in Parliament; If that will not bind them, but they may still proceed on the impeachment, then you invade that common right which every Englishman by the law ought to have preserved to him, that no person ought twice to be brought in question for one and the same thing. and so, my lord, you make a man to run the risk of his life twice, by indicting him in this court, where, though he be acquitted, he may be called to an account again, if the law be so. And if the Lords in Parliament should be of opinion, for they are the judges of that case, that the acquittal will not be binding to them, then a man's life is brought in question twice upon the same account.

My lord, I now come to this, the time, how unseasonable a thing it is, and how dangerous to the government; I take it to be a critical thing now at this time to make such attempts as these are. There are lords now that lie under impeachments of treason, the highest treason, I think, that ever was contrived; and upon this impeachment one lord hath been convicted and executed. Suppose upon the dissolution of that parliament that impeached the late lord Stafford, there had been an indictment against him for one and the same treason: And by the same reason that this court may proceed, his majesty may appoint a high-steward to try by a jury of peers. For the court held before the high-steward, is as much a court as any court in the kingdom, except that of parliament. I say, suppose the king had appointed an high steward, and that lord-high-steward had proceeded against my lord Stafford, I think my lord Stafford had been alive at this day. For in the case of treason your lordship knows there must be two witnesses; and I am sure there came in fresh testimony against my lord Stafford after the second parliament after the impeachment. I appeal to those noble lords that are here, if it were not so; and had it not been for that fresh testimony that came in afterwards, possibly my lord Stafford might have been alive at this time. And the Lords in Parliament, as I have observed in the beginning, when they find an high crime before them, when they find such a general contagious design to subvert the government, and yet they cannot come to cut off the principal agents in this design, because perhaps there may not be two witnesses in strictness of law at the first, it is the wisdom of a parliament to deliberate and to take time. The good queen was used to say, truth was the daughter of time, and time would produce truth, 'Veritas filia 'temporis.' If then there had been any such hasty proceedings, as in this case, I doubt my lord Stafford had been now alive. Now then for these lords that are now in the Tower, if your lordship do go on in this way, do you not open such a gap, as may be a ground to deliver them by the same justice (I speak it under correction here, and I only offer it to your judgment, for I have not had many hours to consider of it; but your lordship will think well of it before you give any judgment) by the same justice the other lords may be tried by another court? This I offer in point of reason, that this proceeding will be very hard, and is an imprudent thing, if not an illegal proceeding. My

lord, I am sure it will have this effect, it will stir up a question between the jurisdiction of this court and the court of parliament: For in all probability, if this person should be acquitted, the Commons and the Lords will look into it. They are a court that make a survey of the proceedings of all other courts; and they will examine this proceeding, or at least may do. And if he be found guilty, here is the power of the Commons in impeaching, and the jurisdiction of the Lords in trial and judgment, taken away by an inferior court to them, and so stir a question between this court, and that highest of courts, the parliament. And what will be the consequence of that? The judgment of that question will be in the superior court, for there is no middle court between this court and the parliament to judge of it; therefore I submit it to your lordships.

These are the things which I offer to your lordship in point of reason, whereof some go to the prudence of the thing, some to the reason, and some to the ill consequences that may happen upon it, and I think many to the illegality of the act. And now this being said in the general, I come to the particular exceptions made by Mr. Attorney as to the form of our plea.

He was pleased to say, that this plea was a plain frivolous plea, which is his exception in general; and he gave you three reasons for it at first, and does now insist upon the same for substance.

One was this, and he insisted upon it at this time, This plea does not set forth any record of an Impeachment, nor the particular matter of it, so as this court may judge of the reason of it; for he compares it to the case of a plea of 'auter foitz acquit.' If a man hath been indicted and acquitted, he may plead it in another court that hath jurisdiction of the cause, if he be again indicted for the same matter: But, my lord, first of all, I take this plea to be well pleaded in form; and, in the second place, if there be any informality or defect (which I do not take it that there is, but if there were any such thing), I take it, it is of another consideration, which the court will deliberate before they give their judgment on.

But I say in the first place, I take it to be a very good plea, and that it is good according to the pleading of 'auter foitz acquit.' In pleading of a general act of parliament, we need not set forth the act, but refer to the record; and that will depend upon the method of impeachment in parliament, which I am of opinion, being the general law of parliaments, this court ought to take cognizance of. In the case of 'auter foitz acquit,' there is first an indictment proceeding of the court upon the plea, a fair trial, and a fair acquittal, and a record of all this matter. If now this person comes to be indicted again for the same offence, there is a record for him to plead that will shew forth the whole matter; and if he does not plead that record, it is his own default. But in this case there is no such record to plead, and there is the mistake upon which Mr. Attorney has gone all along. And you must in this case be governed by the rule and method of parliament, which is this: The Commons, in the name of themselves, and of all the Commons of England, impeach such a person, and they bring up this impeachment to the Lords in general, and there they have liberty to present articles in due time, after due consideration, which ought not to be done hastily. All this is no record, such as may be had in the case of 'auter foitz 'acquit:' For first, the impeachment of the Commons is no record; when it is brought up to the Lords, there is only an entry into the Journal of the Lords, that such a day such a person came from the House of Commons, and impeached such a one. And you are not to expect the same strict method, and form of proceeding, as in other courts, the courts in Westminster-hall, or inferior courts. Your lordship in this case must be governed by such proceeding as is in parliament, and must take it as it is; and we have said enough, and as much as can be in our case. We have not indeed set forth an indictment, a plea, a 'Venire facias,' &c. for there is no such proceeding in parliament; but there was an impeachment by the Commons, in the names of themselves and of all the Commons of England, before the Lords, that it is 'in pleno robore et effectu,' and that it was 'secundum legem et consuetu-'dinem parliamenti, prout patet inde inter re-'corda remanen.' &c. And here is enough. For when we refer you to a record, that is as much as if we had set forth the record itself; for we tell you there is such a record, and we point you to the place where you may find it, and so we take it, it is a very full plea; and if not, it is as much as any man can plead in such a case, though it be not pleaded particularly.

And, my lord, that your lordship is to judge in this case according to the methods of parliament, I depend upon the authority of my lord Coke; I will repeat you some of his words: Speaking of the law of parliaments, he says, and he borrowed it out of Fleta, That this high court of parliament, 'propriis suis legibus et 'consuetudinibus subsistit. Et ista lex ab om-'nibus quærenda, à multis ignorata, et à paucis 'cognita.' But he tells you, and certainly he says true in it, Whoever will be learned in the law of parliaments must repair to the rolls of parliament: And give me leave to cite his opinion, which, I hope may be of great weight with this court: It is in the 4th Institute, fol. 15, he says, For any thing moved or done in the House of Commons, it ought to be determined, adjudged and discussed by the course of parliament, not by the civil law, nor yet by the common laws of this realm, used in more inferior courts, which was declared to be 'secundum 'legem et consuetudinem parliamenti,' concerning the peers, and the like, pari ratione, for the Commons; and that stops this court in our case: For so it is said in this plea, which is the matter you are to be governed by, that it is 'se-

'cundum legem et consuetudinem parliamenti.' He tells you further, there is no notice to be taken of any thing said or done in the House of Commons, but by the report of that House, and every member thereof hath a judicial place; he takes it out of Henry 7, and so the book is expressly. And he goes on: This is the reason that judges ought not to give any opinion of matters of parliament; because it is not to be decided by the common laws, but 'secundum 'legem et consuetudinem parliamenti.' So he tells you, you are bound by the methods of parliament; and I need not press the thing much after his authority; for he was learned in parliament matters.

But I would crave leave to mention a case that was lately in this court, and that was the case of my lord of Shaftesbury,* who was brought by Habeas Corpus to this court, and upon that Habeas Corpus it was thus returned, That he was committed by order of the Lords in parliament, there to remain during the pleasure of the king and of the House of Lords; and this for an high contempt committed in that House. Upon this return we insisted that my lord might be bailed, because it was uncertain, the pleasure of the king, or the House of Lords; and upon reading the order, there is no crime expressed, but only in general for an high contempt. I speak it not for the particular case's sake, but to apply the reason of it to our case; the reason then given by the judges, Mr. Justice Jones will please to remember it (for it was particularly declared by him) why they could not bail my lord, was this; he was pleased to say, We in this court take notice of the court of Exchequer, and other courts in Westminster-hall; and it would be strange if we should not take notice of the course of parliament, and House of Lords. And if you are bound so to do in other cases, you are bound to do so in this. And if without pleading you take notice of the course of those courts, you will also take notice of the law of parliaments, and customs of parliaments. And (that I may make use of it to our purpose in this case) we need not particularly say, 'secundum legem et con- 'suetudinem parliamenti in hoc,' instancing in this, and that, and the other particular: But the court is to look into it, without my looking into the particular law of parliament. So that, my lord, here is ground enough before the court, and I know the court will look into it, before they give judgment.

The second exception is this, That it is no said in the body of the plea, that Fitzharris is impeached for this treason; but it comes in only in the averment. Now, my lord, as to that, we must pursue the impeachment as it is in the Lords Journal. It is for treason generally there, and it is said to be 'secundum 'legem et consuetudinem parliamenti,' which goes to all, and there is a record of it among the records of parliament, and Mr. Attorney hath confessed it by the demurrer.

And that this is the same treason, we do aver in fact, which also is confessed by the demurrer; and your lordship will see by the records and forms of entries in parliament (that I may not repeat things over and over again) that this is the course and method of parliaments.

Mr. Attorney hath fancied an exception of grammar, an adjective for a substantive; but I take it to be as well as any man can plead in this case. For what says the prisoner? The knights, citizens, and burgesses in parliament assembled, did impeach me; which impeachment is still in force before the Lords. I take it to be as plain as can be. If they did impeach me, then there was an impeachment; it can bear no other sense.

My lord, another exception, and which was thought a strong one the other day, and strongly urged, is, that the king may chuse his court, and they compared it with the other courts; But there is the mistake that runs all along in this case. It is no doubt, the king may chuse his court for his own action and suit; but the impeachment is an impeachment of the Commons, and their suit is to be tried no where else but in parliament. And the case that was the other day cited by Mr. Attorney, for this purpose, is true of the person that was arraigned for treason, and hath been indicted and arraigned in Ireland, and he may be arraigned and tried here, there is no question of it; but to say, therefore, that this is a consequence from that rule, that therefore he will chuse whether he will proceed in parliament upon the Commons impeachment, and put a stop to the proceeding of the parliament, by proceeding in this court, I take to be a great *non sequitur*.

My lord, I have offered these reasons, as to the form of the plea to maintain it. Now as to the precedents, I would a little speak what hath been done in the like case, where this court hath taken hold of causes, and the prosecution of the court hath been stopped by pleas to the jurisdiction, and what hath been done upon those pleas. What doom they have had, I will hint some of them to you.

There was a case mentioned by your lordship the other day, the bishop of Winchester's case, 3 Ed. 3. I dare not say I have looked upon the Parliament-Roll; but my lord Coke tells us, he hath recited the record, 'de verbo in verbum:' In the 2d Institute, fol. 15. there are all the proceedings. It was not an indictment, for my lord Coke contradicts that, and says, it was a declaration: There the record at large sets forth, that the bishop of Winchester was attached to answer the king; for that whereas at a parliament held at Sarum, it was ordained, 'per ipsum Regem ne quis ad Dom. Parlia- 'ment. summonitus ab eodem recederet sine li- 'centia Regis.' And that this bishop, in contempt of the king, recissit, without leave of the king. I think, it is rather an action than a criminal proceeding: What says the bishop to this? He comes, and says, 'Si quis deliquerit 'erga Dominum Regem in Parliamento aliquo, 'in Parliamento debet corrigi et emendari, et

* See vol. 6, p. 1270, of this Collection.

'non alibi in minore Curia quam in Parliamen-'to,' &c. What becomes of this plea? It is strange there should be such an inhibition, that no man should depart without leave of the king and the bishop be punished for it; we do not find any judgment was given, nor would they venture to do it. My lord Coke hath a mark upon it; for this very reason, it looked as if there was a design to weaken the parliaments, by bringing their proceedings into Westminster-hall, but they would not do it; they would give no judgment for the king; but for aught appears, the plea stood.

Then there is the other case of Mr. Plowden, and many more in primo et secundo Phil. et Mar. where a great many of them, some whereof were burgesses, and they submitted, but he did not. The information there is this, that these persons were summoned to the parliament, and departed from thence without the leave of the king and queen, though it was prohibited by them that any should depart: Most of them submit to a fine; and if it had rested there, it might have turned to the prejudice of the Commons as an example.

But Mr. Plowden, he pleads as one that understood himself, and the power of parliaments, and their proceedings very well, and considers the time to have pleaded in: Says he, I continued in the parliament from the beginning to the end of the parliament; but he relies not there; but he brings a traverse full of pregnancy; and if our plea be faulty, theirs was an hundred times as faulty, *absque hoc*, That he, the said Edmund Plowden, the said day and year during the said parliament, without licence of the said king and queen, and the court aforesaid did contemptuously depart in contempt of the said king and queen, and their commandment and inhibition, and to the great detriment of the common-weal and state of this kingdom, &c. All these things he pleads, which your lordship knows to be a very ill traverse; and yet this case continued all the time of that queen, and the court would never give judgment in it. This was in primo et secundo; and yet it appearing upon the face of the information, that it was a case that concerned the Commons, the court would not give judgment for or against the Commons as long as the king and queen lived.

There is a later case, and that is Elliot's case 5 Car.* There is an information against my lord Hollis, sir John Elliot, and many more; and there is a plea put in to the jurisdiction of the court; I have a copy of my lord Hollis's plea, and it is in a manner as faulty as Plowden's plea: but the court in that case does not go upon the insufficiency of the plea, but gives judgment generally that this court had a jurisdiction; the assault happened in parliament, and the words were spoken there; and upon the demurrer, they gave judgment upon the whole matter. What became of that judgment? We know very well it was reversed, 19 of this king. And pray observe the proceedings in the reversal of that judgment. Judgment was given against my lord Hollis and the rest of the gentlemen of the House of Commons, though there was no prospect of a parliament, yet they were obstinate, and would not plead; for they thought the judgment to be a very hard judgment; and this being a plea in abatement, judgment was given for want of a plea over. It may fall out in this case, that this person may be obstinate, and not plead over, if you should give your judgment against this plea. In Elliot's case they were fined severely, and they continued under this judgment in prison, and in execution for the fine a great while; and they were delivered by what I cannot indeed justify in all it's proceedings, I mean the long-parliament; but what was done in 19 of this king, I think is good authority, which none can say but was a parliament as useful to the king and kingdom as ever could be. In that parliament the Commons examined this Judgment, I speak because I have it in my printed book; it is in Croke Car. I confess, it is not in the first impression; but it is in the second edition, which I have, and these are the expressions in it.

L. C. J. What case is that?

Mr. *Williams.* It is in Croke Car. 181, 604, but the reversal was in 19 of this king.

L. C. J. Was the judgment given, do you say, 19 of this king? Can a case of that time be reported in Croke?

Mr. *Williams.* I do not say so absurd a thing If your lordship will have patience to hear me, I will tell you what I say. My book, which is the 2d impression of Croke, reflecting upon that case in 5 Caroli, does publish the Votes of the House of Commons about, and the reversal of the Judgment, in the 19th of this king. There the proceeding is this; Information is given to the House of Commons, that there was such a case published, which did derogate much from the privilege of parliament, invading the liberty of speech; and the House of Commons considering the consequence, ordered the book to be sent for and read, and taken into consideration and debated; and upon debate, the House came to this resolution, That the judgment against Elliot and others is an illegal judgment, and against the freedom and liberty of speech: and this Vote they send up to the Lords, where it is confirmed and resolved in agreement with the Vote of the Commons: and by the way, in answer to a paper that is commonly spread about by the name of "The Observator;" I say, the Commons came to a Resolution, and pass a vote, which is not indeed a law; and when they have done that, they may transmit their opinions to the Lords, and desire them to concur: then the Lords and Commons have a Conference upon it, and at the Conference the Commons reasons are delivered, which the Lords take up with them to their House, and debate them. Then they come to a resolution to agree with the Commons. Afterwards, upon this resolution

* See vol. 3, p. 294, of this Collection.

of both Houses, they go regularly to work, by Writ of Error to reverse the judgment. And if it should fall out in this case, that your lordship should give judgment against the plea, and this person should be obstinate, and not plead over, and thereupon your lordship give judgment of death upon him; it may come to be a very hard case, if a Writ of Error should be brought in parliament, to reverse this judgment; and it should be reversed, when the party is dead. Therefore it will be of great consequence in this particular.

My lord, I will mind you of one old case, it was 20 Ric. 2. A person [Thomas Hacksey] there presents a petition to the Commons in parliament; and it seems there was something suggested in the Petition, which did amount to high-treason, as there may be some petition or some complaint against a great minister that may contain an insinuation, as it were, of high-treason; he was indicted out of parliament for high-treason, and was found Guilty, and by the grace of the prince he was pardoned: but because the Commons would not lie under that precedent of an invasion of their privilege, though he was a person without doors that prepared that petition, and no more hurt done to him but the prosecution, he being pardoned, the judgment was voided.

L. C. J. Where is that authority?

Mr. *Williams.* 20 Ric. 2, Ro. Parl. 12. And you will find it in the argument of Selden's case, published in Rushworth's Collections, Appendix to vol. 1, fol. 47, and 48.

And now, my lord, I have done with the substance of the case, with my reasons for the matter and for the form. In this case, here is the life of a person before you; here is the right of the Commons to impeach in parliament, before you; here is the judicature of the Lords to determine that impeachment, before you; here are the method and proceeding of parliament before you; and how far you will lay your hands upon this case, thus circumstantiated, we must submit to you: but I hope you will proceed no further on the indictment.

L. C. J. Pray, gentlemen, let us a little direct you not to spend our time about that which is not to the purpose, or that is not in the case: here is nothing of the Commons right to impeach in parliament before us, nor of the Lords jurisdiction, nor the methods of parliament in this case: they are things quite foreign to the case and the matter in hand; which is, whether this plea, as thus pleaded, be sufficient to protect the prisoner from being questioned in this Court, for the treasonable matter in the indictment before us. Therefore you ought not to spend time in things that are not before us to be considered, being out of the case; for we have nothing to do with any privilege of parliament, or of either of the Houses here at this time.

Justice *Jones.* And, gentlemen, there is nothing at all here of any fact done in parliament that can be insisted on here; nor is there any complaint against Mr. Fitzharris for any thing he hath done in parliament. All Mr. Williams's precedents run to that; but this is for a thing done without doors.

L. C. J. We speak to you to come to the point, which is the duty of all Courts to keep counsel to the points before them. The sole matter before us is, whether this be a good plea to ouste this Court of a jurisdiction, which otherwise unquestionably we have of this matter?

Mr. *Williams.* It is a hard matter for the bar to answer the bench, my lord.

Sir *Fr. Winnington.* My lord, I shall pursue your direction as well as my understanding will give me leave, and save your time as much as I can; but the Court having assigned us of counsel, you will give us leave to use our discretion, keeping as near as we can to the points of the case, and to the pleading. But if upon the reasoning of this case, other parliament-cases fall in, I hope you will give me leave to cite them for maintaining our plea. The plea here is to the jurisdiction, and consists of two parts. First, matter of record, which is, that an impeachment is depending in the House of Lords (for so it must be taken upon the pleading, as I shall manifestly prove:) the second is matter in *pais* (viz.) the averment, that the impeachment and indictment are for one and the same treason: and the plea is made up of these two parts, together with an averment that the person is the same. The king's attorney hath been pleased to demur generally to us, and I am sure that if our plea be well and formally pleaded, all the matter of fact is confessed by the demurrer.

Mr. Attorney did, to my apprehension, make but one objection the other day, and he still insists upon it, that here is a record too generally pleaded, and they compare it to the common case of an 'auter foitz acquit, upon another indictment; but I hope to make it evidently appear, that it is in no sort a parallel case. The matter which I conceive is confessed by the demurrer, is, that there is an impeachment by the Commons of England of high-treason against Fitzharris lodged in the House of Lords, 'secundum legem et consuetudinem parliamenti:' and that the treason for which he was impeached, is the same treason contained in the indictment, to which the prisoner hath now pleaded. Upon this matter of fact, so agreed, the general question is,

Whether an impeachment for treason, by the House of Commons, and still depending, be a sufficient matter to ouste the Court from proceeding upon an indictment for the same offence. My method will be shortly to speak to these things.

L. C. J. Pray let us give you some direction; that is not the question, nor can come in question in the case: you mistake the points of the case.

Sir *Fr. Winnington.* Why, my lord?

L. C. J. The question is, whether you have pleaded sufficient matter here to ouste us of our jurisdiction? It is to no purpose to put questions in the case, that are not in it.

Sir *F. Winnington.* My lord, I know the case is very nice and tender on all sides, and therefore may very well bear an interruption; however I express myself, my meaning is the same with your lordship's. The method that I shall proceed in, will be this: I will suppose the case before you had been of an impeachment, containing the special treason for which he is now indicted. I will shew in the next place, that as it is now pleaded, it is as available as if the impeachment in the House of Lords had mentioned the particular treason. I shall then give some reasons why it is so, and mention one or two precedents that have not yet been cited. Two of the king's counsel did agree, that they would not make a doubt of the plea, if there had been a particular Impeachment; and therefore I would, by considering what would be the reason of that case, apply it particularly to the present case. The House of Lords is a superior court to this: and is agreed to be the highest court of record in the kingdom, Plowden 380. Co. Lit. 109, 110. 9 Co. in Præfat. And then I am within the common rule of pleading, according to the differences taken in Sparie's Case 5 Co. 61, and 62. That a suit first commenced in an inferior court cannot stop a suit in a superior court, though subsequent; but a suit in a superior court may be pleaded, to stop the proceedings of one that is inferior. And though it may be objected here, that the parliament is determined and dissolved, and so there would be a failure of justice; yet this objection is of no force: for if once the suit be well commenced in the superior court it cannot after go down to the inferior. And what is begun in one parliament may be determined in another; so is the case 4 Edward 3. n. 16. of the lord Berkeley, and those that were accused for the death of Edward 2.* And though it was objected there, as hath been here, that by this means there might be a stop of justice, by the dissolution of the parliament; yet the short and true answer is, That it is in law to be presumed, parliaments will be called frequently, to consider of the business of the kingdom, and redress grievances, according to the several Statutes made for that purpose, 4 Ed. 3. cap. 14. 36 Ed. 3. cap. 10. I shall labour this no farther; but taking it as the common rule of pleading, that a record in a superior court may be pleaded to stop a proceeding in an inferior; I shall come to prove that this record is well pleaded, and could not be otherwise, unless Mr. Attorney would have had us plead what is false, this being the truth of the case. For the Commons did impeach Mr. Fitzharris generally of treason, as it is the course of parliaments for them to do; and in our very plea we alledge, that he was impeached 'secundum legem et consuetudinem parliamenti;' and so Mr. Attorney hath confessed by the demurrer: and if they may prefer an Impeachment in general, according to the law and custom of parliament; why then so far it must be allowed, that we have pleaded well that he was impeached of treason. It is very true, my lord, if a man will plead generally that he was indicted of High-Treason, it would be ill; because the court cannot take it otherwise than he pleaded it; and such a general indictment would be altogether void, and therefore no averment could make it good) or supply that generality and uncertainty.

But an impeachment generally for treason is good and warranted by the law and course of parliament, and so confessed by the demurrer. And so your lordship will take it to be, and will give credit, that all is regular in the proceedings of that high court. You will presume, even in the ecclesiastical courts (as my lord Coke says in the 4th report) that all things are rightly done, when they have a jurisdiction; *à fortiori* you will believe the greatest court in the kingdom does proceed regularly. My lord Coke in the 4th inst. fol. 14, and 15, does say, what the law and course of parliament is, the judges will never intermeddle with. They always leave it to the parliament, who are the superior judges, and are to determine the matters before them. For they take notice, that the course of a court is the law of a court, as it is in Lane's case in the 2d report in the case of the Exchequer. And therefore, if a general impeachment is 'secundum legem et consuetudinem,' which is confessed by the demurrer in this case, then you must take it for granted that the parliament proceed rightly, and that such a general impeachment is sufficient in law. There is a famous case that strengthens what I say, 11 Ric. 2. di. Rot. Parl. par. 2. the case of the Lords appellants. You will find it also cited in Rushworth's Col. part 1. in the appendix, fol. 51. Tresilian and others were appealed against for treason, and both the judges of the common and of the civil law were by direction of the king called to advise of that matter. And they did all declare, that the proceedings in that case were neither agreeable to common law, nor civil law. But the Lords in parliament said, it did not belong to the judges of the common law or civil law to guide them; but that they ought to proceed according to the course and law of parliaments (which are the words of our plea), and that therefore no opinion of theirs should ouste them of their jurisdiction, or alter the course and method of their proceeding. My lord, this case is very remarkable; but I will go a little farther: the judges in all ages have been so far from taking upon them to judge of the laws and customs of parliament, that they have denied to answer when their advice has been demanded, and insisted upon it, that they were not proper judges of such matters, as in 31 Hen. 6. Rot. Par. n. 26. For there, among other things, the judges were demanded, whether the Speaker of the House, during the adjournment of parliament, might be arrested: they desired to be excused from giving any opinion: for, said they, in this great matter they ought not to interpose, it being a matter of parliament.

* See vol. 1, p. 55, of this Collection.

In the great council primo et secundo Jacobi, about the union of both kingdoms, the judges refused to give their opinions upon several questions put to them; desiring to be excused, for that such things did not belong to them, but were matters fit for parliament only. My meaning is, to infer from hence, that since it is pleaded here to be according to the law and course of parliaments, and Mr. Attorney hath acknowledged it, that now your lordship is foreclosed from further meddling with this case, it appearing upon record to be a matter whereof you cannot judge.

But the objection is, that admit the impeachment should be taken to be according to the course of parliament, yet it is so general, that the court cannot judge upon it: I answer, that it is evident the impeachment was not for nothing; it is most certainly to be presumed, that such a body of men as the House of Commons would not impeach a man for no crime. Fitzharris avers by his plea, that it was for the same treason, for which the jury have found this bill against him. Now this averment makes the matter as clear to the court, as if the impeachment had mentioned the particular treason.

Every day's experience shews, that averments, which are consistent with the record, are good, and are of necessity to clear the fact to the court; so that the judges may give a judgment upon it. If the defendant will plead a recovery in a formal action, in bar to an action of debt, or other action; it is not enough for him to set out the record; he must aver also, that the causes of the action are the same, and that it is the same person who is mentioned in one record, and in the other records; and this shews, that the most special and particular are of no use without averments.

My lord, there is a case that I find directly to this purpose, which goes further than the case I did but now put, and that is, 26 Assiz. Pl. 15. It is also mentioned in Stanf. Pla. Cor. 105, where a man was indicted for the murder of J. S. and he pleads a record of acquittal, where he was indicted for the murder of J. N. But he avers, that J. S. in this indictment, is the same person with J. N. in the other indictment; and that was adjudged a good plea, and the party was acquitted, though the averment there seemed to be a contradiction to the record. This makes it clear, that if an averment may consist with the record, the law will allow it. In More's Rep. 823, Pl. 1112, the king against Howard, it is said, that if an act of parliament be certified into Chancery, no averment lies to say this is no act of parliament, because the Commons did not assent to it; but if it appears in the body of the act, that the Commons did not assent, as if it was ordained by the king and Lords, and without mentioning any assent of the Commons: there it may be averred to be no act; for this being a matter consistent with the record, is averrable: And so it is agreed in 33 H. 6, fol. 18, Pilkinton's Case.

Now Mr. Attorney has his election here (as it is in all such cases) either to plead *null. tiel. Record.* and then we must have produced it; and if we had failed, it had been against us, as to the whole plea. Or if he would not deny the record (as indeed he could not) he might have taken issue upon our averment, that it was not for one and the same offence; but he has demurred, and thereby confessed there is such a record, and confessed the averment to be true, that he was impeached for the same crime, and that he is the same person. And now it is plain to your lordship, that I stated the question right at first.

My lord, I shall cite you one precedent out of Rast. Ent. fol. 384 and 385, where a man was indicted and acquitted before certain justices, and being indicted *de novo*——

L. C. J. It is title Gaol-delivery, is it not?

Sir *F. Win.* Yes, my lord, it is. And he pleads that he was indicted 'coram aliis justiciariis,' for the same felony, and upon this plea the entry is made, 'Quia testatum est hic 'in cur. in præfatos justiciarios,' that the said party was acquitted of the felony, in manner and form, as he had alledged in his plea. Therefore it is adjudged, that he should be discharged, and go without delay. My lord, I do not altogether rely upon this precedent for law; but I find it in that book.

Now, my lord, I shall offer some reasons in general. First, that when once the Commons in parliament, in the name of themselves, and of all the Commons of England, have lodged an impeachment against any man, it seems to me against natural justice, that ever any commoners should afterwards come to try or judge that man for that fact. I speak this, because every man in England that is a commoner, is a party to the accusation; and so we have pleaded by such an impeachment, a man is subjected to another sort of trial: Magna Charta says, That every man shall be tried by his peers, or by the law of the land. And by the law of the land, there are several sorts of trial, some by juries, others not by juries. This is one of those sorts where the trial is by the law of the land, but not by his peers: for it would be hard that any man should come to try or give judgment upon a person who hath been his accuser before; and in effect hath already given his judgment that he is guilty, by the accusation of him, and so stands not indifferent. By this means the trial by jury is gone; and the Lords, who are the peers of the realm, are judges in point of fact, as well as law. Here is an enormous offence, against which all the nation cries, for so they do in the impeachment. Then, says the law, it is not fit that you should try him, who are parties; but the Lords are the proper judges, they shall try him *per testes*, and the commoners may come in as witnesses, but not as judges

My lord, another reason is this, that if an appeal of death, or any other appeal were depending before the statute of 3 H. 7. cap. 1, the king could not proceed upon an indictment

for the same fact; because the king, as the common parent, does only take care that such offenders should not go away with impunity; but the preference was given to the person more particularly concerned, and the king's indictment must stay till the year and day were out, to see whether they will proceed in their suits. And so says my lord chief justice Hales, in his Pleas of the Crown, 24, 42, 45.* Then 'a minori ad majus,' does the law so regard the interest of the wife or the heir, &c. in their suit, and has it no regard to the suit of all the Commons of England? For manifestly, an impeachment is the suit of the people, and not the king's suit.

That is the 2d reason; another reason I shall urge, is that which was touched by Mr. Williams. Suppose this man should be tried here, and be acquitted; is it to be presumed that he can plead this acquittal in bar to the impeachment before the Lords? My lord, I believe there is no considering man in England, that has regard either to the jurisdiction of parliament, or to the nature of the suit, will affirm, that it would be a good plea; and that he could bar the great Court of the kingdom from proceeding against him, by saying he was acquitted by a jury in Westminster-Hall, after the suit was first well commenced in that Court.

My lord, I say, with reverence to the Court, that should you proceed in this trial, it may fall out, that contrary to a fundamental rule of law, a man shall be twice put in danger of his life for one offence, which by the law he cannot be; and therefore I urge that as a reason, why you cannot proceed here on this indictment.

My lord, I will now mention two or three precedents, which will prove that this impeachment is according to the course and law of parliaments, though it may seem needless, after the king's learned counsel have agreed to it.

My lord, I shall first mention the case of Michael de la Poole, Rot. Par. 18 or 28 H. 6, n. 18. He was a very great man, and came to the House of Lords voluntarily, and said, there was a rumour that he was guilty of horrible things.

L. C. J. Where did you take this case, out of Cotton? It is mentioned there; but I have seen a copy of the roll.

Sir *Fr. Winnington.* Yes, my lord: thereupon the Commons pray he may be committed upon his own confession; and that the thing being debated in the House, the Lords said, We know not what was meant by those words, 'horrible things;' it may import only misdemeanors: if it had been said treason, we had known how to have proceeded thereupon: and thereupon within a few days after, the Commons came and accused him of treason. And there it is said, that the course of parliament is to find out the truth by circumstances, and such degrees as the nature of the thing will bear, and they are not confined to the strict rules of other Courts. I will not cite any more antient cases, though there are many to be found of general impeachments: for we are not disputing what is the right and course of impeachments, which is confessed, upon the pleading: but we have had several cases of late; the earl of Clarendon was impeached generally, and the Commons took time to bring in their articles; and I have had the experience in three or four parliaments, wherein we have been pretty well busied with impeachments, though we have had no great success in them, that though the Commons may, if they please, carry up particular articles at first; yet the law and course is, for the Lords to receive the general impeachment, and the Commons say, that in due time they will bring in their articles. So it was done in the case of the five popish Lords; some particular member was appointed to go up, and impeach them of high treason in general; and in that case, though the parliament was dissolved before any articles were sent up, yet afterwards, in the next parliament, the articles upon the former impeachments were sent up, and received, and my lord Stafford since executed, upon his conviction upon that impeachment: yet indictments were exhibited against them, before ever any impeachment was sent up by the Commons, and preparations were made for their trials. But from that day to this, there hath been no attempt to try them upon their indictments, though there have been several intervals of parliament.

Our case is stronger than that of the Lords: for in the case at the bar, the first suit was in the House of Lords by the Commons, whilst in the other case the first was the suit of the king, by indictment; and yet by a subsequent impeachment that was stopped, and the Lords continue yet prisoners in the Tower. Our time hath been so short, that we could not see the copies of orders, which we might otherwise have made use of, for maintaining this plea: we sent to the House of Lords, but the officers were out of town, and we could come at the sight of nothing there. We have been told the opinion of the judges was delivered at council concerning these very Lords, that the impeachments being lodged in parliament, no other prosecution could be against them, till the prosecution of the Commons was determined. So far the Courts below have always been from meddling with the jurisdiction of parliament, that even many times in questions upon acts of parliament, they have gone up to the parliament, to know what was meant by it. And I remember it was said by the Court in that case of my lord of Shaftesbury, where it was agreed by all, that the commitment was too general, for it was only for a contempt, whereas the crime ought particularly to appear in the warrant; that it being in a case of commitment by the parliament (at least while that parliament was continuing) they ought not to meddle with it, nor could they enquire into the formality of the warrant.

My lord, I must mention one thing touching the case of my lord Hollis, which was cited

by Mr. Williams, and I have but a word to add: it is in the Appendix to the first part of Rushworth's Coll. and also in Croke, Car. fol. 181. It was there pleaded to the jurisdiction of this Court, that it was a matter done in parliament: in our case it is pleaded that an impeachment is depending in parliament; that was but a prosecution for a misdemeanor, this is a case of high-treason. It fell out in that case, the Court here did adjudge, that the information did lie; but upon a Writ of Error it was agreed by the Lords unanimously, that the judgment was erroneous, and that the parties should be restored to all which they had lost, by reason of it: but if this man should lose his life by your judgment, what help would there be upon a Writ of Error? The danger of such a thing requires great consideration; and it would be of fatal consequence, if the Lords should hereafter adjudge that this Court had no jurisdiction.

As for Mr. Attorney's objection to day, that we have not set forth actually, that there was any impeachment: I do confess I was a little startled at it; for the words of the plea are, That Edward Fitzharris, by the knights, citizens and burgesses, was impeached; which impeachment is in force. I do not know how in the world we could have thought of more express words, than to say, he was impeached; and that that impeachment is in full force, as appears by the record.

For the other objection, the other day (for we would mention all, how little soever they deserve an answer) that the king may chuse in what Court he will sue; it is agreed, when it is at his own suit: but this is not so, but at the Commons suit, and can be no where else prosecuted, than where it now depends. This is the method and course of parliaments we say; and that the method and course of parliaments is the law of the land, your lordship will take notice that it is so.

To conclude, as this plea now stands, the demurrer confessing the matter of it, it cannot be over-ruled, without deciding whether the Lords can proceed upon such general impeachments, and whether the Commons can impeach in such a general way. We submit the whole to your judgment: it is a case deserves great consideration, as being of great weight and moment; and highly concerns the jurisdiction of the Lords, the privileges of the Commons, and the rights of all the people of England.

Mr. *Wallop*. May it please your lordship, there are in this plea three principal parts upon which it turns, which are expressly alledged. First, that Fitzharris before the indictment was according to the law and custom of parliament impeached of high-treason, and this I humbly conceive is confessed by Mr. Attorney upon the demurrer. The second thing is, that this impeachment, be it as it will, general or particular, does remain in full force and virtue. This is plainly alledged and demurred to, and so confessed by Mr. Attorney; for all things well alledged and pleaded, are confessed by the demurrer. The third great point and hinge upon which it turns, is this, that the high treason, mentioned in the indictment, and the high treason for which he was impeached in the House of Lords, is one and the same treason. This we have plainly averred, and this Mr. Attorney hath likewise by his demurrer plainly confessed, as we humbly conceive.

For the two former points there is no difficulty in them, and therefore I shall pass them over. It is the third matter which I take to be the only point in the case; and if we have well averred it, and can by law be let into such an averment; then I hope your lordship and this Court will not pretend to go on in this case. They object, and say, because he is impeached of high-treason generally, without naming any particular treason, that cannot be averred to be the same, and a demurrer does never confess the truth of that which by law cannot be said; but if it may be said, and is said plainly, then the demurrer confesses it.

My lord, I humbly conceive this matter is well averrable, and we have taken a good averment. I grant that a repugnant and an impossible averment cannot be taken, as to aver a horse to be a sheep, which is apparently repugnant and impossible; and in that case a demurrer can never confess the truth of that which appears impossible to be true. But, my lord, if there be no impossibility, nor repugnancy, nor contradiction in the averment between the matters that are averred to be the same, as there is not between that which is but generally expressed, and that which is more especially alledged; where all may well stand together, and the one includes the other and needs only some farther explanation; it is not only allowable to aver it, but most proper, and in such case only necessary. For, 'quod constat clare non debet verificari,' in this case it is not necessary that it should appear to the court upon the view of the indictment and impeachment, that the matter contained in both, is the same; but it is sufficient, that it be proveable upon an issue to be taken. And so much is admitted by the judges in Sparry's case Co. 5 Rep. 54. That if there be convenient certainty which may be put in issue, it is sufficient, and consequently not necessary to appear at the first, but upon the event of the issue afterwards to be tried. And if they intend it otherwise, I confess I understand them not. It is true, it must appear to the court, either at the first opening, or upon an issue subsequent to be found. And, my lord, if this matter may appear at first or at last, and the thing is possible to be proved, then we are well enough. In Corbet and Barne's case, in the first Croke, fol. 520, a battery supposed to be in London, and a battery supposed to be in Herefordshire, were averred to be one and the same battery, which naturally is impossible; yet being transitory, and therefore supposable to be done in any county, such an averment is allowable, though it seemed contradictory, and could not appear to the court by comparing the several declarations to be any way the same.

And there being a demurrer for that cause in that case, the truth of the averment was ruled to be confessed by the demurrer, and so here by the demurrer, the truth of the suggestion, that the treason in the impeachment, and the treason in the indictment, is one and the same, is confessed.

By taking this averment, we offer them here a fair issue, an issue of fact triable by a jury, wherein the attorney-general might have joined with us, if he had pleased; but refusing that, and having demurred, and thereby confessed what we have alledged, it must be taken to be true, as if found by a jury. And, my lord, that this matter is properly averrable and triable, I think it is plain, it being a question of fact, which is properly triable by the country. And if they had taken issue upon that, we might have gone to a jury, where the matter would have been easily proved. For upon evidence given, the jury might fairly take into consideration the reading of this very numerical libel set forth in the indictment, and the particular and special debate of the House of Commons thereupon. And that upon those very debates the House voted that Fitzharris should be impeached for matters contained in that libel. And that upon those votes the impeachment was carried up to the Lords. This is evidence sufficient that the House of Commons did intend to accuse him of the same treason contained in the indictment, which proves the issue; that is, that the treason contained in the impeachment, is the same with that contained in the indictment. Neither is this to put the intention of the mind or secret thoughts of the heart in issue, which is against the rules of law; but to put them into a way of proof, which well stand with the rules of law, which upon the general, or other collateral issue, may well be enquired of by the jury. As in an action, 'quare canem, 'mordacem defendens scienter retinuit.' Here 'scienter' is not directly issuable, but it is provable and must be proved upon the general issue. So in the present case, the intention of the Commons upon the issue offered by us, and refused by the attorney general, might, and ought, and would have been proved, and without doubt, found by the jury. Neither is this general impeachment such a national thing as the other side would pretend, but it is as if they should say, we do charge him to have committed certain crimes that are treason. Now whether the crimes they say he had committed, and for which they impeached him, are the same with those for which he is indicted, is a good and proper issue. And if it appears to the court to be the same, you will certainly yourselves take off your hands from those proceedings. This is all I shall say as to the averment. And if we can well get over that, I take it, all the rest is well enough.

But again, they say, the Impeachment is too general, and no man shall be put to answer to such a general accusation.

And I say so too, neither shall Fitzharris be put to answer to it without special articles; yet he cannot quash the im[illegible] for this cause, as he might the [illegible] which shews the difference [illegible] an impeachment and an indictment, which [illegible]ays contains the special matter, and withou[illegible] which it might be quashed and made no [illegible] But here by the law of parliament such [illegible]l impeachments are held good; and [illegible] are usually brought in afterwards, and after those additional articles which cannot be in the course and way of indictment; and therefore we must take the impeachment as we find it; and since it stands against us as a record, though it is general, we may, and must plead it in the same generality; having no way to make it on record, as we have in case of such a general indictment.

So then this being an impeachment according to the course of parliament, it is well lodged in the House of Lords, where it only ought to be tried, and we must plead it as we may, and as we find the case to be. And having averred the crimes to be the same, we have done what we could, and therefore enough.

And that a general Impeachment without articles is a bar to any indictment for the same matter, was resolved by all the judges, as I am informed, in the case of the Lords in the Tower, * who were all indicted for treason, either in the King's bench or before commissioners of Oyer and Terminer. And afterwards (5 Dec. 1678) generally impeached before the Lords in parliament, and no articles exhibited till 3 April 1679. And yet in the mean time it was resolved at the Council Table by all the Judges there attending, that after the general impeachment before articles, they could not be proceeded against upon those indictments, though the parliament wherein they were impeached was dissolved.

And that was a stronger case than this of Fitzharris: for there the inferior court was first possessed of the cause, and yet the general impeachment closed up the hands of the court. But in this case, the superior court, the parliament, was first possest of the cause, which cannot be taken out of their hands by the inferior court.

There is a farther difference betwixt an impeachment in parliament, and an indictment; that in an indictment which is always as particular as articles upon an impeachment, you cannot plead *auter foitz* arraigned; but you must plead *auter foitz* convict or acquit, as appears in sir William Wishipole's case, Chron. 1. 105. But in an impeachment in parliament, the other side will acknowledge, that after articles exhibited, there can be no proceedings upon an indictment for the same offence, although the defendant in the impeachment be neither convict, nor acquit. Otherwise you may bring back all the lords in the Tower to the King's Bench to be tried, which Mr. Attorney will not, I suppose, attempt.

And it is observable in the case of sir William

* See vol. 7, p. 1218, of this Collection.

Wishipole, That to avoid the doubt that the party there should not be questioned, both upon the Coroner's Inquest, and the indictment of murder; it was ruled by the court, that the first should be quashed as insufficient: So careful were the judges to avoid the double vexation, in a case compared with this, of no great import.

I shall say no more to the case, but only observe how scrupulous the judges have been to touch upon a case, where they had the least suspicion of jealousy that the parliament had, or pretended to have a jurisdiction, or were possessed of the cause. I am sure I could never get any thing by any labours of mine in those cases. But upon all such motions they were so aware of what might be the consequence, that they would always worship afar off, and would never come near the mount, they would ever retire when they came but near the brink of this gulph.

Now, my lord, if you retain this cause, in consequence you charge yourselves with the blood of this man; wherein, if you proceed regularly, and according to the law all is well. But however, by overruling his plea, you take upon you his blood one way or other; through which you must wade to come at the cause. And whether it be advisable to come at it upon these terms, I leave it to your lordship's wisdom to consider.

Mr. *Pollexfen*. My lord, I shall not make any long argument, there hath been so much said before me. But I would fain come to the question if I could; for I must confess, after all, I cannot see what the other side make the question. Mr. Attorney was pleased to say, that both for the matter and form, he objected against our plea. But if for the matter it be admitted to me, that an impeachment in parliament for the same matter will out this court of jurisdiction; I will say nothing at all of it, for I apprehend that is not then in question.

L. C. J. No, not at all.

Mr. *Pollexfen*. Then the matter seems to be agreed, and only the manner and form of a plea are now in question. And for the manner, they except to it in these particulars. First, they say, it is not alledged that there is any impeachment upon record; now I confess, form is a subtil matter in itself, and it is easy for any man that reads other men's words and writings, if he will, to make what construction he will of them, even Nolumus to be Volumus; but I know the court will not do so. But for an answer to the objection, I think it is as strongly and closely penned as I can tell how to pen any thing, he was impeached, 'Quæ quidem Impetitio, &c.' What can that 'quæ quidem' signify, but the impeachment that was just mentioned before? But what they mean by this, to say, this is not the same impeachment, when the words are positive that it is the same, I must confess I cannot fathom.

My lord, there was another thing spoken the last day, but they have not mentioned it now: if there be any thing stirred in it. I hope your lordship will be pleased to hear us before you give your judgment in it, That it was not said to be *sub pede sigilli*; but I know they will not insist upon it, therefore I say nothing to that.

But the great question now is, whether or no this be not too general, the alledging that he was impeached in parliament, and not saying how or for what crime; though there be an averment afterwards, that it is for the said crime? Whether this be not so general, as that therefore this plea should be naught?

First, For this of the averment, I take it with submission, let the crimes be never so particularly specified in the record that is pleaded, and in that upon which the party is brought in judicature, yet always there must be an averment; and that averment is so much the substantial part of the plea, that let the matter never so much appear to be the same without an averment, it would be naught; and it must come to be tried *per pais*, whether the offence be the same or not: For if a man plead one indictment for the murder of J. S. to another indictment for the murder of J. S. though they bear the same name, he must aver they are one and the same person. For else *non constat* to the court; but there may be two J. S's. Therefore all averments are still the substance of the plea, to bring the identity of the matter into judgment, and are to be tried by the country: So then the objection to the generality is not an objection to the substance, but rather an objection to the form on their side; because the substance is alledged in the plea, that it is for the same treason: Which substance, if Mr. Attorney had thought not fit to have demurred to but taken issue on, must have been tried *per pais*.

Having thus spoken to the averment, my lord, let me speak to the general allegation that he was impeached for treason, and not saying particularly what the fact was.

My lord, if they admit the law, that an impeachment in parliament does suspend or take away the jurisdiction of this court, then they have admitted great part of the fact, and then the matter in question will be, what impeachment in parliament it is that will take away the jurisdiction of the court, and there can be but two sorts; the one at large, where the whole offence is specified; the other not at large, but only in general words, The knights, citizens, and burgesses in parliament assembled, in the name of themselves, and of all the Commons of England, do impeach such an one of high-treason. Now, my lord, if so be such impeachment in parliament be a good impeachment, then have we, I think, the most plain case pleaded that can be, as plain as the fact that this is an impeachment in parliament; and then this court is outed of its jurisdiction.

They that have gone before, have said, which I must pray your lordship to remember, that the court and we are to take notice of the proceedings in other courts, as other courts are

bound to take notice of the proceedings of this; then I would suppose in other familiar cases, there is generally (as it is true in Sparry's case) the writ or declaration, which does in all civil causes set forth the particularity of the thing in question, yet in some cases we are sure it does not do so; but the course and practice of some courts admit general proceedings. Now wherever that is so, the party cannot mend himself by making their course otherwise than it is: For he must not say it is more particular than the course of the court does make it. Therefore he hath no other way by the law to bring his matter on, and help himself, but by an averment that it is the same. I will suppose a case of such a nature as this; a man brings an account in London upon 'Concessit solvere,' and he does not particularize in the court any thing what or how his debt did arise; but after he brings another account or delivery, a special declaration in an account of debt: shall not I, because the first declaration is in general words, aver that this is the same matter that he sued for by the 'Concessit solvere,' which he now sues for in this particular declaration: Or, suppose a man in this court does bring an account for divers wares and merchandizes sold, and does not express any particulars, but that he was indebted, in general words, for wares sold; and afterwards becomes and brings another account, and says, it is for such and such wares; so much for cloth, so much for wine, &c. though his first declaration be in general, not expressing what the wares were, and the last is particular; shall not I come and plead in abatement to the second declaration, that the first and second were for one and the same thing? Suppose again an indictment of barretry be found against a man, which is an offence that is only general, and hath no particulars alledged in the indictment; should not a man that is the second time indicted, come and say, this is one and the same? My lord, under favour, in all these and such like cases, the law must be governed by its own proceedings, and take notice of the nature of the things depending before the court. And if so be, upon consideration of the nature of the thing, there is as much of certainty set forth as the case will admit, and is possible to be had, we must permit the party to plead as he can, and help himself by the averment.

Then, my lord, the question is, whether an impeachment generally in parliament, without particularly setting forth for what, be a good impeachment there or no? If they say it is not, then the bottom of the plea is naught, and all is quite gone; but if they say it is, then I have pleaded my matter as it is. For I cannot say, that that is particular, or make that particular that is not; and I have done all that is possible for me to do in my case. I have pleaded what is in the record; and as it is in the record, from which my plea must not vary, and I have averred it is for the same matter, and you have confessed it by the demurrer.

My lord, I would not intangle the question; but I must confess, I cannot see how they can extricate themselves out of this dilemma, if they do admit a general impeachment is a good impeachment. Then there are fresh instances of this considerable in the case, as that which hath been particularized of the lords in the Tower, and of the opinion in February of the judges in their case. For in the beginning of December were those lords indicted; and after on the 5th of Dec. the House of Commons taking it into their consideration, that there was a commission going out for an high-steward, with an intent to bring them to trial before the peers; they purposely to have the carriage and prosecution of this great and horrid treason, and take off the prosecution upon the indictment, do impeach the same lords, and there the impeachment is just the same as this in our plea of high-treason; but not of any particular fact, adding, only of other crimes and misdemeanors, which is as general as can be. Now, my lord, the judges did take so much notice of it, that though the parliament was dissolved before the particular articles were carried up to set forth the particular offence; yet in February following (some of the judges are here, and they will rectify me, if I be mistaken) their opinions being asked about it at the council-board, upon the petition of the Lords, to be either bailed or tried; they were of opinion, that this impeachment, though thus general, was so depending in parliament, that they could not be tried. So that I think the proceedings in parliament are of that nature, that if you will meddle with what they do, you will take notice of their method of proceedings, as you do of other courts.

Why then, my lord, if this be so, how is it possi[illegible] us to do better? We have pleaded as [illegible] an impeachment of high treason, wh[illegible]ey have us to do, or wherein is our [illegible]? What would they have had us said? We were impeached of any high-treason, so and so particularizing, how can that be? There is no such thing. Then they would have said, 'Nul. Tiel. Record;' and we must have been condemned for failing in our record: Then indeed we had been where they would have had us. But having done according to our fact, if that fact be such as in law will out this court of jurisdiction, I see not how it is possible we should plead otherwise, or what answer they will give to it.

My lord, I will meddle as little as I can with what hath been said, they have mentioned that it is a case of an high nature, and this impeachment in parliament they will look upon it as the suit of all the people of England; why then, my lord, this must needs be agreed to me, if this impeachment in parliament be in the nature of an appeal, surely an appeal does suspend the proceedings upon an indictment for that fact: Which is the case expressly in my lord Dyer, fol. 296. Stanley was indicted of murder, and convicted; after he was convicted, and before any judgment, the wife of the party murdered brought her appeal: then came they

and moved for j[illegible]nt: No, said the court, here is an appeal [illegible]ght; and they could not go to judgment till [t]hat appeal was determined. So the stat. of 3 Hen. 7, cap. 1. and Vaux's Case, 4 Report, fol. 39. An appeal of murder the party convicted before judgment, the petitioner in the appeal did die. Then an indictment brought, and this conviction pleaded in bar of that indictment, and adjudged to be a good plea; but then there was a fault found in the appeal, upon which the conviction on the appeal was void in law, and they went on upon the indictment. This is to shew, that if this be of the nature of an appeal, then ought this suit first to have it's course and determination, before your lordship proceed on this indictment.

But, my lord, whether it be of this nature or no, is a matter we know were under great controversy; and whether your lordship will interpose in that great question, or whether it comes in judgment under this question, you will do well to consider: For it is a matter of parliament, and determinable among themselves, not in the courts below, nor have ever inferior courts taken upon them to meddle with the actions of the superior courts, but leave them to proceed according to their laws: And if that be done in any case, there will be as much regard had in this great cause to the court of parliament as in others.

Besides the authorities cited out by lord Coke and others, I would cite one more, and that is Cotton's Records, 5 H. 4, fol. 426, the earl of Northumberland's Case. He comes and confesses himself to be guilty of an offence against his allegiance, the king delivered his petition to the justices, and would have them to consider of it; no, said the pa[illegible] it is matter of parliament, and the ju[illegible]no thing to do with it: the Lords m[illegible]testation to this purpose, and then they went on themselves, and adjudged it to be no treason. There is only that one record more which has been often cited, and that is, Rot. Parliamenti, 11 R. 2, pars 1, n. 6, in this parliament the Lords spiritual and temporal claimed the same privilege. My lord, I only offer these things, with what my lord Coke says hath been formerly thought prudence in the judges to do.—So that I hope, that if the matter be good, the form is as good as the matter can be put into, and therefore we hope you will allow us the benefit of it.

Attorney General. May it please your lordship, I am of counsel in this case for the king, and notwithstanding what hath been said, I take it, with submission, that this plea is a naughty plea, as a plea to your jurisdiction, and there is no matter disclosed therein that we can take a good issue upon.

The great substance of the arguments of these gentlemen assigned of counsel for the prisoner, is against the prisoner. For the great matter of their arguments was, lest this gentleman should escape (which arguments in several instances they have used to support the plea) but the prisoner pleads this plea to the purpose that he might escape. Therefore if these gentlemen had taken instructions from him, surely they would have used arguments to the same purpose that he might escape.

My lord, they object we have admitted here that there is an impeachment depending, that we have admitted it is for the same matter, and that we have admitted the parliament to be in being; but no fact is admitted that is not well pleaded. Indeed if that be admitted that the parliament is still in being, then it goes very hard with us; and if not so admitted, the whole force of Mr. Williams's argument falls to the ground. But I say, my lord, with submission, to this matter, that the beginning, continuance, prorogation, adjournments, and dissolution of parliaments, are of public cognizance, and the court *ex officio* will take notice of them, so that they need not be averred. And so is the 41 of the queen, the bishop of Norwich's Case. A private act of parliament was pleaded, and the day of the parliament mistaken; there was a general demurrer, and it was resolved that it was naught, and judgment given against the bishop, though no exception was taken in particular, because the days of the beginning and ending of parliaments are of public notice; and the judges take notice, when a parliament is in being, and when not. That is a sufficient answer to that matter.

Then for those many cautions that have been given you, what a difficult thing it is for two jurisdictions to interfere, Mr. Fitzharris is much concerned in that matter, who hath forfeited his life to the law as a most notorious offender that certainly deserves nothing but punishment; yet he would fain live a little longer, and is much concerned that the judicature of parliament should be preserved. If it be not law, he shall not be oppressed in it; but if it be law, *fiat Justitia.* Certainly no consideration whatsoever ought to put courts of justice out of their steady course; but they ought to proceed according to the laws of the land.

My lord, I observe it is an unusual plea, and perhaps they had some reason to put it so. It concludes, 'si curia procedere vult,' I wonder they did not put in *aut debeat,* that is the usual form of such pleas; for you have no will but the law, and if you cannot give judgment, you ought not to be pressed in it; but it being according to law that great offenders and malefactors should be brought to condign punishment, we must press it, whatsoever the consequences are. And if we did not take it to be the interest of all the kingdom, and of the Commons too as well as of the king, my lord, I should not press it; but it is all their interest that so notorious a malefactor that hath certainly been guilty of treason in the highest degree; and that for the utmost advancement of the late Popish Plot, should not escape, or the truth be stifled, but brought into examination in the face of the sun, that all men may see what a villainous thing hath been attempted to

raise up the whole kingdom against the king: but they say, if it be not law, you will not proceed, it ties your hands. But, with submission, they have not given you one instance to make good what they say. Many things have been, that a plea depending in a superior court is pleadable to the jurisdiction of an inferior court: for, my lord, that is it we put upon them to shew: if it had been pleaded in abatement, it would have had its weight, and been considered of, as in Sparry's Case, where it was no plea to the jurisdiction.

Put the case it had been a good impeachment, and he had been arraigned upon it and acquitted; if he had afterwards come to be indicted in this court, and the prisoner will not plead this in bar but to the jurisdiction of the court, it would not have been a good plea; but he had lost his advantage by mispleading. If then an arraignment, and an acquittal, or conviction thereupon, is not a good plea to the jurisdiction; then certainly an impeachment depending singly cannot be a good plea to the jurisdiction. This court hath a full jurisdiction of this case, and of this person, both of the crime and of the party, who is a commoner; and not only to find the indictment, but to proceed to justice; and thus you had at the time of the fact committed. For certainly, we need not put cases for to prove that the King's-bench, especially since the statute for trying treason beyond the seas, hath an universal jurisdiction of all persons and offences. Pray then what is it that must out this court of their jurisdiction? For all the cases that have been, or can be put about matters which are not originally examinable in this court, make not to the matter in question: there, it is true, the court may be by plea outed of its jurisdiction; as at common law, where a fact is done 'super 'altum mare,' and so pleaded, that puts it out of the court's jurisdiction; and that was my lord Hollis's and sir J. Elliot's Case,* and so that was my lord Shaftesbury's Case† too, the fact was done out of their jurisdiction, and that may be pleaded to the jurisdiction, because they had no original jurisdiction of the fact; but where the crime and the person were absolutely within the jurisdiction of the court, and the court may originally take cognizance of it, as this court had of the present case, I would fain know what can out that jurisdiction less than an act of parliament: I will be bold to say, the king by his great-seal cannot do it; nor can an act of either House, or both Houses together without the king, out the jurisdiction. To say, their proceedings ought to be a bar, that is another case, the party hath his advantage, and may plead it in abatement or bar, as the case requires: for if there had been an acquittal or conviction, the party could not plead it to the jurisdiction. Therefore for those cases they put, when you come to examine the reasons of them, you see how they stand, viz. that the court had no original jurisdiction.

My lord Shaftesbury was committed by the Lords for a crime in that House; a contempt to that House, he is brought here, and it appears to be a commitment in execution. My lord, that was out of your jurisdiction; and if you had bailed him, what would you have done? would you have bailed him to be tried here? No, you could not do it, and therefore you proceeded not in that case. And so in the other cases: for there is not one of their cases that have been cited of the other side, but where it was out of the jurisdiction of the court originally, and not at all within it. As for the case of the five Lords in the Tower, because they say it will have a mighty influence upon them, and they put the case, that there was in December an indictment, and afterwards an impeachment from the Commons; and they cite some opinion, given at the Council-board, which I hope these gentlemen will not say was a judicial opinion, or any way affects this cause: but for that, my lord, I observe, the Lords took care that these indictments should be all removed into the Lords' House; so they did foresee that the king might have proceeded upon the indictments, if they had not been removed thither. But our case now is quite another thing: for those Lords were not fully within your jurisdiction. You cannot try a peer of the realm for treason; and besides, the Lords have pleaded in full parliament, where, by the law of parliament, all the peers are to be their judges; and so you cannot out them of that right. And the reason is plain, because thereby you must do them an apparent prejudice; they have pleaded there, all the whole peerage are their triers. But upon trial before commissioners, they must have but a select number of peers to be their triers. But in none of those cases hath any judicial opinion been given: for the case of 11 R. 2. first cited by sir Fran. Winnington, and then by Mr. Pollexfen, a declaration in parliament, That they proceeded according to the law of parliament, and not according to the common law, nor according to the practice of inferior courts; and that will be nothing to our purpose at all, that was in case of the Lords appellants. A proceeding contrary to Magna Charta, contrary to the Statute of Edw. 3. and the known privilege of the subject. But those proceedings had a countenance in parliament; for there was an oath taken by all the Lords in parliament, that they would stand by the Lords appellants. And thereupon they would be controuled by none, and they would not be advised by the judges, but proceed to the trying of peers and commoners according to their own will and pleasure. And between that time of 11 R. 2. and 1 H. 4. see what havock they made by those illegal proceedings; and in 1 H. 4. you will see, that these very lords were sentenced, except one or two of them who were pardoned; and then it was expressly resolved by act of parliament, that no more appeals of that nature, nor any appeals whatsoever, should be any more in parliament. And if so, these gentlemen had

* See vol. 3, p. 290, of this Collection.

† See vol. 6, p. 1270, of this Collection.

best consider how they make an impeachment like an appeal: for in that statute, it is said, there shall be no more appeals. And the petition upon which this act is ...led, runs thus: they pray that no impeachmen... appeal may be in parliament. But when t... king came to make the grant, he grants only ...r appeals, and principally to out those Lords appe...lants who were condemned by that very parliament. So that it is very pretty matter at this time of day to like an impeachment to an appeal.

But, my lord, the other great point is this. There is nothing at all certainly disclosed to you by this plea; therefore there is nothing confessed by us, only the fact that is well pleaded: therefore I shall come to consider what is said by them, as to the form of it. They say, my lord, that they have pleaded it to be 'secundum legem et consuetudinem parliamenti;' and if that be sufficient, let them have said what they would, that would have healed all. But I say, my lord, with submission, they must disclose to you what is the law and custom of parliament in such case, or else you must take it upon you upon your own knowledge, or you cannot give judgment. It is very well known what this 'Lex et consuetudo parliamenti' is; no person versed in the records, but knows it, that by course of parliament a message goes up with a declaration to impeach the party generally; and then after there are articles or a bill of impeachment produced. Now till that be produced, sure there is no counsel of the other side will say, that ever the party can be called to answer. And because these gentlemen do pretend to urge their knowledge herein, I would observe there are three things to be considered of the parliament; the legislative part, the matters of privilege, and the judicial part proper to this case. For the legislative part, and matters of privilege, both Houses do proceed only 'secundum legem et consuetudinem parliamenti;' but for the judicial part, does any man question, but that in all times, they have been guided and directed by the statutes and laws of the land? And have been outed of a jurisdiction in several cases, as by the statute of 4 Edw. 3. and 1 H. 4. And the Lords in all writs of error, and all matters of judgment, proceed 'secundum legem terræ;' and so for life and death. And there is not one law in Westminster-Hall, as to matters of judgment, and another in the court of the Lords above. But I will not trouble your lordship any further to pursue these things. But it is not sufficiently disclosed to you, that there is any such thing as an impeachment depending there; it is only alledged, that he was impeached, and so much the news-book told us, that he was impeached: but to infer from thence that there was an impeachment carried up and lodged for the same High Treason, is no consequence. And then it is alledged, 'Quæ quidem impetitio,' when no impeachment is before set forth, but only that he was impeached generally. And as I observed before, a person might go up with a message to impeach, but that cannot be said to be an impeachment to which the party is compelled to answer; it must be an impeachment on record, and appearing on the face of the record for what crime it is; and so they ought to have set it forth.

Now that this is too general that is alledged here, I take it the books are very full. When a record is pleaded in bar or in abatement, the crimes ought to be set out to appear the same, and so, my lord, are all the precedents of Coke's Entries, 53, Holdcroft's and Burgh's case, and Watt's and Bray's case in 41 and 42 of queen Eliz. Coke's Ent. 59. Wrott's and Wigg's case, 4 Rep. 45, and in Lewes and Scholastica's case, and Dive's and Manning's case. The record must be set out, that the court may judge upon it; and the record must not be tried *per pais*, but by itself. But for what they say, plead it never so certainly, there must be an averment, it must be so it is true; but that is for another purpose than they urge it. The reason is, because if it be for another fact that he hath committed, he may be indicted again, though it be of the same nature; but whether of the same nature, or not of the same nature, is the thing must appear upon the record pleaded, because the court must be ascertained, that it was sufficient for the party to answer to it; for if it were insufficient, he may be again proceeded against: As if an indictment be pleaded which was insufficient, though the party pleads an acquittal or conviction upon it, it will not avail him; for the court will proceed on the other indictment. And so is the resolution in Vaux's case, and in Wigg's case; though there was a judgment given of acquittal, yet he was tried again. So that, my lord, that is one great reason why it must appear, that the court may judge whether it be sufficient for the party to answer. And you have now that here before you; if this be such an impeachment as they have pleaded it, as this person could not answer to by any law of parliament or other court; then it is not sufficient to out you of your jurisdiction. And I do think, that by no law they are, or can be compellable to answer to a general impeachment of high treason. And to give you authority in that, there are many might be cited, as the cases of my lord Stafford, and the other Lords in the Tower, and so is the ancient course of parliament: with submission, I will be bold to say, the impeachments are all so, that ever I met with. And it appears by them, that they all conclude 'contra coronam et dignitatem regis,' in the form of indictments, laying some overt acts and the special particular crimes for which the person is impeached, as overt acts for treason required by the statute of 25 Edw. 3. And I hope they will not say, that without an overt act laid in the impeachment, the impeachment can be good. If then this be so general that it cannot make the crime appear to the court, and is so insufficient, that the court cannot give judgment, I take it you will go on upon the indictment, which chargeth him with a particular crime.

My lord, Mr. Pollexfen does put the case of barretry where such averment is allowable; but that is a special, certain, and particular crime, but high treason is not so; there are abundance of special sorts of high treason, there is but one sort of barretry, and there are no subdivisions; therefore there is nothing to be averred but the special fact that makes that barretry.

Then there was another authority out of the book of assizes cited by sir Fran. Winnington, and greatly relied upon. A man is indicted for the murder of J. S. and afterwards for the murder of J. N. the former was pleaded to the second, with an averment that it is the same person; that is but according to the common form of averments, to be of matter of fact. For if J. S. was known, as well by the name of J. N. as of J. S. the indictment was for the murder of the same person, and there it is pure fact averred. But where it is essential, as this case is, that the particular treason do appear; to say, that it is the same particular treason, and to say, that matter of fact averred shall enlarge a record. I think, is impossible to be found any where. And of all the cases that I have seen or heard, I confess none of the instances comes up to it: for the case in Moor, King and Howard, cited by sir Francis Winnington, that is an authority as expressly against him, that nothing can be more: for if there be an indictment for felony in such a particular act, and then he is indicted again, he cannot come and plead a general indictment of felony, and then aver it is for the particular felony, and so to make the fact enlarge the record, and put matter of record to be tried by a jury.

Mr. Wallop was of opinion, that upon this averment the jury may try the fact. What a pretty case would it be, that a jury should judge upon the whole debates of the House of Commons, whether it be the same matter or no; for those debates must be given in evidence, if such an issue be tried. I did demur with all the care that I could, to bring nothing of that in question; but your lordship knows if they have ever so much in particular against a man, when they come to make good their impeachment, they must ascertain it to a particular crime; and the overt acts must be alledged in the impeachment, or else there is another way to hang a subject than what is the king's highway all over England. And admit there was an intimation of a purpose to impeach, a message sent up, and any judgment given thereupon, pray consider what may be the consequence as to the government; a very great matter depends upon this: if there be any record of that parliament, then is the French act gone: for so is the resolution in 12 Jacobi, where the journal-book was full of proceedings; yet because there was no judgment passed, nor no record of a judgment in a writ of error, they adjudged it no session; but if any judgment had been given, then it had been otherwise. So that the consequences of these things are not easily seen, when men debate upon touchy matters.

But that which is before your lordship is this point upon the pleading, and I conceive I have answered all the precedents they have cited; therefore, my lord, I take it, with submission, there is nothing of that matter before you concerning an impeachment depending before the parliament; but whatsoever was done, it is so imperfectly pleaded, that this court cannot take any notice of it.

Mr. *Solicitor General*. My lord, I shall endeavour to be short, and shall confine myself (because I am tender of your time) to the point in question; which is, whether this plea be sufficient in point of form? There have been many things said on the other side, which I must crave leave to take notice of, so far only as to shew they are not in question before you. Those are what relate to the matter of the plea; for they argue it is good both in matter and form: and from the matter of the plea they have taken occasion to debate, whether a commoner may be impeached? Whether this Court hath power to judge of the privileges and course of parliament? None of which questions will arise upon our case now. Therefore I will not now debate, whether Magna Charta, that hath ordained that every man shall be tried by his Peers, and the statute of 4 Edw. 3, which says, That the Lords shall not be compelled, nor shall have power to give judgment upon a commoner, have sufficiently secured the liberty of the subject from impeachments. Nor is it the question before your lordship, whether you shall judge of any matter that is a right or privilege of parliament; here is nothing before you that was done in parliament; but this is an indictment for high-treason, committed by Fitzharris in this county. Now, my lord, as that is not the question, neither will it be the question, whether an impeachment depending in the House of Lords against a commoner, by the House of Commons, will bar this Court of jurisdiction? For though they have entered upon it, and debated it at large, and seemed to obviate the objections made to that if it had been a question; as by saying that the king hath no election, because this is not the suit of the king, but the suit of the subject: I will not now *ex instituto* argue that point; but I will humbly offer a few things to your lordship's consideration, and I shall take my hints from them. They say, the House of Commons are the grand inquest of the nation, to enquire of treasons and other high crimes, and they make these presentments to the House of Lords. Now when such a presentment is made, it is worthy consideration, whether it be not a presentment for the king; for an impeachment does not conclude as an [illegible] does, but 'contra ligeantiæ suæ debitum, et 'coronam et dignitatem domini regis;' so far it is the king's suit. In an impeachment the witnesses for the prisoner are not sworn, the prisoner hath not counsel for his life in matter of fact, as in cases of appeal, at the suit of the subject, he hath. The king may pardon part of the sentence, it was done so in

Rich. the 2d's time, and it was done so lately in my lord Stafford's case; but take it for a supposition that it is the suit of the people, yet that cannot preclude the king from his suit neither; for at common law before the statute of 3 Hen. 7, where a man had an appeal for murder, the king had not his hands tied up, not to proceed upon the indictment: it had been used so, I do agree, and so it is recited, that it had been used so, in the statute of 3 Hen. 7, but there was no positive law for it, nor could it have been pleaded in bar or an indictment, that the indictment was within the year, but the king used to stay out the year in favour of that suit. But since the statute, the use is otherwise; and the reason why they proceed immediately is, because now an acquittal or an attainder upon the indictment is no bar to the appeal, but the party may go on in his appeal. I mention this, because the consequence which they urge as such a dismal one, will be nothing; which is, what if he should be acquitted here, he could not plead 'auter foitz acquit,' so would be twice brought in jeopardy for the same offence. For it is the same in all cases of appeals, a man comes in jeopardy twice if he be indicted within the year; and attainted or acquitted within the year, it is no bar to the appeal. But this is not like the case of an appeal for murder neither; for though it hath been used discretionally in the Court to stay the suit of the king, and to prefer the suit of the subject, it was then because the subject had the first and nearest concern, as the son in the death of his father, and it did mostly concern him to prosecute it. The king is concerned as the fountain of justice only, to bring offenders to condign punishment; but the nearest damage, and the first to be preferred, was that of the party who had lost his relation. Now the reason of that turns quite contrary here: for as in that case the subject had the nearest concern in the loss of his father, and so was best intitled to the suit; so in this case that very reason will have the king's suit to be preferred: for there is no treason but against the king, and in treason against himself, the king has the nearest concern, and the wrong is primarily and originally to himself. And the subjects damage is but a consequence of that, as all hurt to the king must needs hurt the people. So the king's suit is to be preferred here, as the subjects was in the other case.

Now for the objection that has been made, That if you try this man, upon the same reason you may try the Lords in the Tower. Their case is different, as hath been already observed by Mr. Attorney; and that which has been done by the Lords in that case, to me does rather seem to imply, that this trial may be in this case. For if the Lords after an impeachment brought up against the five Lords in the Tower, and after the special manner in the articles which does ascertain upon what they do proceed, have thought fit notwithstanding to remove the indictment by Certiorari into parliament (for so it was in fact) that no prosecution might be upon them; then certainly they thought the King's Court might proceed without doing so.

My lord, I will mention no more upon this matter, but leave it to your lordship's consideration: but as to the form of the plea, I do conceive, with submission, it is not a formal plea.

We know here of no form of pleading an indictment, but what does set forth the indictment particular; the precedents are so, it is so in Vaulx's case, and all the precedents that I have seen: so is the precedent in Rast. Ent. where in an appeal the defendant waged battle, the plaintiff replies he was formerly indicted, he sets forth the indictment particularly. All the precedents are so, and the law-books resolve it must be so; as Wrott and Wigg's case, where the defendant in an appeal of murder by the wife pleads, that he was indicted for manslaughter before the coroner of the verge, and coroner of the county, for killing the husband at Shepperton, in the county of Middlesex, and had his clergy with reference to the record, and the usual averments; with this farther, that he averred that Shepperton at the time of the indictment and death was within the verge. To which the plaintiff demurred, and judgment for the plaintiff. Now two things are resolved by this judgment.

1. That it is necessary to set forth the whole record of the indictment, or otherwise they ought not to have given judgment for the plaintiff, by reason the indictment was sufficient, as it was pleaded, in that it did not say that Shepperton was within the verge, which was necessary to entitle the coroner of the verge to a jurisdiction, because being pleaded with reference to the record upon *Nul tiel* record pleaded, and the record thereupon brought in, that defect might have been cured.

2. That no averment of fact can supply that which should appear upon record, therefore the averment that Shepperton was within the verge, did not mend the matter, though confessed by the demurrer as much as it is in this case, that it is the same treason.

But they say, there is a difference between this case and those which I have put; for that it is the course of parliament (of which your lordships must take notice), to impeach general; so they could not have pleaded otherwise than they have done, unless they had pleaded it otherwise than the cases were: this reason holds rather the other way; for if in any case such a general way of pleading with reference to the record were to be admitted, it were in case of an indictment, because the Court knows there is no indictment but what does particularly set forth the felony, which when produced, is capable of being applied: but here if the record be brought in, it will no more ascertain the matter of the impeachment, than the plea does already. And whereas they say your lordship is bound to take notice of the course of parliament, so your lordship will take notice

too, that it is not the course of parliaments to try any man upon such a general impeachment. I never heard of any man (I speak it with submission to them that know better) that was brought to plead Not Guilty upon a *general* impeachment of high-treason; that is, upon the Commons bare saying, we do impeach such an one of high-treason. I know none that ever was brought to answer that general accusation.

And now, my lord, as the plea is nought for not setting out the record, so is the averment, with submission, insufficient too. For though he does aver, That the treason in the indictment, and the treason for which he was impeached, are one and the same, and not divers affirmatively and negatively; yet as this case is, he ought to have said, That the treason for which he is indicted, and the treason mentioned in the impeachment, is one and the same: For if he was impeached generally for high-treason, without mention of particulars, it is impossible to be reduced to a certainty: So it is an averment of a fact not capable to be tried.

First, Because, with submission to these gentlemen that have said it, the debates of the House of Commons are not to be given in evidence, and made public to a jury: Nay, they are not always possible to be reduced to a certainty, as the circumstances may be; for they do not always particularly resolve upon what particulars they will accuse before they go up, but a general allegation serves the turn: So that such averment is not triable *per pais*, because as the case may be, it may not be capable of any certainty from the debates of the House of Commons.

Another reason is, because, by this way of pleading, proceedings must be staid for treason, though subsequent to the impeachment, which no man yet has pretended to say: For suppose now a general impeachment lodged, and a treason afterwards committed by the party, I think no man will say, that the House of Commons, when they bring up their special matters, cannot make even this subsequent treason an article upon that impeachment; neither can it be said that such averment as this is, upon such plea pleaded to an indictment here below, would be repugnant, because there is no time at all laid in the impeachment as it is here pleaded, nor no time when the impeachment was brought up; so that it cannot appear to the court, whether the treason in the indictment be subsequent or not: The consequence of which is, we must try whether the House of Commons, upon this general impeachment, did intend to proceed to try him for a fact committed after the impeachment carried up. My lord, this would be to affirm, that a man once impeached in parliament shall never be tried for any offence; it would be like that *Privilegium Clericale* which they made use of to exempt themselves from punishment for all offences.

But, my lord, we do think upon the whole matter, without entering upon the debate, whether a particular impeachment lodged in the House of Lords does preclude the king from his proceedings, we have a good case upon this plea; for that is not a question necessary to be resolved, though it be not granted by the king neither. But the question is, Whether this be a formal plea, and whether here be sufficient matter set forth upon record to bring that other matter into question, and tie up the hands of the court?

Serj. *Jefferies.* My lord, there hath been already enough spoken in this case, I shall desire only to offer one word to that single point, viz. the informality of the plea; which I take to be the sole question in this case: For to argue, whether because there was no bill passed, or decree made in the House of Lords (though the articles had been carried up,) the impeachment did not fall to the ground by the dissolution, I conceive altogether improper; for I think it does not affect the question: Though I desire to take notice that sir Fr. Winnington, Mr. Williams, and Mr. Wallop were all mistaken: For there were no such concessions made by any of the king's counsel the other day, as they alledge; because we did not think it to be the question, and therefore made no discourses about it.

But, my lord, I desire first to take notice of a case or two that hath been cited on the other side; and then I shall apply myself to that which is the question before you at this time. They cite the case of the Lords in the Tower as a judgment for them, which seems to be a judgment against them: For by the Lords granting a *Certiorari* to remove the judgments into parliament, they seem to be of opinion, that notwithstanding they were impeached before the Lords, yet there might have been proceedings below upon those indictments, had they not been removed; and there they remain to this day. Nay further, to those impeachments they have pleaded to issue, which is read for a trial: But in the case at bar, there only is an accusation, without any further proceedings thereupon.

And as to the case of my lord Shaftesbury, that makes strongly for us as I conceive. Mr. Justice Jones's opinion was taken notice of by sir F. Winnington, that they would not meddle by any means with matters depending in parliament: But I must remember, he then gave this reason for his opinion, because the parliament was then in being. And I must humbly put your lordship in mind, that the whole court did then declare, That if the parliament had been dissolved, they would have said something more to that case. I do not say, that they would have given such or such a judgment; but I attended at the bar at that time, and I appeal to the memory of the court, if the court did not then make such a declaration.

But now to the question: Without all peradventure, the cases cited by Mr. Pollexfen are true. If I bring a general *Indebitatus assumpsit* for wares, sold and delivered, and after

bring a particular *Indebitatus assumpsit* for such and such wares, naming the particulars, the party may come and plead in bar, and aver it is for the same thing; and it is a good averment, because there is sufficient matter set forth in the record to support such an averment: For the doubt is only, whether the particular goods mentioned in the second, be not the same that were intended under those general words (goods and merchandizes) in the first.

But suppose there had been only an account brought and no declaration put in, could then the defendant have pleaded such a plea with such an averment, when there was not sufficient matter of record set forth in their pleading, whereby the court might be able to give a judgment, or put it into a way of trial, whether it was for the same or not.

And is it not so in this case? there being but a bare accusation: For I still keep to the informality of the pleading, and I take it not to be such a dangerous case, as these gentlemen of the other side do pretend, for you to determine it. For I am sure it will be better for the court to answer, if ever they shall be required, that they have performed their duty, and done justice according to their consciences and their oaths, than ever to be afraid of any threats or bugbears from the bar.

For would not they, by this manner of pleading, put upon your lordships a difficulty to judge, without any thing contained in the impeachment to guide your judgment, whether the prisoner be impeached for the same thing for which he is indicted? May not the treason intended in this impeachment be for clipping or coining of money? for it is generally said to be only for High-Treason. How comes this then to be helped, so as to be any way issuable, and be tried? Shall it be by that way which Mr. Wallop laid down, that if Mr. Attorney had taken issue, the jury must have tried the question by having the debates of the House of Commons given in evidence? Certainly that cannot be, my lord. If there were but one sort of treason, there might be some colour for this sort of pleading; but there are divers kinds of treasons, and how is it capable to be tried? Who can prove the intentions of the House of Commons, before they are come to a resolution? and therefore cannot be given in evidence, or be regularly brought into judgment.

Therefore we rely upon the informality and uncertainty of the pleading only, and meddle not with the question, whether an impeachment in the House of Lords supersedes an indictment in the King's-bench? For we say, they have not pleaded it so substantially, as to enable the court to judge upon the question: And therefore we pray your lordship's judgment, that the plea may be overruled.

Sir *Fran. Withins.* My lord, there has been so much of your time already taken up by those gentlemen that have argued before me, that I shall be very short in what I have to say.

The question is not at this time, how far forth the Commons in parliament may impeach or not impeach a commoner, before the Lords in parliament, or where the Lords may admit or not admit of such impeachments? That is not the case here, as I humbly conceive, nor will I meddle with it: I shall only speak to the validity of the plea according to law. Now, I say, that this plea of the prisoner as thus pleaded, cannot be good to oust this court of jurisdiction: For first, the prisoner cannot be admitted to make the averment in this plea, that the treason mentioned in the impeachment in parliament, and that contained in this indictment is the same; for if, as the gentlemen that argued on the other side, urged, that this court must take notice of the proceedings and law of parliament, then you will take notice that no person is there tried upon a general impeachment of treason. Special articles are always first exhibited: In this case then either the House of Commons have carried up special articles against the prisoner to the Lords in parliament or not; if the House have done it, then the plea might have been pleaded better by setting forth the articles (which is part of what they say on the other side, that it could be pleaded no better,) for then it would have appeared plainly whether the treason were the same or not. If the articles are not carried up, shall it lie in the mouth of any particular person to say, what articles the Commons in Parliament would have carried up? Shall any single person be admitted to say, what the House would have done, before the House itself says it? In cases of impeachments it lies in the discretion and judgment of the Commons upon debate to exhibit what articles they in their wisdoms shall think fit; and sure it shall never come, that any particular person shall limit them to this or that particular treason before-hand; no surely.

Now suppose in such a case as this, after such a plea pleaded, the Commons upon deliberation should carry up articles quite different; such a plea then would appear to be a stark lie, and the pleading and allowing of it, an apparent delay of justice. So that I conceive, my lord, the prisoner shall by no means be admitted (nor indeed can it be, to aver the intention of the House of Commons, which cannot be tried) before they have declared it themselves; and therefore I conceive the plea to be naught for that reason.

But, my lord, I conceive that the prisoner's plea is ill for another reason, because the court in this case, by any thing expressed in this plea, cannot discern nor take notice whether it be the same treason or not.

Now the reason why the record, as this case is, ought to be alledged specially, is because the matter contained in it may plainly appear to the court, and then by that means the court might judge whether it be the same treason or not. Now treason generally alledged in the impeachment, is the genus, and the particular treason mentioned in the indictment is only a species, and the averment in the plea is, that

the genus and the species is the same; which is absurd, and if allowed, tends to hood-wink and blind the court, instead of making the matter plain for their judgment.

Pleas ought to be plain and certain, because the court upon them alledged, is to judge either of men's estates or lives; and for that reason the matter ought to come plainly and fairly before them, that wrong may be done to neither party by reason of the obscureness or doubtfulness of the allegation: If therefore the hood-wink be brought instead of a plea, it ought not to be allowed. And therefore for these reasons (for what I have farther to say, has been already said by others) I conceive it ought to be over-ruled. I humbly submit it to the court.

L. C. J. You have done your arguments, gentlemen, on all sides?

Counsel. Yes, my lord.

L. C. J. Look you, gentlemen, I'll tell you, you have taken up a great part of our time. We never intended, when we assigned four counsel to Mr. Fitzharris, that they all should make formal arguments in one day, it is the first time that ever it was done; but because it is as you press it in a case of blood, we were willing to hear all you could say, that you might not afterwards say, but that you were fully heard on all sides. But in truth, I must tell you, you have started a great many things that are not in the case at all. We have nothing to do here, whether the Commons House at this day can impeach for treason any commoner in the House of Lords; we have nothing to do with this, what the Lords' jurisdiction is, nor with this point, whether an impeachment in the Lords' House (when the Lords are possessed fully of the impeachment) does bar the bringing any suit, or hinder the proceeding in an inferior court: But here we have a case that rises upon the pleadings; whether you have brought here before us a sufficient plea to take away the jurisdiction of the court, as you have pleaded it, that will be the sole point that is before us: And you have heard what exceptions have been made to the form, and to the matter of your pleading. We do ask you again, Whether you think you are able to mend your pleading in any thing, for the court will not catch you, if you have any thing wherein you can amend it, either in matter or form? If you will let us know it, we shall consider of it; but if you have not, if you abide by this plea, then we do think it is not reasonable, nor will be expected of us in a matter of this consequence to give our judgment concerning this plea presently. All the cases cited concerning facts done in parliament, and where they have endeavoured to have them examined here, are nothing to the purpose at all. For plainly, we do not assume to ourselves a jurisdiction to enquire of such matters: For words spoken, or facts done in the Commons House, or in the Lords, we call none to question here, nor for any thing of that nature, which takes off most of the instances you have given; but our question is barely upon the pleading before us, Whether we have a sufficient pleading of such an impeachment as can foreclose the hands of the court? And as to that, we shall take some reasonable time to consider of it; we will not precipitate in such a case, but deliberate well upon it before we give our judgment. Take back your prisoner.

Att. Gen. Before he goes away, we hope you will set a reasonable time, as short as you can, to have him come again, for your judgment.

L. C. J. Mr. Attorney, we can send for him when we please, to come hither by rule; you see this business has come on in the busy part of a term, and it is impossible for the court to attend nothing but this, we will take some reasonable time.

Then Fitzharris was carried back to the Tower.

On Tuesday, May 10, Mr. Attorney moved the court to appoint a day for their judgment on the plea, and for Fitzharris to be brought up, which they appointed to be the next morning.

And accordingly on Wednesday morning, May 11, he was brought from the Tower to Westminster-hall.

Att. Gen. My lord, I pray that Fitzharris may be brought to the bar.

L. C. J. Where is the Lieutenant of the Tower? Bid him bring Fitzharris to the bar, (which was done.)

Att. Gen. My lord, I pray your judgment on the plea.

L. C. J. Mr. Fitzharris, you have been arraigned here for High Treason, and it is for endeavouring and compassing the king's death, and other treasons, specially mentioned in this indictment; you have pleaded here to the jurisdiction of this court, that there was an impeachment against you by the Commons of England in parliament, before the Lords, for the crime of High-treason; and you do say, that that impeachment is yet in force; and you do say, by way of averment, that this treason whereof you are now indicted, and the treason whereof you were impeached by the Commons of England, before the Lords, are one and the same treason. And upon this the Attorney General for the King hath demurred, and you have joined in demurrer: And we have heard the arguments of your counsel, whom we assigned to argue it for you; we have heard them at large, and have considered of your case among ourselves; and upon full consideration and deliberation concerning your case, and all that hath been said by your counsel, and upon conference that we have had with some other of the judges, we are three of us of opinion, that your plea is not sufficient to bar this court of its jurisdiction; my brother Jones, my brother Raymond, and myself, are of opinion that your plea is insufficient, my brother Dolben not being resolved, but doubting concerning it. And therefore the court does order and award, That you shall answer over to this treason.

Cl. of Crown. Edward Fitzharris, hold up thy hand.

Fitzharris. My lord, I desire I may have liberty to advise with my counsel before I plead.

L. C. J. Mr. Fitzharris, when you proposed a difficulty you had in a matter of law, the court were willing to assign you counsel; because it is known you cannot be a fitting person to advise yourself concerning the law. But as to this, we cannot assign you counsel; it is only a matter of fact, whether you be guilty or not guilty. Therefore in this case you cannot have counsel allowed to advise you.

Fitzh. My lord, I desire, before I plead, or do any thing of that nature, that I may make an end of my confession before your lordship, and some of the privy council.

L. C. J. Look you, Sir, for that you have trifled with us already; you pretended you had some scruples of conscience, and that you were now become another man, and would reveal and discover the whole of this design and Plot, that you are said to be guilty of here: but you have trifled several times concerning it, and we can say nothing concerning that now; we must now have your plea: if afterwards you have a mind to confess and be ingenuous, you may do it; but now you must either plead, or not plead.

Fitzh. My lord, I have some witnesses a great way off, and I desire time to have them ready for my defence.

Cl. of Cr. Edward Fitzharris, hold up thy hand (which he did); thou hast been indicted of high-treason; upon that indictment thou hast been arraigned, and hast pleaded to the jurisdiction of this court. To which Plea his majesty's Attorney-General hath demurred, and thou hast joined therein: and upon the whole matter, this Court, upon mature and considerate deliberation, is of opinion, that thou oughtest to answer over. How sayest thou, art thou Guilty of the high-treason whereof thou hast been indicted, and hast been arraigned, or Not Guilty?

Fitzh. Not Guilty.

Cl. of Cr. Cul. Prist. &c. how wilt thou be tried?

Fitzh. By God and my country.

Cl. of Cr. God send thee a good deliverance.

L. C. J. Now if you have any thing to move, do it. We could not hear your motion till you had pleaded; for the method of the Court must be observed.

Fitzh. I have some witnesses at a distance, my lord.

L. C. J. Where are your witnesses?

Fitzh. I have one witness in Holland, a very material one; that I am much concerned to have for my life.

Justice *Jones.* What is his name?

Fitzh. His name is Steward, my lord.

L. C. J. Look you, Mr. Fitzharris, I will tell you, reasonable time is allowed to all men to make their defence in; but when a man is in Holland, I know not what time you will take for that.

Fitzh. What time your lordship thinks fit for a man to return from thence hither.

L. C. J. Look you, Mr. Attorney, why should not we allow Mr. Fitzharris time for his trial till next term?

Att. Gen. I think he hath not offered any thing to entitle him to it. He doth not tell us, and I would fain know what the witnesses will prove.

Justice *Dolben.* It may be, Mr. Attorney, he will confess what it is that witness can prove.

Att. Gen. For the whole proof in a case of treason lies on our side.

L. C. J. Commonly, and *prima facie*, it does so; but there may be some things that the prisoner may give in evidence for himself that may be material for him to urge for his defence.

Fitzh. My lord, I know not whether it be safe for me to tell what he can say.

Justice *Jones.* Then you reserve it wholly in your own judgment whether he be a material witness, or no?

Fitzh. If my lord chief justice pleases, I will acquaint him in private with it.

Att. Gen. I never saw any good effect of these private proceedings. If he have any thing to offer, he may do it publicly, in the face of justice: and therefore I desire he may be tried this term; for he hath had a whole term's notice, and time enough to consider what persons are material witnesses for him.

Justice *Jones.* Unless he do shew good cause to the contrary, he must be tried this term.

Att. Gen. And, my lord, where it is in the same county where the fact was committed, there is the less reason to stay; criminals in high treason, the fact must be plain and evident against them.

L. C. J. Look you, Mr. Attorney, peradventure he hath been made to depend upon his plea, and hath been advised so to do.

Fitzh. Yes, my lord, and have been close prisoner, and not allowed to speak with any body.

L. C. J. If so, then it may be a surprize upon him.

Fitzh. My lord, I have been allowed nothing to prepare for my defence.

Solicitor General. My lord, he ought to be provided for his trial this term. I do not know, my lord, what witnesses he can pretend to have; the fact was done in Middlesex here, and the proof of the circumstances of that fact do arise here; and I do not know what surprise he can complain of. As to the witness he tells you of, that is in Holland, he doth not tell you to what purpose he is a witness; so that you may know whether it be material or not. I know very well, my lord, in the Old Bailey, when the priests did urge it, that they had witnesses beyond the sea in other countries, they were not suffered to delay their trial upon such a pretence. We must submit it to your lordship's discretion: but we suppose it will not be a precipitous proceeding, he having notice of his trial all this term.

L. C. J. Mr. Attorney, truly, since he pre-

tends he is surprised, and hath depended upon his plea, and hath witnesses that require some time to fetch, we think it reasonable that he should have till the next term; and we will defer it till then. We are all of that opinion, (especially it being such a little delay) to enable him to have what witnesses he doth pretend to have.

Att. Gen. My lord, I never desired in this case, nor in any other, nor ever shall do, that justice be precipitated. I know these open and fair trials proceed with such equal steps to all parties, that we need not be hasty; and therefore, if your lordship be of that opinion, I submit to it, so it be the first week of the next term.

L. C. J. The first week it cannot be.

Att. Gen. Within the first seven days, I mean.

L. C. J. The first Thursday in the term. And take notice, Mr. Fitzharris, that is the day appointed for your trial.

Fitzh. I desire liberty to see my wife, and have a solicitor in the mean time.

L. C. J. I will tell you, for that, Mr. Fitzharris, the Court would never deny any thing of that nature to any one in your condition and circumstances; but your wife makes an ill use of the liberty we granted her: and if she do make an ill use of it, then the Court must restrain her, and hold their hands over her. If we were satisfied she would use the liberty lawfully, and not abuse it ——

Fitzh. My lord, I am sure she will use it lawfully hereafter, and make no ill use of it.

L. C. J. Look you, upon her good usage of it, if she will fairly demean herself, and not abuse it again, we are willing to take off the last rule, and she shall have the same liberty she had before that rule.

Sol. Gen. With this, if your lordship please, we desire there may be some other judge of her prudence besides herself, and the lieutenant of the Tower be by.

Fitzh. My lord, I desire I may have a solicitor; for he was never allowed to come and speak to me, though I had a rule for him.

L. C. J. Look you, as to your counsel now, which was the main reason why you prayed a solicitor, we cannot allow you them any more; for now we are come to a matter of fact only, and we cannot by the rules of law allow you counsel. Therefore what need you have of a solicitor, I cannot tell; his business before was to go from you to the counsel, and from them to you, which is ceased now. But, thus, Mr. Attorney, if he have a desire to see papers and would send for any papers that concern his defence, so as they contain no new treasonable matters and contrivances, he ought sure to have them; and if he have papers at his house, or any where else, which he desires to make use of in his own defence, being inspected by the lieutenant, to see that there be no matter of evil contained in them, he may have one to do that for him without any danger.

Sol. Gen. I do not oppose it, my lord; but I desire that all caution may be used that can be; for this solicitor of his is a lawyer, and writes tracts of law: but any thing material for his defence I am not against.

L. C. J. Mr. Attorney, you need not fear any harm will be that ways: for he is not to speak with him alone.

Mrs. *Fitzharris.* I hope his solicitor may come to him to take instructions how to send for his witnesses.

Just. *Jones.* You can tell how to do that, surely, without a solicitor.

L. C. J. Just as the last rule was, let there be another rule made: for he must have all just advantages to enable him for his defence.

Fitzh. I hope I shall have a rule of court to make my witnesses appear.

Just. *Dolben.* That you may have without a motion.

L. C. J. We will give you any thing that will enable you to make a fair defence.

Cl. of the Cr. He shall have subpoenas for his witnesses.

L. C. J. Then, Mr. Fitzharris, you must expect no other notice. You must take notice now, that upon the first Thursday in the next term, you are to receive your trial here. Take the prisoner back.

Att. Gen. In order to his trial, I desire the sheriff may bring in the freeholders book to the clerk of the crown, to strike the jury.

L. C. J. Mr. Attorney, we will consider of that, how far can we do that, and the course of the court shall be observed. But I doubt how we can.

Att. Gen. That is the practice in trials at the bar.

L. C. J. In civil causes, but not in criminal, that I know of.

Att. Gen. We have reason to desire it; because we are afraid of some practice in this cause, and fear there may be some odd carriage in the return of them.

Fitzh. May I not see my wife before I go hence?

L. C. J. With all our hearts; she may go to you, and with you, Sir, if you please: we will not hinder you of her company, so she carry herself fairly.

Then the Lieutenant took back his prisoner.

The Trial of EDWARD FITZHARRIS, at the King's-Bench, for High-Treason, June 9, 1681. Trin. 33 CHARLES II.

ON Thursday June 9, 1681, Edward Fitzharris was brought to the bar of the court of King's-bench; and the court being sat proceeded thus:

Mr. *Thompson.* My lord, I moved you the other day, that before Mr. Fitzharris's trial, he might give such evidence as he had to give against sir John Arundel and sir Richard Beiling, concerning the death of sir Edmundbury Godfrey, before he be convicted of treason; and

we understood that it was the direction of the court, that we might move it this morning before conviction, that he might declare upon oath here in court what he knows of that matter against those gentlemen: for after he is convicted, I believe it will be too late for us to think of it. Mr. Godfrey hath a *great* deal of reason to desire what I now move, that his brother's murderers may be prosecuted; and we hope all the favour that can be granted in such a case will be granted unto us: for there hath been a design of late set on foot, to make it be believed, that sir Edmundbury Godfrey murdered himself, notwithstanding that clear evidence that hath been already given of this matter, and notwithstanding that several persons have been convicted and attainted upon that evidence. So that these gentlemen think themselves obliged to prosecute the matter as far as they can, and beg of your lordship, that what can be done for them may. And particularly, that he may perfect his discovery against the two named at his last examination before the grand jury; and that his examination about them may now be taken by the court.

L. C. J. Look you, Mr. Thompson, that that you moved before, had some reason in it, that he might be examined, and give evidence to a grand-jury, and we told you he should; but if there be never a grand-jury sworn yet, who can he give evidence to? Would you have us take his examination and afterwards give it in evidence to the grand-jury?

Mr. *Thomp.* My lord, I only say, then it is our hard hap that he is not examined before a grand-jury.

L. C. J. But do you think it is fit for you to move this now?

Mr. *Thomp.* My lord, I understood it was permitted me by the court the other day, to move again; and I move by the direction of my client, and I submit it to your lordship.

L. C. J. You know it cannot be granted. Go on, and swear the jury.

Fitzh. My lord, I beg that my wife and solicitor may be by, to help and assist my memory.

L. C. J. Let your wife be by you, if she please, and if you think it is any advantage to you, with all our hearts; if she will, let her go down to you.

Cl. of Crown. Cryer, make an O yes: Whoever can inform, &c.

Att. Gen. My lord, I know not what the effect of this may be: if his wife be instructed to instruct him, that ought not to be permitted, with submission: Suppose she should come to prompt him (and for certain she is well documentized) that your lordship won't suffer.

Serj. *Jefferies.* My lord, she comes prepared with papers in her hand.

Mrs. *Fitzharris.* I won't shew them without my lord's permission.

L. C. J. If she brings any papers that are drawn by counsel, prepared for him, without doubt it is not to be allowed.

Mrs. *Fitzharris.* No, no; it is only my own little memorandums.

L. C. J. Whatsoever is written by her husband, for help of his memory in matter of fact, let her do it.

Fitzharris. My lord, I humbly beg my solicitor may be by me too.

L. C. J. We allow of no solicitors in cases of High-treason.

Cl. of Cr. Edward Fitzharris, hold up thy hand (which he did): Those good men which thou shalt hear called, and personally appear, &c.

Fitzharris. My lord, I desire they may be distinctly named as they are in the pannel, that I may know how to make my challenges.

Sol. Gen. My lord, I must humbly offer it to your lordship's consideration, for the precedent's sake, whether any person can assist the prisoner as to matter of fact?

L. C. J. Yes, and it is always done to take notes for him to help his memory.

Serj. *Jefferies.* But, my lord, I would acquaint your lordship what is the thing we find in this case; here is a particular note given in to the prisoner of the jury, pray be sure to challenge such and such, and don't challenge the rest. God forbid but his memory should be helped in matters of fact, as is usual in these cases; but no instructions ought to be given him, sure. And, my lord, the example will go a great way; and therefore we are in your lordship's directions about this matter.

Fitzharris. My lord, I hope it is but just, for I have had all the disadvantages in the world. I have been kept close prisoner, and have not been permitted to have any one come to me, to help me in my preparation for my trial.

Att. Gen. My lord, I pray your judgment in point of law; I doubt not you will do the king right, as well as the prisoner; I could not get a copy of the pannel, till last night about four o'clock: Here is prepared a copy, with crosses and marks who he should challenge, and who not; and truly, my lord, since I had the pannel upon looking over it, I do find the sheriff hath returned three anabaptist preachers, and I know not how many fanatics: And since there are such practices as we find in this case, we doubt there may be more; and therefore I pray she may be removed.

Mrs. *Fitzharris.* I will not be removed.

Fitzharris. Is it fit or reasonable for me, that I should stand here without any help?

Att. Gen. In case you be guilty of this, you deserve no great favour.

Mrs. *Fitzharris.* Surely the court will never suffer the king's counsel to take away a man's life at this rate.

L. C. J. Mrs. Fitzharris, you must give good words: And if you will not be modest and civil I promise you we will remove you presently.

Mrs. *Fitzharris.* If you do remove me, that is the worst you can do to me: What should I come here for, without I may help my husband?

L. C. J. If she do bring him instructions to except against such and such jury-men, she does misbehave herself, and must be removed.

Att. Gen. This paper that we speak of is a

copy of the pannel; and there are particular marks, a great many.

Sol. Gen. A woman hath a very great privilege to protect her husband; but I never yet knew that she had liberty to bring him instructions ready drawn.

Mrs. *Fitzharris.* My lord, the lady marchioness of Winchester did assist in the case of my lord Stafford, and took notes, and gave him what papers she pleased.

L. C. J. Sure it is no such huge matter to let a man's wife stand by him, if she will demean herself handsomely and fairly.

Att. Gen. It is not, if that were all; but when she comes with papers, instructed, and with particular directions, that is the assigning him counsel in point of fact.

L. C. J. Let her stand by her husband if she be quiet: But if she be troublesome, we shall soon remove her.

Fitzh. It is impossible I should make my defence without her.

Serj. *Jeffries.* I see it is a perfect formal brief.

Mrs. *Fitzh.* Must he have nothing to help himself?

Fitzh. In short, the king's counsel would take my life away, without letting me make my defence.

Att. Gen. I desire not to take any papers from him, if they be such as are permitted by law.

Sol. Gen. My lord, his innocency must make his defence, and nothing else.

Serj. *Jeffries.* My lord, we are in your lordship's judgment, whether you will allow these papers.

L. C. J. Let us see the paper.

Fitzh. My lord, I will deliver them to my wife again.

L. C. J. Let it be so.

Cl. of Cr. Call sir William Roberts (who did not appear): Sir Michael Heneage.

Sir *M. Heneage.* My lord, I am so ill, I cannot attend this cause.

L. C. J. We cannot excuse you, sir Michael, if there be not enough besides, it is not in our power to excuse you.

Sir *M. Heneage.* I must suffer all things rather than lose my health.

L. C. J. Well, stand by, till the rest are called.

Cl. of Cr. Sir William Gulston, Nicholas Rainton, Charles Umphrevile (they did not appear): John Wildman.

Att. Gen. My lord, I desire he may be asked before he be called to the book, whether he be a free-holder in Middlesex?

Major *Wildman.* I am a prosecutor of this person; for I was a parliament-man in the last parliament; and I dare not appear, my lord, for fear of being questioned for breach of the privileges of the Commons.

Att. Gen. My lord, I pray he may answer that question whether he be a free-holder in Middlesex?

Major *Wildman.* I pray to be excused, upon a very good reason; I was one of them that voted the Impeachment against this man.

Att. Gen. Are you a free-holder of Middlesex, upon your oath?

L. C. J. Look you, major Wildman, you are returned upon a pannel here, you have appeared, and your appearance is recorded; you must answer such questions as are put to you; it is not in your power to deny.

Major *Wildman.* I beg the excuse of the court, I cannot serve upon the jury.

L. C. J. If you be no free-holder the law will excuse you.

Major *Wildman.* Perhaps there may be some estates in my name that may be freeholds; perhaps I may be some trustee, or the like.

Att. Gen. Have you any freehold in your own right in Middlesex?

Major *Wildman.* I don't know that I have; if it be in the right of another, or as trustee, I take not that to be a freehold.

Cl. of Cr. Call Thomas Johnson.

Mrs. *Fitzh.* Let him be sworn, there is no exception against him.

L. C. J. Hold your peace, or you go out of court if you talk again.

Mrs. *Fitzh.* I do not say any thing that is any harm, my lord.

Cl. of Cr. Swear Thomas Johnson: you shall well and truly try, &c.

Fitzh. My lord, I pray the clerk may not skip over the names as they are returned.

Cl. of Cr. Sir, I call every one as they are in the pannel; and don't do me wrong.

L. C. J. It may be he does not call them as they are mentioned and set down in the pannel, for all have not appeared; but calls those whose appearance is recorded.

Cl. of Cr. I have called them as they are here set down.

L. C. J. Well let them all be called for; may be they will appear now that did not appear before.

Cl. of Cr. Maximilian Beard.

Mr. *Beard.* My lord, I desire to be excused, I am very infirm and very ancient, threescore and fifteen years of age, at least.

L. C. J. Why did the sheriff return you? If you be of that age, you should be put out of the freeholders book. But stay, you are here impanneled, and have appeared; if there be enough, we will excuse you.

Justice *Jones.* He ought to have witnesses of his age; and if he would not have appeared, he might have had a writ of privilege for his discharge in regard of his age.

L. C. J. Well, we will set by him; if there be enough besides, we will spare him.

Cl. of Cr. Isaac Honywood (he did not appear): Lucy Knightly (who was sworn): Henry Baker.

Att. Gen. My lord, I challenge him for the king.

Fitzharris. My lord, why should he challenge him? I desire to know the law, whether the two foremen should not try the challenge, and not the court or the counsel.

Serj. *Maynard.* If the king challenge, he hath time to shew cause till the pannel be gone

through; the law will have the *minus suspecti*; but if there want any thing, the king must shew good cause.

Cl. of Cr. Edward Probyn.

Att. Gen. I challenge him for the king.

Cl. of Cr. Edward Wilford (was sworn.)

Fitzharris. My lord, must not Mr. Attorney shew his cause now?

L. C. J. Look you, Mr. Fitzharris, either side may take their exception to any man; but the cause need not be shewn till the pannel is gone through, or the rest of the jurors challenged *.

Cl. of Cr. John Kent, of Stepney.

Mr. *Kent.* My lord, I am no freeholder.

L. C. J. Then you cannot be sworn here upon this jury †.

Cl. of Cr. John Willmore.

Att. Gen. We challenge him for the king.

Fitzharris. For what cause?

Serj. *Jeff.* We will shew you reasons hereafter.

Cl. of Cr. Alexander Hosey (was sworn:) Giles Shute.

Att. Gen. Are you a freeholder, Sir?

Mr. *Shute.* No.

Att. Gen. Mr. Whitaker is got near him, and he tells him what he is to do, my lord.

Fitzh. Here is the lieutenant of the Tower between me and him.

Serj. *Jeff.* But the bar is no fit place for Mr. Whitaker, he is not yet called to the bar.

Cl. of Cr. Martin James.

Att. Gen. Are you a freeholder, Sir?

Mr. *James.* Yes.

Att. Gen. Then swear him, (which was done.)

Cl. of Cr. Nathanael Grantham.

Att. Gen. Are you a freeholder, Sir?

Mr. *Grantham.* No.

Cl. of Cr. Henry Beiling.

Att. Gen. Are you a freeholder, Sir?

Mr *Beiling.* Yes.

Fitzh. Then I challenge him.

Cl. of Cr. Benjamin Dennis.

Att. Gen. Is he a freeholder?

Mr. *Dennis.* No.

Att. Gen. My lord, you see what practices here are, most of the jury are no freeholders.

Cl. of Cr. John Preston, (did not appear:) John Viner, of White Chapel.

Att. Gen. He hath fetched them from all corners of the town here, yet not all of them freeholders neither.

Cl. of Cr. Swear Mr. Viner, (which was done.) William Withers, (was sworn:) William Cleave, (sworn:) Thomas Goffe, (sworn:) Abraham Greaves.

Att. Gen. Ask him if he is a freeholder?

Mr. *Greaves.* No.

Cl. of Cr. Henry Jones.

Att. Gen. Is he a freeholder?

Mr. *Jones.* No.

Cl. of Cr. Ralph Farr.

Att. Gen. Ask him the same question.

Crier. Are you a freeholder, Sir?

Mr. *Farr.* Yes.

Cl of Cr. Then swear him, (which was done.) Samuel Freebody.

Att. Gen. Are you a freeholder, Sir?

Mr. *Freebody.* Yes.

Att. Gen. Then swear him, (which was done.)

Cl. of Cr. Gilbert Urwin of Covent-garden (did not appear.) Edward Watts, of Westminster.

Att. Gen. Are you a freeholder, Sir?

Watts. Yes.

Att. Gen. Then we challenge you for the king.

Cl. of Cr. John Bradshaw of Holborn (did not appear:) Isaac Heath of Wapping (no freeholder:) Edward Hutchins of Westminster.

Att. Gen. We challenge him for the king.

Cl. of Cr. John Lockier of Westminster,

Att. Gen. Are you a freeholder?

Mr. *Lockier.* Yes.

Att. Gen. Then swear him.

Cl. of Cr. Count these. Thomas Johnson.

Crier. One, &c.

The names of the twelve sworn, are these: Thomas Johnson, Lacy Knightley, Edward Wilford, Alexander Hosey, Martin James, John Viner, William Withers, William Cleave, Thomas Goffe, Ralph Farr, Samuel Freebody, and John Lockier.

Cl. of Cr. Edward Fitzharris, hold up thy hand. Gentlemen, you that are sworn, look upon the prisoner, and hearken to your charge.

Fitzh. My lord, I humbly beg pen, ink, and paper.

L. C. J. Let him have pen, ink, and paper.

Cl. of Cr. You shall have them presently; (which were given him.)

"He stands indicted by the name of Edward Fitzharris, late of the parish of St. Martin's in the Fields, in the county of Middlesex, gent. for that he as a false traitor against the most illustrious, and most excellent prince, our sovereign lord Charles the Second, by the grace of God king of England, Scotland, France, and Ireland, his natural lord; not having the fear of God in his heart, nor weighing the duty of his allegiance, but being moved and seduced by the instigation of the devil; the love, and true due and natural obedience, which a true and faithful subject of our said sovereign lord the king, towards him our said sovereign lord the king, should, and of right ought to bear, wholly withdrawing; and with all his might intending the peace and common tranquillity within this king-

* "Here the Chief Justice did not shew the same favour to Fitzharris, which he afterwards shewed to count Coningsmark, in directing him how to make the king shew cause, by challenging all the rest." Note in former Edition.

† "In lord Russell's Trial, 'no freehold' was not allowed to be a good challenge, and several, though no freeholders, were admitted to be sworn on the jury. The like in col. Sidney's Case." Note in former Edition.

dom of England to disturb, and war and rebellion against our said sovereign lord the king to stir up and move; and the government of our said sovereign lord the king, within this kingdom of England, to subvert; and our said sovereign lord the king from the title, honour, and regal name of the imperial crown of his kingdom of England to depose and deprive; and our said sovereign lord the king to death and final destruction to bring and put, the 22d day of February, in the 33rd year of the reign of our sovereign lord Charles the Second, now king of England, &c. and divers other days and times, as well before, as after, at the parish of St. Martin's in the Fields, in the county of Middlesex, traitorously did compass, imagine, and intend the killing, death, and final destruction of our said sovereign lord the king, and the ancient government of this his kingdom to change, and alter, and wholly to subvert, and him our said sovereign lord the king, that now is, from the title, honour, and regal name of the imperial crown of his kingdom of England to depose and deprive, and war and rebellion against our said sovereign lord the king, to stir up and levy within this kingdom of England. And his said wicked treasons and traitorous compassings, imaginations, and purposes aforesaid to fulfil and perfect, he the said Edward Fitzharris, as a false traitor, together with one Edmond Everard, a subject of our said sovereign lord the king, did then and there traitorously assemble himself, meet and consult, and the same his treasons and traiterous compassings, imaginations, and purposes, then and there to the said Edmond Everard, in the hearing of divers other subjects of our said sovereign lord the king, openly, maliciously, traiterously, and advisedly speaking, did publish and declare. And to persuade and induce the said Edmond Everard, to be aiding and assisting in his said traiterous compassings, imaginations and purposes, he the said Edward Fitzharris, as a false traitor, maliciously, advisedly, and traiterously to the said Edmond Everard a great reward then and there did offer, and promote to procure. And for the further completing of his treasons aforesaid, and to incite the subjects of our said sovereign lord the king, as one man, to rise, and open rebellion and insurrection within this kingdom of England to raise, against our said sovereign lord the king, and our said sovereign lord the king from the title, honour, and regal name of the imperial crown of his kingdom of England to cast down and depose, he the said Edward Fitzharris, as a false traitor, a certain most wicked and traiterous libel, the title of which is in these English words following, "The true Englishman speaking plain English," traiterously, maliciously, and advisedly, in writing to be made and expressed, did then and there cause, procure and publish; in which said libel the said most wicked treason, and traiterous compassings, imaginations and purposes aforesaid, of him the said Edward Fitzharris, to excite and persuade the subjects of our said sovereign lord the king of this kingdom of England, against our said sovereign lord the king to rise and rebel; and our said sovereign lord the king from the style, honour, and regal name of the imperial crown of this his kingdom of England to deprive and depose, in writing are expressed and declared, amongst other things, as followeth: "If James (meaning James duke of York, the brother of our said sovereign lord the king) be conscious, and guilty, Chs. (meaning Charles 2, now king of England) is so too, believe me (meaning himself the said Edward Fitzharris) both these (meaning our said sovereign lord the king, and the said James duke of York) are brethren in iniquity, they (meaning our said sovereign lord the king and James duke of York) are in confederacy with Pope and French to introduce popery and arbitrary government, as their actions (meaning the actions of our said sovereign lord the king, and James duke of York) demonstrate. The parliament's Magna Charta and Liberty of the Subject are as heavy yokes they'd as willingly cast off, for to make themselves (meaning our said sovereign lord the king, and the said duke of York) as absolute as their brother of France. And if this can be proved to be their aim (meaning our said sovereign lord the king, and the aforesaid duke of York) and main endeavour, why should not every true Briton be a Quaker thus far, and let the English spirit be up and move us, (meaning the subjects of our said sovereign lord the king of this kingdom of England) all as one man to self-defence? Nay, and if need be, to open action, and fling off those intolerable riders?" (Meaning our said sovereign lord the king, and the said duke of York.) And in another place in the said most wicked traiterous libel are contained, amongst other things, these false, seditious, and traiterous sentences in these English words following. "J. and C. (meaning the said Charles our sovereign lord the king, and his said brother James duke of York) both brethren in iniquity, corrupt both in root and branch, as you (meaning the subjects of our said sovereign lord the king) have seen, they (meaning our said sovereign lord the king, and the said duke of York) study but to enslave you (meaning the subjects of our said sovereign lord the king) to a Romish and French-like yoke. Is it not plain? Have you (meaning the subjects of our said sovereign lord the king) not eyes, sense, or feeling? Where is that old English noble spirit? Are you (meaning the subjects of our said sovereign lord the king) become French asses, to suffer any load to be laid upon you? And if you (meaning the subjects of our said sovereign lord the king) can get no remedy from this next parliament, as certainly you (meaning again the subjects of our said sovereign lord the king) will not: and that the K. (meaning our said sovereign lord the king that now is) repents not, complies not with their advice, then up all (meaning the subjects of our sovereign lord the king) as one man. O brave Englishmen! Look to your own defence 'ere it be too late, rouse up your spirits." And in ano-

ther place in the said most wicked and traitorous libel are contained, amongst other things, these false, seditious, and traiterous sentences in these English words following; to wit, "I (meaning himself the said Edward Fitzharris) will only add, that as it is the undoubted right of parliaments to make a law against a popish successor, who would prove destructive to our laws and liberties; so it is their undoubted right to dethrone any possessor that follows evil counsellors to the destruction of our government," (meaning the government of this kingdom of England.) And in another place in the said traiterous libel, are contained these English words following: "Then let all (meaning the subjects of our said sovereign lord the king that now is) be ready; then let the city of London stand by the parliament with offers of any money for the maintaining of their liberties and religion in any extreme way, if parliamentary courses be not complied with by the king;" (meaning our said sovereign lord the king) against the duty of their allegiance, and against the peace of our said sovereign lord the king, his crown and dignity, &c. and against the form of the statute in this case made and provided."

Upon this Indictment he hath been arraigned, and thereunto hath pleaded, Not Guilty; and for his trial hath put himself upon God and his country, which country you are, &c.

Crier. Make proclamation. O yes, if any one will give evidence, &c.

Mr. *Heath.* May it please your lordship, and you gentlemen of the Jury, this is an indictment of high-treason against Edward Fitzharris, the prisoner at the bar; and the indictment sets forth, that the 21st of February, in the 33d year of the king, at St. Martin's-in-the-Fields, he did compass and imagine the death of the king, and to raise war and rebellion within this kingdom. And the indictment does set forth, that for the accomplishment of this, he did meet and assemble with one Edmond Everard; and several others, and did discover this his traiterous purpose to the said Everard, and did persuade him to aid and assist therein; and offered him great rewards if he would do so. It further sets forth, That for the further perfecting of this treasonable imagination of the said Edward Fitzharris, he did frame and make a treasonable libel, and the . of the libel is, 'The true Englishman speaking plain English;' and in that treasonable libel, are these treasonable words contained, 'If James be guilty' (meaning the duke of York) 'Charles' (meaning the king) 'is so too,' &c. And the several words that have been read to you in this indictment, are contained in the said libel, which I shall not repeat. To this indictment he hath pleaded, Not Guilty; if we prove it upon him, you are to find him guilty.

Serj. *Maynard.* May it please your lordship, truly it is a sad thing to consider how many have been found guilty of plotting against the king, but none have gone so far as the prisoner at the bar: for they designed only his death; but this person would have carried on his treason by a means to slander him while he was alive, and thereby to excite the people to such a rebellion as you have heard. I shall add no further words; the thing is not aggravatable, it is so great an offence it itself; but we will call our witnesses, and go to our proof.

Att. Gen. My Lord, yesterday you had here the primate of Ireland, who was found guilty for a notable high-treason in Ireland: you have now this day before you one of his emissaries, who is come over into England, and who has here committed one of the most execrable treasons that ever was brought into a court of justice; I must needs say, that it will appear to all the auditors this day, that here is the highest improvement of the Popish Plot, and aggravated with such circumstances, as shew they have out-done themselves in it. Hitherto those cases that have been brought into judgment before you, have been the attempts upon the life of the king, in instances of either shooting, stabbing, or poisoning: I say, hitherto they have gone no further than to practise these things, and that by popish hands, they have kept the plot amongst themselves; but now they have gone one step further, that is, by attempting to poison all the Protestants of England as much as in them lies, that they should by their own hands destroy one another, and their lawful prince; that is the treason now before you; and I take it, with submission, they can go no further. For it is impossible to arise to a higher piece of malice and villainy than to set the people's hearts against their prince, and to set them together by the ears one against another. This we shall prove, in the course of our evidence, to be the design of the prisoner at the bar. The general design hath been opened to you out of the indictment to kill and destroy the king, and to depose him from his government; and we shall charge him with all those several overt-acts, which I shall open to you: First, several meetings to consult about this matter at Gray's Inn and several other places; which, my lord, I think there is no question to be made, but is an overt-act to make high treason. We shall go further, and shew that these designs he had to depose the king, and raise his people against him, he does declare openly to Mr. Everard; which is another overt-act within the new statute. We shall, my lord, go further yet, and prove the great rewards he hath offered to Mr. Everard for joining with him, and being assisting to him in this affair, part in ready money, and part in annual pension. And there your lordship will find where the spring is, from whence all these mischiefs arise, some foreign power; but the Papists, the priests are at the bottom of it, they are the persons that set him on, and these must draw in a great person beyond sea, who must reward this gentleman for being a partner in this plot. And we shall prove some money paid in hand. But then,

my lord, that which was the effect of this consult, is the framing this pernicious libel; for so give me leave to call it.

My lord, the indictment is modest, but when you come to hear the libel itself read, you will find it so; and it was not prudence, that so vile a thing should appear upon record. And truly, I believe in a Protestant kingdom it is the first attempt of this nature that ever was: For, my lord, it is to defame the whole royal family, it is to stain their blood, and to make them vile in the sight of the whole kingdom, and of all posterity. My lord, this libel in its particulars chargeth that most excellent and innocent person, our late and never to be forgotten sovereign king Charles 1, to be the author of the Irish rebellion; it charges our present prince with the exercise of arbitrary government, to be a Papist, to be a person that deprives his subjects of all manner of liberty, and property; in express terms, it charges him with this, than which nothing can be more false: for there is none of his subjects, I think, but must say, that our most gracious prince, for the time he hath reigned, may vie with the best 20 years of any of his predecessors, for the preserving the liberty and property of the people, for giving us peace and plenty all our time, for the permitting and securing to them the free current of the law, and for securing their civil and religious rights.

My lord, when we have gone through the evidence about the contexture, and this libel is read and produced, we shall prove the design of it, and how it was framed, and the eyes of the world will be opened, and you will see that this was no intention, no engine framed to trepan, or ensnare any private person, or as it was secretly braited abroad, to be put in such men's pockets; but a piece of the greatest Machiavellian policy that ever was invented and prepared for a public press, as a catholic poison to infect all the king's subjects, and excite them one against another.

And we shall prove that this person, in the several methods that I have opened, hath proceeded to accomplish his traiterous designs of dethroning the king: nay, he hath said, it is resolved among them, now that nothing else will do it but the poisoning the hearts of the people with hatred to their king, and malice against one another. And when we have proved the matter fully, through all the parts, we must leave it to the jury, who, I question not, will do themselves, and all other Protestants right, as well as their prince. We shall now go to our evidence, and first we will call Mr. Everard; but, my lord, I would only first observe to you, that this gentleman, Mr. Fitzharris, and Mr. Everard, were both employed in the French king's service, and there acquainted together. Mr. Everard came early off, and became a Protestant, leaving the French king's service, because he found their several plots and designs upon England. Then comes Mr. Fitzharris to him, and because he looked upon Mr. Everard not to be rewarded according to his merits, invites him over, with telling him those things that the witness himself will tell you, back again to the French interest.

Then Mr. *Everard* was sworn.

Fitzharris. Look me in the face, Mr. Everard.

Everard. I will, Sir.

Att. Gen. Will you acquaint my lord, and the jury, how you came first acquainted with the prisoner, and then tell the several passages between you.

Sol. Gen. Tell your whole knowledge in this matter.

Everard. My lord, I came acquainted with Mr. Fitzharris beyond seas, when we were both in the French king's service, and on conference with him of late, especially about the beginning of February last, he renewed his acquaintance, though at several times before we had several discourses whereof I did not take much notice, but in those meetings in February last, and in those visits he paid me then, we had several discourses tending to represent the disadvantages and sufferings I sustained, for adhering to the protestant and English interest; and besides comparing in the other balance, what advantages I might expect if I would re-ingratiate myself into their interest.

L. C. J. What interest?

Everard. The French and the popish interest. And there was an opportunity in my hands, wherein I might be serviceable to myself and others; and he told me there were several persons, among whom were some parliament men, that did adhere to the French interest, and gave an account to the French ambassador of every day's proceedings: And as I was looked upon to be the author of a kind of pamphlet, that was called, 'An Answer to 'the King's Declaration, concerning the Duke 'of Monmouth;' therefore I should be fit to serve them, especially to make such another pamphlet to reflect upon the king, and alienate him from his people, and his people from him. Whereupon I told him I would do any thing that was for my true interest, but I did conceive with myself, that that was none of it. He appointed a time when we should meet again; but I sent him a note, I could not meet possibly that day, which was Monday, as I remember the 21st of February: However he was impatient, and came to me, and told me he would give me heads and instructions tending to that pamphlet I was to write, to scandalize the king, and raise a rebellion, and alienate the hearts of the kingdom, and set the people together by the ears. Upon this he gave me some heads by word of mouth: As soon as I parted from him, I met with one Mr. Savile of Lincoln's-Inn, and as soon as I met with him, I acquainted him with what was passed, and told him I wished rather than 10*l.* I had met him sooner, half an hour before. Why, what is the occasion, says he? Why, said I, there is a person that hath had such and such discourse

with me, and one of his main errands, amongst others, is for me to write a scandalous libel reflecting upon his majesty and the government. And upon this I said, Mr. Savile, I shall not confer with him any further, unless I have somebody by to witness what he says; he speaks most commonly French, and sometimes English, and therefore it must be one who understands both the tongues well. So we went into the city together that afternoon to one Mr. Crow's, who is a silkman in Queen Street; said we, Sir, you are a moderate impartial man, and understand French, we desire you will be present to over hear some proposals that are made to me tending to set our country together by the ears, and he comes from a popish party. Mr. Crow said, he would be willing to undertake any thing to serve the protestant English interest, but he would not undertake to speak French so well as to be able to understand all nice passages and words that might be proposed. And then Mr. Savile and I went to Mr. Smith a Durham gentleman, and made him the same proposal I had made Mr. Crow, desiring him that he would come and overhear our discourse, and I would place him in a fit place. Mr. Smith assented to the propositions and said he would. Mr. Smith asked me what day and time we were to meet; I told him, to-morrow at six or seven o'clock at night at my chamber in Grays-Inn: But further, he said, we must have other witnesses, for one witness would not be sufficient; so we went to the Exchange Coffee-house, and there we met with sir William Waller, to whom we made the same proposal, that since we must have some that understood French, and keep the thing secret, till it were time to have it come out, he would please to undertake it. Sir William Waller promised to come, but failed the first meeting, which was to be on the Tuesday; then we went to another French merchant, who was proposed by Mr. Savile, but he was not within: so then we must rely on one witness for that meeting. Mr. Fitzharris was to meet me about two o'clock at my chamber in Gray's-Inn, where Mr. Smith and Mr. Savile were to meet likewise, and they came first to the tavern just at the corner of Fuller's-Rents, which hath a prospect into the court: And from thence I saw Mr. Fitzharris in the court pointing to another gentleman that was with him, up to my chamber, and he was walking suspiciously up and down. Then I went out of the tavern, and came up to my chamber, and after a little while captain Fitzharris came up to my room; I placed him in another room, where my wife was, and shut the door to, whilst I sent word to Mr. Smith to come into the outer room and shut himself into my closet. There was Mr. Smith in the closet, and there was an hole or two for the purpose made through both the planks of the boards and hangings, but the hangings hung over the hole that it might not be discerned by Mr. Fitzharris; and he could raise it, and then see who was in the room, and hear their words; for I placed my chair towards the closet, which had an angle outwards, and now and then I did stand against the hole, and now and then sat, to give Mr. Smith advantage, and to give Mr. Fitzharris no suspicion. When we were so placed, Mr. Fitzharris asked me what I had done as to the thing proposed, this libel that I was to draw up; I said, I was busy, and had not been able to finish it; but here are some heads of it, said I, and shewed him half a dozen lines drawn up together; and when I had read them, Sir, said I, is this your mind? Yes, said he, but I must add much more than this is to it. Then Mr. Fitzharris proceeded to give me further instructions; and so repeated what instructions he had given me before, that the king and all the royal family must be traduced to be popishly and arbitrarily inclined from the beginning, that king Charles 1 especially had an hand in the Irish rebellion, and that likewise king Charles 2, that now is, did countenance the same, as did appear by his promoting those very officers that were in the Irish rebellion, Fitz-Gerald, Fitz-Patrick, and Mont-Garrat, which should be named in the libel. Besides that, the act made at the king's coming in, forbidding any to call the king papist, was merely to stop people's mouths, that they should not call him a papist, when he should incline to further popery, and did intend by his actions so to do. And besides his adhering so closely to the duke of York's interest, was to be another argument of it, his hindering the duke of York from coming to his trial, and to be proceeded against by the parliament, and hindering the officers that were put in by the duke of York from being cast out. Another argument was, because those privy counsellors and justices of the peace, that did adhere to the Protestant interest, were turned out of all places of trust; and besides, he said, it did appear to the people consequently, that the king was conscious to himself, that he was as guilty as his brother and was as much a papist as his brother, and it was in the people's power as well to depose a present popish possessor, as a popish successor; and that the people must be stirred up against him, and encouraged to blow the trumpet, and especially that the city and common council must be encouraged to stand by the parliament; and seeing the king was such, that no hopes was to be had of the parliament at Oxon, they were bound to provide for themselves and to advance some hundreds or thousands of pounds to the parliament to settle the Protestant religion without the king, if parliamentary ways would not succeed. These were some of the instructions.

Att. Gen. Did he say any thing that day about a reward you should have?

Everard. He spake in the general about a reward, but he spoke more fully to that the day after; he did not then come so much to particulars: then some part of those instructions I writ in my table-book, which is produced here, and others of them in another scroll of paper. He then desired to know of

me when the scheme of this thing would be ready; said I, you may come to-morrow; I will, says he, come about six or seven o'clock in the evening. In the mean time I writ a letter to sir William Waller in French, which I sent by a porter, and therein I said, Sir, you have missed a great opportunity of rendering a great service to the king, by not coming to see me when you were expected; for the person, the French emissary whom I spoke of to you, hath proposed very scandalous seditious things to be written, and therefore I desire you not to fail, as you tender the king's interest, to come to my chamber at six o'clock at night. Sir William Waller received my letter, and came thither accordingly; I placed sir William Waller in another room, and I placed my own chair at a narrow table near the place where sir William Waller was, and there through the wainscot and hangings we made a slit, whereby sir William Waller might see into the next room where Mr Fitzharris and I sat: but before I placed him there, I shewed sir William Waller two copies of the instructions for the libel drawn up. Said I, Sir, here are two copies which are both the same, and I desire you to countermark them, that you may know them again, and thereby see what alteration will be made; for here are no blots now, and by that you will find the alteration. Sir William Waller, while my back was turned, counter-marked those copies. I went into the next room, and I had not been long there, but Mr. Fitzharris came in; I placed the table near the alcove, where sir William Waller was, within his hearing and seeing. Mr. Fitzharris asked me what I had done in the business: Sir, said I, here are two copies of it, pray, will you see how you like it? So he took one, and I took the other.

Serj. *Jeffries.* My lord, I must interrupt this gentleman, for I see they continue to give the prisoner papers.

Fitzharris. It is only a paper of the names of my witnesses.

L. C. J. Go on, Sir.

Everard. My lord, captain Fitzharris did read one copy of this pamphlet, and did amend it; he did add some things, and struck out other things: then said I, Is this, sir, according to your liking? Yes, says he, but I must add something, for it is not yet full enough; but says he, this must be fair copied out; for it is not the French embassador's confessor to read, who should present it to the embassador. Upon this I told him it should be done against the next day; but in the mean time I told him, Sir, these are very treasonable things, and this a very treasonable project. Oh, said he, the more treasonable the better, and that will do the effect better. What is that, Sir, said I? That is, says he, to set these people together by the ears, and keep them clashing, and whilst they are so in clashing, and mistrusting one another, the French shall gain Flanders, and then, said he, we shall make no bones to gain England too. But, sir, said I, you spoke of some recompence for me, what shall I have for venturing this? Why, says he, after this libel is delivered up, and that hath gotten you this confidence that you are trusty, then I will gain the French confessor, who is very shy, and may so well be, because one of the confessors of an embassador hath been already trepanned upon such an occasion. Therefore he is very wary, but he must have an assurance under your hand, which he shall have by this libel; and then in a few days you shall have forty guineas, and a monthly pension; which shall be some thousands of crowns; for my master the French king is not a niggard as to these things. The Spanish embassador is so very niggardly and penurious a man, that he cannot keep a table; but said he, you shall be well rewarded by the French king; and be not discouraged by the danger, for I am in as great danger as you. After some such instructions and encouragements, that Mr. Fitzharris gave to go on in the work, he departed; and I cannot well call any thing to mind of more particulars; but upon questions asked me, perhaps I may. But then at that time, or the next time, captain Fitzharris gave me half a sheet of paper; for I told him I may chance to forget part of your instructions, therefore pray write what is your mind; and in that paper he writ down, that it was in the people's power to depose a popish possessor, as it was to oppose a popish successor, and certain other treasonable heads: the half sheet of paper is to be produced in the Court, under his own hand, which he hath confessed, besides other treasonable instructions, that he gave me by word of mouth. But he at that time departed, and came the next day to have a copy of the treasonable libel writ out fair, and promised me to meet at the Boarded-House, where we usually met in Holborn at Mr. Fashion's; and I did there come and deliver him a copy of this treasonable libel, and he said I should hear in a few days from him, and should have a recompence, and this should be but as an entrance-business; for I should be brought into the cabal, where several Protestants and parliament-men came to give an account to the embassador, how things were transacted: but to-morrow, said he, I cannot go to receive the libel back again, for I am to go to Knight's-bridge.

Fitzh. Where there?

Everard. To my lord Howard's; for, said he, you have seen his son often with me. My lord Howard is very civil to me, he was my father's lawyer.

Att. Gen. Will you ask him any questions, Mr. Fitzharris?

Fitzh. Did you write this libel?

Everard. Yes, by your instructions, I did.

Fitzh. Do you believe I had any traiterous intention in it?

Everard. Yes.

Serj. *Jefferies.* You said, the more treason the better, Mr. Fitzharris.

Fitzh. Were you put upon this to trepan others?

Att. Gen. It is no trepanning to ask them to come, and hear you give him those instructions, sure.

Fitzh. But I ask him this question, Mr. Attorney; was he put upon it to trepan others?

Everard. Can you mention any person that I was to trepan?

Fitzh. Were you put upon it to trepan the Protestant Lords, and the House of Commons?

Everard. No, I was not.

Fitzh. Is this the same libel that was read in the House of Commons, upon which I was impeached?

Everard. Yes, I believe, Mr. Fitzharris, it was.

Att. Gen. Mr. Everard, because he puts you upon it, and to satisfy all the world, I ask you upon your oath, did any person whatsoever put you upon this to trepan other persons, or to put it into their pockets, as it is reported?

Everard. I was put upon it by none but Mr. Fitzharris, of whom I asked, what will be the use of this? Said he, we shall disperse them, we know how.

Att. Gen. Did he tell you in what manner?

Everard. No, he did not tell how.

Att. Gen. To whom was it to be delivered?

Everard. I was to deliver it to Fitzharris, who was to deliver it to the French confessor, and it was to be drawn in the name of the Nonconformists, and put upon them.

Serj. *Jefferies.* What religion is Mr. Fitzharris of?

Everard. He was always looked upon to be a papist.

Fitzh. When did you see me at mass?

Att. Gen. Hath he not owned himself so?

Everard. He hath owned himself at several times to be a papist.

Sol. Gen. What did he say to you about your being a Protestant, and what cause you had to turn to the Popish religion?

Everard. He said, I was under great disadvantages, and had much loss by leaving them, I had better have adhered to their interest still. He had this discourse with me at several meetings, and gave me several visits, some at my chamber, some at Gray's-Inn walks, sometimes at the house with black posts in where we talked of several things.

Mrs. *Fitzh.* I am sorry he kept such a rogue as you are company.

L. C. J. Officers, take her away, if she can't hold her tongue, and give better language.

Fitzh. She will speak no more, my lord.

L. C. J. Stand still then, and be quiet.

Att. Gen. What was your discourse at the ale-house.

Everard. To give instructions to set the people together by the ears; and one most effectual means was by scandalizing and libelling the government, and especially the king.

Mr. *Jones.* Did any body else assist you in drawing the libel,

Everard. There is at the latter end of the libel a paragraph that was taken out of another book; there was a scandalous libel that was brought by the woman that carries paper books about, and out of that, to make short work, and out of The Character of a Popish Successor, in which he said were many things material, he would have some of the expressions of this libel taken: so I copied some of the queries out of that paper, which was said to be a letter intercepted to Roger L'Estrange, and that day that I was under examination before Mr. Secretary Jenkins, that libel lay before him upon his table. He asked me if I had seen that, I told him yes, for I had copied in that paper that was the libel those queries; and then, said he, here is a warrant to be given out against Curtis for it.

Serj. *Jefferies.* After such time that you had carried him the copy that sir William had marked, and he amended it, did you shew it sir William Waller presently?

Everard. Yes, immediately; and I asked him, Sir, says I, is there any alteration? Yes, said he, I see alterations, and shewed them one. Do you know the difference of hands, said I? Yes, said he, I do, and suppose will give you an account of it.

Mr. *Johnson.* My lord, I humbly beg Mr. Everard may be asked, who those parliament-men were that were to concur with the French ambassador in this design?

L. C. J. Did he name any parliament-men?

Everard. No, he did not, he said, I should know them hereafter.

L. C. J. Then he did not name any?

Everard. No, he did not.

Att. Gen. Then swear Mr. Smith. (Which was done.) Pray, sir, will you look about, and give an account what you know.

Mr. *Smith.* Will you have an account how it came first to my knowledge?

Att. Gen. Yes, the whole, from the bottom to the top, from the begining to the end.

Mr. *Smith.* I remember, about the 22d or the 21st of Feb. either one or the other, Mr. Everard and one Mr. Savile came to my chambers, and told me the same design that Mr. Everard hath repeated before, and that there was an Irish gent. an officer of the French king's army that was to manage the thing; he was one that could speak French very well, and they desired me to be concerned in it, because I understood French. Upon this I told him, I would willingly undertake such a business, if I thought there were any convenient place in the room where I might hear, and see, undiscovered. After he had told me, as he has before told your lordship, that it was to make a difference between the king and his people, and to misrepresent the king, as I shall inform you by and by. I went to his chamber after we had spoke to Mr. Crow, who would not undertake to speak French so well as to be capable of understanding all; but at last we met sir William Waller, who undertook the matter. I walked immediately after dinner to the chamber, and saw the conveniences, and the next night we expected sir W. Waller; but he not coming that night I went into the closet myself till Fitzharris came according to the appointment. When Fitz-

harris came, there were two chairs set, one chair next the closet where I stood, and another opposite against me; that opposite against me, was that where Mr. Fitzharris sat, and Mr. Everard was next close to me, and I looked out through the hole, and I heard there some little discourses about the business in hand. At last Mr. Everard stands up, and goes to the side-board, and brings a piece of paper, about half a sheet, as I think, with him; and he read it, which was a seditious kind of paper, which I shall tell you of by and by. and he asked him in French, whether this were agreeable or no; to which the gent. answered, it was well, but something must be added to it. Upon this, Mr. Everard took out his note-book, and read some things therein, and then Mr. Everard desired him to instance what heads he would have more than were there. To which Fitzharris replied, that he would have him to represent the king as a papist, which, might be demonstrated by several reasons: first, his adhering to the duke of York, and peremptorily resolving to espouse that interest. The second reason was, the preferring such as were the duke's creatures, both at sea and land, and keeping in office those that were preferred by the duke, known papists; and this was also another reason to prove that head of the instructions, that the king after his restoration procured an act to be made that it should be treason for any to call him papist; and this was only that he might the better, and with more ease, introduce popery into England. He charged likewise king Charles 1, to be a promoter of the Irish rebellion, and that Charles 2 furthered and approved it; that is another instance. That the parliament at Oxford was only a sham to delude the people, and that such a king was not to be trusted with such a people, neither as to their lives, liberties, or religion; but that the people must provide for themselves in time, and blow the trumpet boldly. Another instance was, as it was the undoubted right of the people to make laws against, and to oppose a popish successor, so they might depose a popish possessor. To this effect was the substance of what was said.

Att Gen. Did he name a reward that Mr. Everard was to have?

Smith. There was a reward mentioned, but I don't remember any particulars.

Att. Gen. Did he tell who set him on work?

Smith. He said, if they did but set England together by the ears, the French would get Flanders, and at length prevail here, and Mr. Everard should get an interest in the common-council, and make it his business that they should make a kind of an address to the parliament, and promise to stand by them with their lives and fortunes in opposing popery, and arbitrary government, and if parliament-ways failed, to assist in another way; and if the king hindered the duke of York to come to a legal trial, that then they should take other courses.

Att. Gen. What did he desire from Mr. Everard, when he seemed to boggle at his instructions?

Smith. Mr. Everard said, he would do these things, yet he was in great danger; why, says Mr. Fitzharris, so am I, and a great many more. What other conference was between them, I know not, for I never saw them together after.

Serj. Jefferies. Look you, Sir, is this the same person?

Smith. Yes, I did know him to be the same person that night he was taken.

L. C. J. You could see him where you were?

Smith. My lord, I saw him clear enough, there were three candles lighted, and I was as near to him as I am to your lordship.

L. C. J. You were not in the room?

Smith. I was in a little closet close by.

Att. Gen. You know nothing of the paper of instructions?

Smith. I remember he told me of such an one, but I was not there the second night.

Sir *F. Withins.* Mr. Everard said they were treasonable things, what then said Fitzharris?

Smith. He said the more treason was in them the better.

Serj. Jefferies. And the particulars were to set the people together by the ears, and to bring in the French king.

Smith. It is all one in terms.

Serj. Jefferies. How was it?

Smith. That the king and the people should be set at variance, then the French king would fall upon Flanders and Holland, and afterwards would take England in his way, and make no bones of it.

Serj. Jefferies. Will you ask him any questions, Mr. Fitzharris?

Fitzh. Do you believe that I did it with a treasonable intention?

Smith. Sir, I am not to judge of that, I am not of your jury, nor to answer any such thing.

Fitzh. What do you think, Sir, pray?

Smith. You could have no good design to bring about by any such matter (I think) as this paper is.

Fitzh. Is this the same paper that was read in the House of Commons?

Smith. Sir, I was not of the House of Commons, I don't know what was read there.

Mr. *Johnson.* Mr. Everard did seem to hint at a design amongst some protestant Lords, and parliament-men, and others, dissenters from the church of England; I desire to know whether Mr. Smith heard those words?

L. C. J. That was not the first night.

Smith. I did not hear it.

L. C. J. Look you, Mr. Johnson, Mr. Smith was not present at the second meeting, then sir William Waller was there, it was only the first night Mr. Smith was there, and he speaks to that. Therefore as to the alteration of the copy and some other things, he tells you that was done the second night, and then was the discourse concerning the French confessor, and those other things which you mention.

Att. Gen. I believe the jury misapprehend Mr. Everard in that too.

L. C. J. It was only what Fitzharris told him.

Att. Gen. But I see the thing sticks with the jury; therefore, I would fain ask Mr. Everard this question, did you declare any such thing, or was it Mr Fitzharris that told you?

Mr. Everard. Mr. Fitzharris told me, that several parliament-men were joined with the French ambassador to give him an account of things, but he told me besides, that it must be drawn up as it were in the name of the Non-Conformists, to father it upon them; yet when there was one word in it, Thou, as if it were in the Quakers name; no, says he, it must not be so, but it must be under the name of all the Non-Conformists, that it may be common to all the discontented party.

L. C. J. So you must take the sense of this right, gentlemen. It is not, Mr. Everard tells you, some parliament-men and lords were engaged in this business, but Mr. Fitzharris's design was to engage Everard, and he urged what he could to encourage him to it. So that the arguments he used were, that some lords and parliament-men were engaged in this, to encourage him to go on.

Mr. *Johnson.* It is true, my lord, so that here does appear there was some other interest than the French interest in this matter, if what Mr. Fitzharris said was true.

Att. Gen. Fitzharris said so, to engage him.

L. C. J. Look you, Mr. Johnson, we do all verily believe and hope, there was no such thing as that any lord, or any of the Commons of England were so engaged; it was his interest, as Mr. Fitzharris took it, to mention it so, to engage this gentleman.

Everard. I did not say lords.

L. C. J. What did you say then?

Everard. Parliament-men in general.

Att. Gen. Then swear sir William Waller, (Which was done.)

Sir Fran. Withins. Pray, sir William, will you give an account of what you know of this matter.

Sir Wm. Waller. My lord, the last time I was here in this court, being summoned to give in my evidence, I did make some difficulty of it, upon the account that this person was impeached by the Commons of England in Parliament; but Mr. Justice Jones having declared the law required me in such a case to give in my evidence, I am now ready to give it in, and shall do it as briefly as I can.

L. C. J. Well, Sir, pray go on.

Sir Wm. Waller. My lord, upon the 22d or 23d of Feb. last, Mr. Everard met me in the city, and told me, he had a business of very great concernment to discover to me; whereupon, my lord, we went into a place where we might conveniently discourse together; and he told me, in short, that Mr. Edw. Fitzharris, that unfortunate gentleman at the bar, had been with him several times, and endeavoured to engage him in a business, which would in effect turn all into confusion in England, and render the king very odious in the sight of his subjects. Many things he did there tell me, and earnestly pressed me to join in this design, to endeavour the discovery of it. I was indeed at the first shy of meddling with it, being no way in the commission of the peace, and so not liable to engage in a business of that nature; but I was afraid to discourage Mr. Smith, who voluntarily and ingeniously offered himself for the service of his king and country: but I did not go that afternoon, being willing to hear whether the business went on, and was likely to come to any thing. The next morning Mr. Everard writ to me this letter (plucking out a paper.)

Just. *Dolben.* Read it, Sir.

Sir Wm. Waller. My lord, in effect it was for to let me know, Mr. Smith hath been with him the night before, and that according as they had laid then business, Mr. Fitzharris did indeed come, and had some discourse in the hearing of Mr. Smith, several things beyond what they had acquainted me with, things of the highest nature imaginable; and therefore he earnestly pressed me, as I tendered the welfare of my king and country, that I would not fail to come that afternoon to be an ear-witness of the treasonable practices that were in hand. I looked upon myself then obliged to go, and did, according to the directions he gave me, go about three o'clock in the afternoon to a tavern at the lower end of Fuller's Rents near Gray's Inn, and there we were to discourse further of the business. I had not been there long, but I looked out of a back window, and spied Mr. Fitzharris with another gentleman in a brown-coloured suit, walking just before Gray's Inn door I do not know the name of the court, but there I saw them walking, but in their going he frequently looked up at Mr Everard's chamber, and pointed at it. When he was gone, I told him, it may be Mr. Fitzharris may come sooner than the hour appointed, therefore I think it will not be amiss to go without further delay to your chamber, and see what conveniency there may be to lie secret, where I may be both an eye and an ear-witness. I went to his chamber, and when I came into the room, there was a little closet, which I thought not so convenient for me, and I rather chose to look about if I could find another place more convenient. In short, in the next room I found by my cane there was a door, and hangings over it. I turned up the hangings there, and in the door there was a crevice, which I opened a little with my knife, and ripped a hole in the hangings which looked into the room where the gentleman was to be. And before Mr. Fitzharris came, Mr. Everard had given me a large account, much after the same manner that he hath given in his testimony here, and he showed me two papers. I took the two papers, and gave them a private mark, that I might know them again; and withal we placed a table and a chair ready against Mr. Fitzharris's coming in, and agreed, that he should be placed so, as that through

the hole I might have a full sight of him; but lest by an accident he should be removed from thence, I desired Mr Everard to ask him three questions. The 1st was, Whether he had not married a daughter of one captain Finch, whose father was killed in his majesty's service? The 2d was, Whether, as he read over the paper, it was drawn up according to his instructions? And the 3d was, Who was the person that should recompence Mr Everard for running so great an hazard? According to these instructions, the table being placed, and every thing in order, about seven o'clock, or between six and seven, Mr Fitzharris came in, and being sat down, he began to ask some questions, amongst others——

[Then some complaint was made by the king's counsel, of papers given to Mr Fitzharris.]

Fitzharris. Pray, my lord, I beg that paper may be given to my wife again.

Att. Gen. I pray it may be given to the court.

Serj. *Maynard.* I pray it may be read.

Sol. Gen. It is not the duty of a solicitor to bring papers, he was only appointed by the court to run of errands; he was not to advise or furnish with matter of defence.

Serj. *Jefferies.* My lord, this is an offence committed in the face of the court, therefore we pray the person that hath done it may be committed.

Just. *Dolben.* It is nothing but the resolutions of the House of Commons, give it him again.

L. C. J. If Mr Whitaker lies there to trouble the court, we shall find another place for him.

Sol. Gen. My lord, Mr Whitaker hath done his duty now, and what service your lordship appointed him, so I think he may be sent away, for here is no more business for him.

Sir *Wm. Waller.* Mr Fitzharris came in, I think it was between six or seven o'clock, and coming there, he sat himself down in the chair prepared for him, and Mr Everard, according to the instructions I had given him, did ask him several questions, but Mr Fitzharris did ask him first, Whether he had finished the paper according to some instructions he had given him? Mr Everard produced two papers, the one was the copy of the other, as I counted Mr Fitzharris had one given into his hand, and the other Mr Everard had. Mr Everard, after he had read a little in it, did ask, whether this was drawn up according to the instructions Mr Fitzharris had given? He answered, It was exactly according to the instructions he had given him. After he had read a little further, says Mr Everard to him, This is a business of a very dangerous consequence, what reward shall I have for running so great a hazard? He told him again thus: Sir, says he, I think I run an equal hazard with you, for you have a paper under my hand, which will render me liable to danger. And then he went on and read further; and if Mr Attorney will please to let me see the paper, there is one particular clause in it that I took special notice of.

Att. Gen. Would you have the libel, or the paper, sir William?

Sir *W. Waller.* The libel, Sir; (which was given him.) There was one passage in it which I remember, and it was this (speaking of the king's preferring persons that were engaged in the late Irish rebellion) the paper was first (preters) but says Mr Fitzharris, in French, it must be (has promoted) several passages of this nature I heard him alter, and I saw him alter with his pen. For after such time as Mr. Fitzharris was gone out of the room, I went immediately into the room where Mr. Everard was, and took notice of the paper, and the ink upon the paper was hardly dry.

Att. Gen. Look upon that, that is the original, and the other the counter-part.

Sir *W. Waller.* Here is the mark (then pointing to the bottom of the paper.) These two papers I marked both together, and this is the paper, Sir, was mended. I do remember it more particularly, for this paper I had in my own custody, and signed it afterwards.

L. C. J. Well, go on.

Sir *W. Waller.* He was asking him, pray, Sir, said he, what reward shall I have? Why, says Mr Fitzharris, you shall be very well paid, you shall not need to fear, you shall have all manner of encouragement. This business will bring a considerable advantage to you, and you shall be otherwise preferred than what you were in the French king's service. Says he, You cannot but know how you have been slighted and neglected, notwithstanding the service you have done, and the French ambassador is the person that is to recompence you for your pains, and he spoke of forty, but truly I did not hear whether it were guineas, or what it was, that he should have for present payment; and I heard him speak something of a pension, he named 3000 crowns, but whether annually, or how, I cannot tell. Pray, Sir, said he, what shall I do in this case, for I do not know, I am but in a low condition, and have occasion for money? Why, says he, the French ambassador will supply you, and you shall certainly, as soon as the paper is perfected, have your reward, and, says he, there are a great many more that we have employed in businesses of this nature, to create misunderstanding between the king and his people, by which means the French will easily over-run Flanders and the Low Countries, and then England will become an easy morsel. And this is the substance of what I remember.

Fitzh. Do you believe I had any such design as treason in it?

Sir *W. Waller.* I cannot say any thing to that, I only speak to matter of fact.

Att. Gen. Did he declare he had many more employed in the service?

Sir *W. Waller.* Yes, he did say so. And said he, there are two parliament-men that frequent my lord Shaftesbury's, who my lord

does not suspect, that do come and sound him, and then go and acquaint the French embassador with all they can discover.

Fitzh. Is this the same paper, by the oath you have taken, for which I was impeached by the Commons in parliament?

Sir *W. Waller.* Yes, it is a copy of the same paper, and that paper I did read in the House.

Att. Gen. It is the original.

Mr. *Johnson.* My lord, I desire to ask sir W. Waller one question. Sir, you have heard the indictment read, then pray tell us whether this very libel be expressed in the indictment according to what was delivered in the House of Commons?

Att. Gen. You shall hear that by and by yourselves: for you shall hear the paper read to you with the indictment.

Sir *W. Waller.* This is a copy of that paper.

Mr. *Johnson* (Foreman of the Jury.) Does Mr. Fitzharris stand impeached by the House of Commons upon the same treasons mentioned in the indictment?

Sir *W. Waller.* Yes, sir.

Att. Gen. Upon the same treasons?

Sir *W. Waller.* Upon this treasonable paper he does. For as soon as ever I had communicated this paper to the House, and I had made my report of the treasonable transactions of Mr. Fitzharris, the House immediately proceeded to the impeachment.

Sol. Gen. Does the impeachment mention that paper; or what particular treason he was impeached upon?

Sir *W. Waller.* I know nothing of that. But upon this paper that impeachment was grounded, that is all I can say.

Sol. Gen. That this libel was spoken of in the House of Commons, is true; but it does not appear upon the impeachment, that he was impeachment for that libel.

L. C. J. Have you any more witnesses?

Att. Gen. Yes, we have to other matters. But we desire to let them alone till the libel be read.

Mr. *Johnson.* My lord, we beg we may have the comparison of the libel with the indictment.

Fitzh. I would ask sir W. Waller one question more upon his oath, whether he had any design of trepanning me, or any body else in this thing?

Sol. Gen. Had you any design to trepan the prisoner, or any body?

Sir *W. Waller.* No, Mr. Fitzharris, indeed not I.

Fitzh. I looked upon you always as a person that was my enemy.

Att. Gen. What, because you were a papist?

Fitzh. No, it was upon another account, I appeal to Mr. Justice Dolben.

Justice *Dolben.* What do you appeal to me for?

Serj. *Jefferies.* Have you known Mr. Fitzharris before, sir William?

Sir *W. Waller.* Yes, many years.

Serj. *Jefferies.* What religion was he reputed to be of?

Sir *W. Waller.* A Roman Catholic.

Fitzh. I am not bound to continue so always.

Mr. *Jones.* Shew your conversion.

Att. Gen. Pray let the libel be read.

[Then the Paper was produced.]

Att. Gen. Sir W. Waller, and Mr. Everard, is that the paper?

Everard. This is the paper.

Att. Gen. Is it interlined with his own hand?

Everard. Yes, for there are the words (have promoted) that I said before, he altered.

L. C. J. Gentlemen, pray mark this now, you will hear the clauses contained in the indictment read, and you shall hear this paper read, and then yourselves shall be judges, whether it does contain them, yea, or no.

Mr. *Johnson.* We desire to see it at the bar.

Att. Gen. Here is a copy of these clauses, you may examine it by that.

Serj. *Maynard.* It is not the whole libel, but only some clauses of it he is indicted for.

L. C. J. Yes, brother; but what they desire is only to see whether so much as is contained in the indictment, is also in the libel.

Att. Gen. Pray swear Mr. Astrey, then; (which was done.)

L. C. J. Look you, gentlemen, this is one that is intrusted with the affairs of the crown, he is now sworn, and I ask him this question for your satisfaction. Mr. Astrey, are the English sentences that are in the indictment also comprized in the libel?

Mr. *Astrey.* My lord, I did examine this indictment with the libel at Mr. Attorney General's chamber as well as I could, and they are *in terminis* the same, the words in the indictment, and the words in the libel.

Mr. *Johnson.* My lord, if all be not in the indictment that is in the libel, then perhaps there may be some connection with what is antecedent, something to explain those clauses the indictment mentions, so that they may bear another construction. Therefore we would have all read.

Serj. *Maynard.* It must be all read to them.

L. C. J. Yes, brother, it shall be wholly read them, though it need not be expressed *de verbo in verbum* in the indictment; yet for their satisfaction it shall be wholly read to them.

Sol. Gen. These gentlemen are very cautious, I perceive.

L. C. J. Look you, gentlemen, if you will attend the Court, we will give you what satisfaction we can; pray, Mr. Solicitor, give them leave to speak to the Court: what you desire, gentlemen, is reasonable enough, that you may hear the libel, to see whether these are not clauses taken out of a paper, which may have another import in the paper than they have when they are taken out; that is your meaning.

Mr. *Johnson.* Yes, my lord.

L. C. J. To that intent you shall hear the libel read distinctly; you shall have the very clauses of the indictment by you, that you may look upon them.

Att. Gen. The other part of the libel will do it.

L C J Pray, Mr Attorney, do not direct me; they shall have the Indictment whilst Mr Astrey reads the libel, that they may see the import of the words You do not apprehend it aright Mr Johnson does not desire to see, whether Mr Astrey read right, but whether those clauses in the Indictment are of the same import in the Indictment, that they are of in the libel, therefore they must have a copy of the Indictment whilst Mr Astrey reads the libel, And Mr Astrey, pray mark those clau when you come to them, for you will find they are dispersed up and down the libel.

Mr *Astrey* I do not swear to that very paper, but I believe you will find they are rightly taken out of the libel in the Indictment

Att Gen This is the copy of the Indictment clauses

Cl of Cr reads, "Friend, I thank thee for the character of the Popish successor———"

Then one of the Jury, having the copy in his hand, and not finding it exact, desired a true copy

Sir *W Waller* Here is a true copy of it, which I took myself, and read in the House

Then the Libel was read through, which was as follows

"THE TRUE ENGLISHMAN speaking Plain English, in a Letter from a Friend to a Friend

"I thank you for the character of a Popish successor which you sent me, wherein our just fears and the grounds of them are justly set out But I am in greater fear of the present possessor, why do we frighten ourselves about the evil that is to come, not looking to that which is at hand? We would cut off the budding weeds, and let the poisonous root lie still, we would stop the channel of our evils, and let the fountain still run My meaning is this; can Pylades know and act all the bloody conspiracies, and not impart them to his dear Orestes? If James be conscious and guilty, Charles is so too Believe me, these two brethren in iniquity, they are in confederacy with Pope and French, to introduce Popery and arbitrary government, as all their actions demonstrate The Parliament, Magna Charta, and Liberty of the Subjects, are as heavy yokes which they would cast off to be as absolute as their brother of France, and if this can be proved to be their only aim and endeavour, why should not every true Briton be a Quaker thus far? Let the English rise, and move as one man to self defence, to open action, and fling off their intolerable riders. Blow the trumpet, stand on your guard, and withstand them as bears and tigers And since there can be no trust given to this goodly couple of Popish brethren, nor no relief expected from a parliament; trust to your swords in defence of your lives, laws, religion, and properties, like the stout earl of old, who told a king, that if he could not be defended by Magna Charta, he would be relieved by Longa Spada

"Yet to convince the world, that this Scottish race is corrupt, root and branch, and Popish from the very beginning, be pleased to consider these reasons following.

The grandfather of these men, James the Scot, was of no religion at the bottom, but entered by a pretence of a sham plot of the Papists against his life, whilst really he collogued with the Popish party under-hand, his mother, his kindred and companions were French, and Papists, when come into England, he wrote to the Pope with great submission, yet afterwards thinking it for his purpose to cajole the parliament, and write against the Pope and cardinals, he sends a Scots bird to blind the eyes of the Vatican keeper with money, and to steal his letters from off the Roman file, and then he crows as boldly as an unsuspected harlot for the Protestant religion and interest.

"That man's son, Charles the First, held a secret correspondency with the Pope, calling him his dear and holy father, as is to be seen in his letters recorded in Rushworth's Collections: Were not his wife and courtiers Papists? Did he not countenance and promote the rebellion in Ireland? As the Irish grandees and his se commissions testify and declare, was there a Popish Plot, and an universal consp the Papists discovered to him and his Laud, and did they not piously stifle it, lest they should have discovered the nakedness of their mother church? whilst that goodly Protestant prince pretended to relieve the poor besieged Protestants at Rochel by his confident Buckingham, did he not hold correspondency with the French cardinal how to betray them for a sum of money? (which his obstinacy with his parliament made him stand in need of.) But they who so ill approved themselves to be heads of the Protestant church, Charles and Laud, did they not lose their own heads by a manifest judgment of God? And was not the false heart of their emissary Buckingham, found out by an assassin's knife?

"But to come nearer to our purpose, these two goodly imps of our days are stark naught, arrived at the height of wickedness, and of professed arbitrariness and Popery

"As for James he was a Papist whilst he had a regiment in the French, and afterwards in the Spanish service beyond seas And as for Charles, he was reported, ere he came into England, to have been reconciled to the church of Rome in one of the French king's country-houses, and since they came in, how have they wheedled and played fast and loose in their profession of religion, as occasion and their affairs required? Have they not all along maintained secret correspondency with France and Rome? As Coleman's letters may sufficiently instruct such who have not seen more secret memoirs.

"But let us come to examine their actions, which are a better proof of their hearts: Were

not the duke's servants and confidents all papists? Witness his Talbots, Patricks, and other Irish teagues. Were not the duke and such of his creatures as were known papists, promoted to all public offices of trust, both at sea and land? Witness Bellasis, now a traitor in the Tower. Did not James, by Coleman, Throgmorton, and others hold open correspondency with the pope and cardinals? And could Charles be ignorant of all this? Nay, he liked all so well, that he hardly employed any about him but papists, as Clifford, whom he made treasurer; or employed any abroad but persons of the same stamp. Witness Godolphin, whom he sent ambassador into Spain, as he did others elsewhere; what more obvious than that, though the duke's treachery against the kingdom and protestant religion be fully made out, and the people and parliament seek to bring him to a legal trial, yet Charles obstructs justice, and will not suffer it? How can this be, but that he is joined in will and in deed in all the duke's villainies; and that he is afraid to be discovered and found out to be a papist, and a betrayer of his people and the protestant religion? If he was heartily concerned for our religion, would he not oppose a popish successor, who would infallibly overthrow it; Can there be any thing more evident, than that he continues the duke's adherents, and those who [a]dvanced by him in all offices of trust? [H]ath he not turned out of his counsel the [mos]t zealous protestants, such as Shaftesbury, Essex, and others, and introduced in their rooms other mere tools, or those that are popishly and arbitrarily affected? Hath he not modelled all the sheriffs and justices throughout England, in subserviency to a popish design? Was not sir William Waller, and Dr. Chamberlain, and divers others turned out of the commission in and about London, merely for being zealous prosecutors of priests and papists? Doth not Charles all he can to hinder the further detection of the popish plot? And doth he not to his utmost discountenance the discoverers of it, and suffer them to want bread? And doth he not in the mean time plentifully encourage and reward Fitzgerald and all the sham plotters? Whereas Dangerfield had 8*l.* a week whilst a forger of plots against the protestants, he is cast off with scorn, and in danger of his life, since he laid open the popish engineers. Is not Charles so much in love with his popish Irish rebels, (therein treading in his father's steps) that he promotes Mongarret, Carlingford, Fitz-Patrick, and others, who were the heads of the rebellion, to honours and preferment; though Charles took the covenant and coronation oath to preserve the protestant religion, yet hath he not palpably broken them? He made large promises and protestations at Breda for the allowing a perpetual liberty of conscience to non-conforming protestants, but he soon forgot them all: To what end was the act, which was made soon after his restoration, prohibiting any to call him papist, or to say he was popishly inclined, and render such as should offend, guilty of a premunire; but to stop the people's mouths whenever he should act any thing in favour of popery, as he was then resolved to do?

"Is it not manifest therefore that Scotch oaths, Breda promises, protestant profession, liberty of conscience, war with France, saving of Flanders, is all in jest to delude protestant subjects? Is it not apparent that breaking of leagues, Dutch war, Smyrna fleet, French measures to favour their conquests, loss of ships, war in Christendom, blood of Protestants, reprieving of Popish traitors, is all in earnest, and done in favour of popery? And are not his fair speeches, his true protestant love to parliaments, just rights, and English liberties, his pretended ignorance of the plot, and his hanging of traitors to serve a turn but in mere jest? Are not his great debaucheries, his whoring courtiers, popish councils, cheating rogues, hellish plottings, his saving of traitors, his French pensioners, his nests of whores, and swarms of bastards, his Macks, his cut-throats, his horrid murderers, his burning of London and the provost's house too, his sham plotting, his suborned villains, his popish officers by sea and land, his strugglings for a popish successor, his agreements with France, his frequent dissolutions of parliaments, his buying of voices, his false returns, all of them designs to ruin us in good earnest, and in favour of arbitrary government? And is it not in order to this blessed end that you see none countenanced by Charles and James, but church papists, betraying bishops, tantivy abhorrers, barking touzers, popish scribblers to deceive the people, and fix the popish successor's illegal title? Are not Jesuits counsels, French assistance to conquer Ireland, subdue Scotland, win Flanders, beat the Dutch, get their shipping, be masters of the seas? And are not facing a rebellion, letting the plot go on, the endeavouring to retrieve the popish cause by getting a popish pensionary, abhorring parliaments, who shall betray their country, enslave posterity, and destroy themselves at last, means only to save a popish traitorous successor, and a present popish possessor? James and Charles are brethren in iniquity, corrupt both in root and branch, and who study to enslave England to a French and Romish yoke, is not all this plain? Have you not eyes, sense, or feeling? Where is the old English noble spirit? Are you become French asses, to suffer any load to be laid upon you? And therefore if you can get no remedy from this next parliament, (as certainly you will not) and if Charles doth not repent and comply with it, then up all as one man. O brave Englishmen, look to your own defence ere it be too late; rouze up your spirits, remember your predecessors, remember how that the asserting of their liberties, justified both by success and law, the war of the barons against wicked counsellors who misled the king. And will you now let that go which cost them so dear? How many oppressing kings have been deposed in this nation, as

appears in records referred unto in that worthy patriot's history of the succession; were not Richard 2, and Henry 6, both laid aside, not to mention others, and was there ever such a king as this of ours? Was not king John deposed for going about to embrace the Mahometan religion, and for entering into a league with the king of Morocco to that purpose? Though Mahometanism and the king of Morocco were no such enemies to our rights and liberties, as popery and the French are. Is it not time then that all should be ready? Let the city of London stand by the parliament, for the maintaining of their liberties and religion in an extreme way, if parliamentary ways be not consented unto by the king, let the counties be ready to enter into an association, as the county of York did in Henry the 6th's time."

L. C. J. Gentlemen, now you have heard it read, and you may observe there is nothing in this paper can extenuate or mitigate the clauses, but abundance to make them more horrid and exceedingly aggravated.

Att. Gen. Then call Mr. Saville, who was the person Mr. Everard did meet with, and acquaint with this business (but he did not appear.) Then call sir Philip Lloyd and Mr. Bridgeman. My lord, the next piece of evidence we shall give, is this; sir William Waller and Mr. Everard do both say, that he gave part of his instructions under his own hand; we shall produce the paper, and prove he acknowledged it to be his own hand.

[Then the Paper was produced.]

Att. Gen. Who writ that, Sir?

Everard. Mr. Fitzharris.

Att. Gen. Are those the instructions he gave you to frame this libel?

Everard. These are part of the instructions, my lord; the other part I took in my table-book before Mr. Smith.

Att. Gen. We will prove it by other witnesses, sir Philip Lloyd, and Mr. Bridgeman.

Mr. *Bridgeman* sworn.

Att. Gen. Did the prisoner acknowledge that to be all his own hand-writing?

Bridgeman. Yes, my lord, Mr. Fitzharris did acknowledge it to be all writ with his own hand.

Sir *Philip Lloyd* sworn.

Sir *F. Withins.* Look upon that paper, Sir, (which he did.) Did Mr. Fitzharris acknowledge it was his hand writing?

Sir *P. Lloyd.* Yes he did; and that I might bear testimony of it the better, I writ with my own hand on the back of it, that he did so.

Att. Gen. Read it.

Cl. of Cr. reads, "After this sham meeting of the parliament at Oxon, which nobody expects any good of, it will be necessary &c."

Sol. Gen. These words are likewise in the Indictment.

L. C. J. When was that given to you, Mr. Everard? for—Mr. Fitzharris it seems owned it before the lords in the council, but Mr. Everard swears of the delivery of it; what time was it?

Everard. It was either Monday or Tuesday.

L. C. J. In February, was it not?

Everard. Yes, and I asked captain Fitzharris, according to sir William Waller's queries, whether he had given instructions according to what he would have contained in the thing? Yes, said he; but have you not enough under my own hand to do it by?

Serj. *Maynard.* My lord, we have done our evidence, we will leave it now to hear what the prisoner will say for his defence.

L. C. J. Mr. Fitzharris, if you have any thing to say for your defence, this is your time to do it.

Fitzh. Yes, my lord, Dr. Oates, I may be called.

Att. Gen. If you have any witnesses, name them.

Mrs. *Fitzh.* Yes, yes, Dr. Oates? and ask him what he heard Mr. Everard say.

L. C. J. What say you to Dr. Oates? Here he is.

Fitzh. Pray, Doctor, what have you heard Mr. Everard say about this libel since I was taken?

Dr. *Oates.* My lord, after this business was talked of abroad, having heard that sir William Waller and Everard had made the discovery, I did discourse Mr. Everard about the business, and about the libel. He told me he wrote the libel, and when I would not believe it, the man was a little angry that I would not believe it: And then I told him he was a man very unfortunate in speaking; for he spoke but badly. He said, though he was unfortunate in his tongue, yet he was as fortunate in his [illegible] that he took a great deal out of the int[illegible] letter to Roger L'Estrange: and I then [illegible] him what the design of it was, he told me, it [illegible] to be printed, and to be sent about by the pe[illegible] post to the protesting lords, and the [illegible] in the House of Commons, and they were to be taken up as soon as they had it, and to be searched, and to have it found about them. I then asked him if there were any other persons concerned in it, besides those publicly talked of; he told me the court had a hand in it, and the king had given Fitzharris money already, and would give him more if it had success. This he told me at Oxford, and before he went thither, and after.

Fitzh. Mr. Sheriff Cornish, I do beg you say what his majesty told you, when you came to him from me, when I was in Newgate.

Sheriff. I do not know what you call me for, Mr. Fitzharris.

Fitzh. I desire you to acquaint the court what the king said to you when you came to him from Newgate from me.

Sheriff. My lord, I shall desire your lordship's opinion in this matter, whether it be seemly or decent for a subject to declare what

discourse his prince is pleased to have with him?

L. C. J. Look you, Sir, if you give any evidence, give it. We are not to direct any witness whether they shall give their evidence, or not.

Att. Gen. Mr. Sheriff, you ought to do it openly, if you give any; therefore pray let us hear you.

Sheriff. My lord, I cannot remember what was said relating to this particular matter, There was a great deal his majesty was pleased to discourse with me concerning things of several kinds and natures; my memory may fail me; but if Mr. Fitzharris please to ask as to any particular matter.

Fitzh. What the king said when you came from Newgate to him, to acquaint him that I would make a discovery: did he say I was employed by him, and received any money, and what for?

Sheriff. My lord, I do remember something of that kind. When I was giving his majesty an account that I found the prisoner at the bar in a disposition to make a discovery, his majesty was pleased to tell me, he had often had him before him and his secretaries upon examination, and could make nothing at all of what he did say or discover to them; and his majesty was pleased likewise to say, that he had for near three months before acquainted him, that he was in pursuit of a plot, a matter that related much to his majesty's person and government: and the king did say, in as much as he made great protestations of his zeal for his service, he did countenance and give him some money. I know nothing more.

Att. Gen. Did the king ever declare that he saw Fitzharris in his life, or that he ever was in his presence?—*Sheriff.* Yes.

Att. Gen. Ay, but before his appearing at the council-table, did the king ever say he saw him, or before he was arrested for this fact?

Sheriff. Yes, his majesty was pleased to say about three months before, he came to him, and he pretended he would discover a great plot to him.

L. C. J. Have you any other questions to ask Mr. Sheriff?

Fitzh. No. Where is colonel Mansel?

Oates. My lord, I desire that if the prisoner have any more questions to ask me, he may do it; because the croud is great; and I would go out.

Fitzh. Sir, I have many more questions to ask you, I desire you would please to stay.

L. C. J. You must stay if he have any more questions to ask you. Here is Col. Mansel, what say you to him?

Fitzh. Colonel, what did you hear sir William Waller say, after this discovery was made?

Col. *Mansel.* That which I heard sir W. Waller say, was this: I had occasion to speak with sir James Hayes, and enquiring for him I found he was at the Dog-Tavern; so I went up, and found in the company sir W. Waller, and another gentleman, one Mr. Hunt, and some more. After the rest of the company were gone, and only sir James Hayes, Mr. Hunt, myself, and sir W. Waller left, sir William was giving an account of this business, and said the king, when I had acquainted him with it, told me I had done him the greatest piece of service that ever I had done him in my life, and gave me a great many thanks: but I was no sooner gone from thence, but two worthy gentlemen gave me an account, that the king said, I had broken all his measures, and he would have me taken off one way or another.

Fitzh. Did he say any thing, that it was a design to put the libel upon the Protestant Lords and the House of Commons?

Col *Mansel.* There was that said

L. C. J. What was said? Don't come with your imperfect discourses here; but if you give evidence, tell what was said.

Col *Mansel* Sir W. Waller said, that the design was against the Protestant Lords, and the Protestant party.

Serj. *Maynard* I do not doubt that it was against the protestant party

Att. Gen. Recollect yourself: was it against the Protestant Lords, or the Protestant party.

Col. *Mansel* He said, the Protestant party.

Att Gen. So say we.

Fitzh. Did he not say it was another sham plot, Sir, against the fanaticks, and the House of Commons? Where is Mr. Hunt?

[Mr *Hunt* appeared.]

Hunt. What would you have with me, Mr Fitzharris? I never had any conversation with you in my life.

Fitzh No, Sir; but what have you heard sir William Waller say concerning my business?

Hunt. My lord, I would rather I had lost my hearing for that time, than have heard it to repeat it. Sir W. Waller did tell me, at the Dog-tavern, where was sir James Hayes, and colonel Mansel by, after he had read over the libel to us, there was a great deal of company more; but he only gave us the curiosity to see what the libel was. And when he had read it, he did tell us, that the king gave him particular thanks for that good service he had done him in detecting Fitzharris, but he said he was told by two gentlemen that had heard the king speak it, who were of undoubted credit, that the king was in an extreme passion, bestowed many hard names on him, and said, he would give any thing in the world to take him out of the world; that he was an insufferable vexation to him, and that he had broken all his measures. And he said the same things again, in the presence of sir Philip Harcourt, and my lord Radnor's son Mr. Roberts, at capt. Hull's chamber, in Pembroke-college in Oxon.

Att. Gen. What did he say about the prisoner.

Hunt. This was about the libel of Fitzharris that the king gave him particular thanks about that business: And afterwards the king did express great passion, in some short time after

he was gone And he did say he was informed by two witnesses, that heard the king say it, he knew not what to do with him, he broke all his measures.

Fitzh. Did he not say, this was a design against the protestants?

Hunt. He did say it was a design to contrive these papers into the hands of people, to make them evidences of rebellion; and that was his apprehension of the thing And he said further (for I am a witness here, and must speak all my knowledge) that he had another Plot which he had traced near to a full discovery, a most horrid Plot than this or Dangerfield's, for he said, this was the counterpart of Dangerfield's Plot I hope he will not deny it if he be asked, here he is, and upon his oath, I am not and I desire not to take credit unsworn, but am willing to give my testimony on oath

Fitzh. Where is Dr. Cary?

Mr. Sh. Corn. Dr. Cary is not well, my lord, and can't come.

Fitzh. Then Mr. Sheriff Bethell

Oates. My lord, I pray I may be discharged

L. C. J. Doctor, we have nothing to say to you but the prisoner hath more questions to ask you It is not we that detain you, but you stay upon the prisoner's account

Fitzh. Mr. Sheriff Bethell, I desire to know what you can say concerning Mr. Everard

Mr. Sh. Bethell. My lord, I know nothing of Mr. Everard, [illegible] business, save that he told me, he [illegible] And I confess, my lord, truth [illegible] that I conceive he knew my face [illegible] word in his days he put [illegible] treason against me [illegible] of one that's known to be my mortal enemy. And it was so groundless, that though it was three years [illegible] I never heard a word [illegible] Friday last [illegible] witnesses of this, [illegible] that sent the notice of it to me.

Fitzh. Pray call Mrs. Wall (who came down from [illegible])

Fitzh. Mrs. Wall, pray will you tell the court, have not I conveyed some libels and treasonable papers to the king by your means, and received money upon that account?

Mrs. Wall. Not as I know of

Fitzh. Did not you receive some of them from me to give to the king?

Mrs. Wall. No indeed not I

Fitzh. Is the footman here that was by, when you paid me the money

Mrs. Wall. Yes, and the porter too, though you have not subpoena'd them.

Fitzh. How along ago is that?

Mrs. Wall. Two years ago

Fitzh. Was it not about Christmas last was twelve month I gave you the libel about the king and your lady; and the king thanked me extremely, and I had 250*l.* given me? Come Mrs. Wall, don't think to trick me out of my life in the case, for I will not be tricked so Pray tell the court Can you deny that I had the 250*l.* speak, Mrs. Wall had I 250*l.*?

Mrs. Wall. That was not the question you asked me at first.

Fitzh. But speak, had I it?

Mrs. Wall. There was 250*l.* I think it was 200 or 150, 250*l.*

Fitzh. What use was it for? and upon what account?

Mrs. Wall. You do know it was not any libel.

Fitzh. If you have any mind, tell it.

Mrs. Wall. There it is (Delivering in a paper to be read.)

Cl. of Cr. The humble petition of Edward Fitzharris

Mrs. Wall. I really took him for as honest a man as ever I knew in my life; and had it been in my power to have done him a kindness, I should not have failed to have done it.

Att. Gen. Was he your countryman, madam?

Mrs. Wall. Yes, he is, and my relation too. I knew him to be the son of a very loyal family; and while his mother was in town, he came often to our house; and when she went away, he left visiting the house a great while And you, Mr. Fitzharris, did once tell me, you could bring in people to the king's interest, that were very considerable. So I spoke to the secretary of state about you, that there was one that had been with me, and told me, that he could bring in those to the king and duke's interest that were very considerable The secretary of state desired of me to know who they were; and then he named to me one Thomas Mercey, and another person, who I desire to be excused from naming. The other party he did name was thought considerable, both for quality and understanding; and the secretary desired me to get him in, if I could

Att. Gen. Pray, madam, who was it?

Mrs. Wall. I desire Mr. Fitzharris may tell you

Fitzh. No, Mrs. Wall, pray do you tell it, since you have spoke of it.

Mrs. Wall. I say nothing but what I will take my oath of

Fitzh. Then you will never swear that which is true. Pray, Mrs. Wall, speak, who was it?

Mrs. Wall. I desire I may not name him; but he may

Att. Gen. He will not

Mrs. Wall. Truly I do not think it convenient for me to name such persons as those are, upon such accounts

Fitzh. Pray, Mrs. Wall, name the person that I would have brought into the king's service.

Mrs. Wall. If the Court commands me, I will, otherwise I will not.

Fitzh. Did you ever, upon any such account as this, receive any money for me? Speak the truth

Mrs. Wall. God forbid your blood should lie at my door, I assure you, I should be sorry for it He told me, these persons were considerable for the king's interest, and could do him extraordinary good service So, as I said, I

spoke to the secretary of state; and he would know who they were. And when he was told who they were, as for one of them, Thomas Merrey, he was not thought worth the looking after, for he was thought an inconsiderable rascal; but as for the other gentleman, he was thought a man of worth, and a person, that, if he would, could really serve the king Upon this, when you first came, I was never at rest for you; and therefore, after a while, before you came again, I gave the porter order to tell you, I was not at home; and I desire the porter may be asked the question But when I next saw the secretary, I desired that he would give them a positive answer, one way or the other; and the next time I saw you, this was your business, and I told the secretary of state of it. You gave me this paper, and desired me to solicit for your quit-rent in Ireland, for you were in great misery, and had been a great sufferer So I spoke to the dutchess of Portsmouth, and she spoke to the secretary of state; that if this man be so considerable a sufferer, it is convenient to give him something for his encouragement and if you will give him something, said I, give it him quickly. I was four, if not six months, a getting this money

Fitzh But will you say it was upon that account? When was that money paid?

Mrs Wall I never thought I should be brought in for a witness; or that you would have abused me thus for my kindness.

Fitzh. When were those papers given you that you produced?

Mrs. Wall I wish I may never see the face of God, if I know any more than what I gave evidence; there are the papers, they will tell you the time

Fitzh. Did I give them you?

Mrs Wall You or your wife did, and I suppose your wife's condition was yours

Fitzh. Was not the money received before those papers ever were given you?

Mrs Wall Nay, Mr Fitzharris, I will tell you more; send to Mr Henry Guy, and let him tell you when he paid it you

Fitzh Call the porter, and the footman if he be here.

L C J If you would ask any more questions of Mrs Wall, do

Fitzh Did not I come to you the Wednesday before I was taken, and told you, I desired to speak with the king, and that I had a libel to present to him?

Mrs. Wall. No, so far from that, that it was the Thursday before you were taken, you came about nine o'clock at night to our lodgings, and sent up to my chamber; and I sent word that Mr. Cowling was there, for I did not care to see you: but you sent word up, you had something of consequence to tell me So I came down, and you desired me to bring you to the speech of the king, which was a thing you did never desire before: and you said thus, if you did but see the king, you believed you could say something to him that might do him service.

Fitzh. Did not I say, here is the libel that I come to deliver to the king now?

Mrs Wall No, as I have a soul to be saved

Fitzh. Mrs Wall, I did, and this was what you said at the same time: that since my lord Sunderland was gone, you could have no secret service I did desire to speak with the king privately, those were the words; and you told me, you could not so easily do business with the king, since my lord Sunderland's time.

L C J We must not let you hold a dialogue between yourselves, you must speak that the Court may hear

Att Gen Was not he a Roman Catholic?

Mrs Wall Yes, we looked upon him so, and upon that account we said it was dangerous for him to go near the king

Att Gen Did not you know that ever he was admitted to the king?

Mrs Wall Never, but he hath been talking with me in a room as the king passed by

Att Gen Did the king ever take any notice of him, speak to him?

Mrs. Wall The king never took notice of him, nor spoke with him by my means, nor gave him money, other than what I speak of, nor the duchess of Portsmouth

L C J Look you, Mrs Wall, I think you do say, that there was some money paid to Mr Fitzharris; pray speak plain, upon what account was it paid?

Mrs Wall My lord, it was for the bringing in of my lord Howard of Escrick, who is there; since you press me to it, I must tell, I think my lord will not deny it

Lord Howard I will never deny the truth

Fitzh. Where was my lord Howard of Escrick?

Mrs Wall He was not so much for the king's interest, or that which they call the king's interest

Fitzh How long is this since?

Mrs Wall Two years ago since he came first to me, but whether it be a year and a half since my lord met with the king, I cannot tell

Fitzh When my lord was admitted in to the king, I did wait on him to that purpose, to bring in my lord Howard

Mrs Wall I desire that my lord Howard may be asked, whether he do not remember, when the king was coming, Mr Fitzharris was put out of the room first

Fitzh. You say, I never shewed any libel to the king

Mrs Wall I tell you what I said since to this gentleman that is here; I wish you had shewn the libel unto me, that I might have been in a capacity of saving your life

Fitzh You said, that I had the 250*l* for bringing in my lord Howard

Mrs Wall I say, it was upon promise to bring in persons that would be useful and serviceable to the king

L C J She is your own witness, and she tells you, two persons you did undertake to bring in, and for that you had this money

Mrs. *Wall.* It was his poverty and this together.

Serj. *Jefferies.* Mrs. Wall, I conceive he never discovered this libel unto you; but pray, did he ever discourse with you about Everard? And what character did he give him?

Mrs. *Wall.* Once he did, and he said he was an honest man, and asked me if I would be acquainted with him? I told him no, for he had a knavish reputation; he was an informer, and I cared for no informers.

Fitzh. Mrs. Wall, to let the world see how you shuffle about me, when did the king see my lord Howard first, when I brought him?

Mrs. *Wall.* I don't know, ask my lord Howard.

Fitzh. Did not I speak to the king in the outer room? and did not you get me to make a stand there?

Mrs. *Wall.* Mr. Fitzharris, don't make me tell that thing.

Fitzh. Pray speak the truth, Mrs. Wall.

Mrs. *Wall.* I defy you and all mankind, to say I do otherwise. You did desire me to tell the duke, that you would first bring my lord to him, and then to the king; and I spoke to the duke, and he said you were a rascal, and he would not meddle with you. This you know.

Fitzh. Did not my lady Portsmouth tell me, the duke was angry, &c.

Mrs. *Wall.* Mr. Fitzharris, when you came to me upon such an errand, was it reasonable that I should bring you upon every trifle to the speech of the king, and I should not bring you then? it is without reason.

L. C. J. You must not ask questions, but answer. And Mr. Fitzharris, do you design to detect Mrs. Wall of falshood? She is your own witness, you consider not you can get nothing by that.

Fitzh. My lord, when you see the papers produced, you will find it is upon another account.

Mrs. *Wall.* I thank you kindly, Mr. Fitzharris! (shewing him a paper.)

Fitzh. But was not this upon the account of a pension granted in Ireland? Pray let the gentlemen of the jury see; this is of another different nature; I appeal to my lord Howard of Escrick, whether he did not speak to my lady about it.

Lord *Howard.* I did so.

Mrs. *Wall.* My lord did second my lady, to get you some charity.

Fitzh. So that the money received here was plainly upon another account.

L. C. J. Look you, if you will have any papers read, they shall be read. But the gentlemen of the jury must not see any papers but what are read.

Then the Petition of Mrs. Fitzharris, and the king's letter to the duke of Ormond, was read, about a pension in Ireland.

Fitzh. My lord, if you please, I have something further to say to Mrs. Wall. But I desire to ask Mr. Cowling a question, and that is, sir, what Mrs. Wall said to you about my business?

Mr. *Cowling.* My lord, I think, the day after this man was examined in the council, I came to Mrs. Wall, and she told me, that the second or third night before he was taken, he came to her to bring him to the king, but she sent down stairs, that she would not let him come up. But asked him, why he did not go to one of the secretaries of state? No, said he, I can't go thither, without being taken notice of; but I'll tell you my business. No, said she, if you will write down your business, and give it me in a paper, I will carry it to the king; and if the king have a mind to speak with you, you shall be sent for. No, said he, I will not do that. Then, said she, I must beg your pardon, if I don't bring you to the king. And Mrs. Wall said further to me, truly her blood did chill when she said so, for she was afraid he was come to do the king a mischief.

Att. Gen. This was three or four nights before he was taken.

Fitzh. Is sir Robert Thomas here? (He did not appear.) Then I desire my lord Howard to stand up.

Lord *Howard.* Have you any thing to say to me, Mr. Fitzharris?

Fitzh. Yes, my lord, if you please. My lord, I desire your lordship will please to tell, what my lady Portsmouth did express to you concerning me, at your coming thither; and whether I did not introduce your lordship; and how civil she was to me upon that account, and how she made work to get the quit rent for me.

Lord *Howard.* Sir, I shall answer as particularly as I can all your questions, but it will be necessary to introduce my evidence with the relation of the whole transaction. You know, about October last, about the beginning of the month, for it was, as I take it, ten days, or a fortnight before the sitting down of the parliament, you did make applications to me, in the name of the king, whether with or without his privity I cannot say, but you did make several invitations to me, of putting myself into the possession of an honour I was altogether unworthy of, of waiting upon the king. I gave you my reasons why I thought myself unfit for that honour, because I was not in any capacity of doing the king any service; and I looked upon the king as a person too sacred, and whose time was too precious to be trifled away upon one that had nothing to offer to him, and therefore I refused it. But notwithstanding, this was reinforced by you; and when I still persisted in the denial of that which was an honour I ought rather to have sought, but only because I thought myself uncapable of deserving it, after several applications, I did at last tell you, besides the impertinency of it, I did also apprehend it might be the occasion of some indecency: for perhaps I might thereby put myself upon declaring myself in some of my sentiments, very much differing from those of his majesty. And for me to seek an opportunity to express my contrariety to his ma-

esty's thoughts, will be both rudeness and imprudence; and therefore I did then ultimately answer you, I would by no means be prevailed with. Then you did lower it, and said, it should suffice, if I would wait upon the duchess of Portsmouth. Truly, I told you, as to that too, you did me a great honour, and greater than I could expect, for I had nothing (I was afraid) worthy her trouble; and therefore I desired to know what it might mean. In short, you did resolve it into this, That you did find the king under great apprehension, that there was something deep in the hearts of some, that stood at a distance from his majesty, and opposite to his interest; and that the parliament stood at an irreconcilable difference with the king. Truly, said I, I am a person not fit to speak in the name of a parliament, for in a little time they will speak for themselves; but if I were to speak, or should presume to speak in the name of the parliament or the whole nation, I should say, I believed the king would find his parliament meeting him with as great affection, duty, and loyalty, as any parliament ever met any king of England. You said, then you were confident, and you cited her grace the duchess of Portsmouth for it, that the king came to meet them with inclinations to gratify them in any thing they could desire. Then said I, to what end need I come there, for the parliament will speak its own sense speedily? Pray do me that kindness, as to go and satisfy the duchess of Portsmouth, and to let her know she may now have an opportunity of declaring how willing she is to be a good instrument between the king and his people. Said you, I can assure you, that she is altogether for the same interest that you look towards; for you are very much mistaken if you think she is a friend to the duke of York. My lord, in short, after much importunity, I did give myself that honour, which I have no cause to repent or be ashamed of, to go to Whitehall, humbly to kiss my lady duchess's hand, and receive her commands. But when I came there, I was surprised with a greater honour of finding the king there, and I think it was an opportunity wherein my time was not ill spent as to myself; but I am afraid this 250*l*. if it were given for the bringing me thither, his majesty doth not think he hath deserved it at this time.

Fitzh. Your lordship came there in October last.

Ld. *Howard.* Because I will do you all the right I can, it was, as I take it, the beginning of October, and about the 10th, because the parliament sat down the 23d, and as I remember, it was a fortnight before. This was the first time that I owe you thanks for the honour of seeing the king. After that, a matter of ten days, I had a second opportunity and by your means also. This was the last time I had the honour to see the king, but in public. After this, I must confess, when the parliament was ended, I did then willingly enough, invite myself to the honour of waiting upon the duchess, and give her thanks and tell her I was sensible she had endeavoured, as much as in her lay, to persuade the king into a good opinion of the parliament, and to give them time of sitting, and thereby to give them opportunity of explaining their intentions for his service and advantage. This was also the last time I had the honour of seeing her. At last, parting from her, I did make it my humble request to her, that she would be pleased to represent your condition to the king, since by your means I had the honour to be shewed the way to her grace's lodgings.

Fitzh. My Lord, did not I come to you with a message the night before my lord Stafford was condemned?

Ld. *Howard.* You say right, and it was in my thoughts, and yet I thought it too tender a thing to speak of; and therefore I thought it so, because, I must confess, at that time, (you must excuse me) I did believe you did not come with that authority you pretended to make use of. After the time that unfortunate lord had had his trial, and the House were preparing their thoughts for the sentence, I was indisposed, and came not to the House that day, which provoked the House so much, that they were near committing me to the Tower; but truly, I was so ill in body, and had so little a mind to have my vote mixed with his blood, that perhaps I should have run the hazard of going to the Tower about it, if that had been all. But the night before you came to me and told me as a great secret, That you did bring it as the desire of the king, and as that which he would take as a great instance of my resignation to his will and pleasure, and that for which I might promise myself all the greatest kindness [illegible] to shew to his subjects, if I would [illegible] next day and give my vote for my lord Stafford. Sir, said I, I have all the [illegible] and blood to dispose [illegible] to favour my lord Stafford [illegible] with the integrity [illegible] though I was [illegible] the day before, [illegible] I will go, though I be [illegible] back to the House; now I see there [illegible] great an account put upon it, for I see [illegible] the concerns, not only of my lord Stafford, but the protestant cause; and then, said I, if all the relations I have were melted down into my lord Stafford, if I had but breath enough to pronounce his doom, he shall die.

Att. Gen. My lord says, he did not think you came from the king, when you came with that message.

Ld. *Howard.* Sir, can I do any more service? I shall be willing to do it if I can. I cannot say, but I had by your means, the honour of waiting upon the king and the duchess; but I had so little reason to value my own worth, that I cannot imagine how it should turn to the king's service.

Oates. My lord, I desire to have liberty of going away, the crowd is so great I cannot stand, and the prisoner hath nothing to say to me.

Att. Gen. My Lord, that may be part of the popish plot, to keep Dr. Oates here, to kill him in the crowd.

Fitzh. Have you not something more to say Doctor? Truly I forget, my memory is so distracted.

Oates. I know not if you have any questions to ask me, I will speak truth. (But he had none, so the Doctor went away.)

Mrs. *Fitzh.* Call Mr. Fanshaw, (who did not appear.)

Fitzh. My lady duchess of Portsmouth.

Mrs. *Wall.* She is not come, because the court is very full: but if the court will send for her, she will come presently.

Fitzh. My lord, I beg that my lady duchess of Portsmouth may be sent for.

Mrs. *Wall.* She ... commission to say, if the court would have her to come, she would so do.

L. C. J. We ... not send for her, if she please to come, so, we have no occasion to send for her.

Mrs. *Wall.* I presume he can ask her no questions but what I can answer.

L. C. J. We will not prejudice the prisoner in his questions, nor send for any witness she will come.

Fitzh. Will you send ... of ... Mrs. Wall ... I am a prisoner ... body ... In the ... the ...

Mrs. *Wall.* Here ...

Fitzh. How ... paid the money to me from my ...

Porter. I cannot tell ...

Fitzh. ...

L. C. J. ...

Fitzh. ... 12 months.

Porter. I cannot ... it was.

Fitzh. You do not ...

Justice *Dolben.* You ... your own witness.

Serjeant *Jeffreys.* He hath no ... to say any thing for him, and ... find fault with what they say.

L. C. J. Have you any other witness, Mr. Fitzharris?

Fitzh. Yes, my lord, my lord of Arran.

L. C. J. What say you to my lord ...

Fitzh. Did not my ... shew you this libel the Sunday that I was taken?

E. of *Arran.* I do not remember I ever heard it, till I heard it read in the ...

Fitzh. Did you not ... my lord?

E. of *Arran.* No, not that I remember.

Fitzh. Did not I tell you, I was carrying it to the king?

E. of *Arran.* Not that I know of.

Fitzh. Was it not a dispute, whether this was treason or not?

E. of *Arran.* You did shew me a libel, but whether this, or no, I cannot say; perhaps it was this. I took him for an honest man, my lord; I have known him five years and knew his family to be a good family; I happened to be at dinner with him the day he was taken. After dinner there were some papers he pulled out and I threw them away, I told you, you would do yourself mischief, some time or other, in meddling with such papers. There we drank a bottle or two of wine together, and then we parted. As soon as I came home, I heard this gentleman was seized on, and taken, which surprised me much. And this is all the account I can give of the matter.

Fitzh. Then your lordship did not read the paper?

E. of *Arran.* No, indeed, not I.

Fitzh. Did not I tell you, I had a promise of a quit rent for secret service?

E. of *Arran.* I do not know particularly what he told me of the quit rent; but I was willing to do him all the good I could, about a reversion of a pension that he had in the right of his wife, that was part of my business that day, thinking he very well deserved it. I am very sorry to see that his father's son, as the ... is in Ireland, should be ... of such a crime.

Att. Gen. My lord ... you ... did ... French king, or ...

E. of *Arran.* ... I heard ...

Fitzh. What ... did you take ...

E. of *Arran.* ... disputes ...

... I do not know ...

Serj. Jeffreys. ... did con... the libel ...

Fitzh. You ... did not the king ... Mrs. Wall's ...

Serj. Jeffreys. ... the king did ... Mrs. Wall's means, or ...

Fitzh. My lord Conway, do not you remember ...

E. of *Conway.* No, not upon my honour ... only em... doing things.

... the king declare in council, that ... of him?

E. of *Conway.* That was for my lord Howard or ... business.

Serj. Jeffreys. Now your lordship is here, I would ask you, Did you ever hear the king declare when he first spoke with the king?

E. of *Conway.* The king never spoke with him till after he was taken, he was taken the 2... th of February, and the king never spoke with him till the ...th, the day ...

Fitzh. Did not you tell me, ... the king did

put himself upon the parliament, they would use him as his father was used?

Mrs. *Wall.* I never told you any such thing. You promised me to bring in my lord Howard of Escrick; but they found themselves mightily mistaken in what was promised he would do when he came in.

L. C J. Why, Mr. Fitzharris, you cast any thing at any body, to make a noise.

Fitzh. Where is Mr. Peacock?

Mrs. *Fitzh.* I would know of her, what Mr. Bulstrode said.

L. C. J. That every body may see you are fairly dealt with, you shall have all the liberty that can be given. You must not ask what another said, but call them themselves to say what they know. Here is Mr. Bulstrode himself.

Fitzh. Mr. Bulstrode, then, what message did you bring from the king to my wife?

Mr. *Bulstrode.* No message at all; but I will tell you what I know. Mrs. Fitzharris soon after her husband came to be close confined, delivered a petition to the king in the park; and the king was pleased to give it to me, as he frequently does. Mrs. Fitzharris came to me, to tell her what the king said to it. Said I, the king hath given me no commands at all in it, but this, carry it to the secretary of state, for I cannot say any thing to it. For the king generally tells me what he will have done with such a petition. But she was so very importunate, I asked the king again: Sir, said I, Mrs. Fitzharris is very importunate, what is your majesty's pleasure in it? Said the king, if she have a mind to petition the council, she may, I will neither meddle nor make with it. Afterwards I met her several times, and she said, her husband was very severely and hardly used, and she was denied the liberty of coming to him. Said I, I hear he is guilty of a very foul thing, and there is no way to help him, but by discovering the author of that villainous libel. For she asked me, what I thought of her husband; and she told me, she intended to try what she could do for him. I said, there was no way to do any good, but to make a full discovery of the author. Then said she, if the king would but let me speak with him, I am sure I could do him service, and prevail with him to discover the author. So I told the king of it; and the king said, if she will come and be examined, with all my heart. And as soon as ever I heard she was come to town, I told her what the king said: and she told me, she would willingly come; and if the king would give her leave to speak with her husband, she did not doubt to prevail with him. That night, about midnight, after I was in bed, and had been in bed two hours, she came to my door and knocked me up. So I rose, and put on my night-gown, and went down, and I heard a voice which I thought was hers. So she came out of the coach to me, and told me, said she, I am come to you to beg of you, that you would be secret, and not to let the Court know that I was to come to have any conference with you; for if you do, I am undone and ruined; for there are some persons, my friends, that will not look upon me if they hear any such thing. The next morning I went to her, and told her, the king had directed she should be examined in the afternoon, and she should come down to be examined: which she did; and as soon as the council was up, I told his majesty she was below. So he ordered some to examine her; but when I told her of it, said she, if the king will not speak alone with me, I will not speak a word, nor be examined. This is the truth of it, I assure you, my lord, upon my salvation.

Fitzh. Where is Mr. Peacock?

Mrs. *Fitzh.* What did Mr. Bulstrode say to me?

L. C. J. Look you, Mrs. Fitzharris, and you gentlewoman, you must not be heard to talk of discourses among yourselves, and to examine what discourse passed between person and person, up and down; that is not to be permitted in a Court; the witness is here, ask him himself. What hath been said to her, will be no evidence.

Mrs. *Fitzh.* What offer did you make me?

Mr. *Bulstrode.* None; I told you this would be the way to ruin your husband.

Fitzh. My lord, I beg of you, may not I ask what he did say?

L. C. J. No, it is no evidence.

Fitzh. Then call Mr. Henry Killigrew. (But he not appearing, the prisoner would have asked what he had been heard to say, but it was not permitted.)

Mrs. *Wall.* Here is the footman Richard Perrot.

Fitzh. How long ago is it since you brought the money to me from my lady Portsmouth?

Perrot. I never brought any.

Fitzh. Was it not he brought the money?

Mrs. *Wall.* Ask him.

Fitzh. Was my lord Howard ever at your house before October last?

Perrot. I do not know.

L. C. J. What use do you make of that?

Fitzh. Pray, my lord, when did you go to my lady dutchess's? Was it before October last?

Lord *Howard.* I think not, I take it as near as I can, it was just before the session of parliament.

Fitzh. It was ten days before the session.

Then my lady duchess of Portsmouth appeared, and a chair was set for her.

Fitzh. I am sorry to see your grace come here upon any such account; but I hope your grace will excuse me, it is for my life. I desire to know of your grace, whether I was not employed to bring several papers to the king, and among the rest, the Impeachment against your grace: and thereupon your grace was pleased to tell me, That it was a great piece of service to bring those sort of papers; and if I could find out men serviceable for that purpose, I

should do the king good service. I told your grace, I knew one Mr. Everard, who knew all the intrigues, and all the clubs in the city, and could tell all the designs of my lord of Shaftesbury, and all that party. And your grace did encourage me to go on, and I did, by your grace's direction, and by your means I came to speak with the king about it.

Lady Duchess. When must I speak?

Sir *G. Jeffries.* Now, madam; and will your grace now be pleased to stand up?

Lady Duchess. I have nothing at all to say to Mr. Fitzharris, nor was concerned in any sort of business with him. All I have to say, is, he desired me to give a Petition to the king to get his estate in Ireland; and I did three or four times speak to the king about it. But I have not any thing else to say to him; I never spoke to him about any thing else.

Fitzh. Does not your grace remember what directions I received about my lord Howard?

Lady Duchess. I know nothing of that, I sent you not to my lord Howard.

L. C. J. If you will ask any questions of my lady, do; but do not make any long discourses.

Fitzh. My lord, my lady may forget. Madam, does not your grace remember you undertook, upon the account of those papers I conveyed, that you would procure me my quit-rent?

Lady Duchess. I never had any papers.

Fitzh. Not that paper of the Impeachment against your grace?

Lady Duchess. No.

Fitzh. Upon what account then had I the money I received?

Lady Duchess. For charity.

Fitzh. I am sorry your grace is so much under Mrs. Wall's influence.

Lady Duchess. I come not here to wrangle with you, Mr. Fitzharris, I am come here to say what I know, and will not say one bit more.

Fitzh. Have I had any money of your grace since you knew my lord Howard?

Lady Duchess. You never had but that for charity.

Fitzh. When did your grace ask it for me?

Lady Duchess. I do not remember the time. Mr. Fitzharris, if I had any thing in the world to do you good, I would do it; but I have it not, and so cannot see that I am any ways more useful here. (Then her grace went away.)

L. C. J. Mr. Fitzharris, have you any more witnesses that you would have called?

Fitzh. No, my lord.

Serj. *Maynard.* Will you apply them you have called?

L. C. J. Well, have you any thing further to say?

Fitzh. Yes, my lord, I have something further to offer for myself: I will tell you what I know, since my witnesses will not do me justice. Gentlemen of the jury, you are my judges in point of law as well as fact, and my blood will be required at your hands, if you do not do me right. My lord, I cannot forbear complaining to the court of the hard usage I received in prison, contrary to the statute of the 31st of his majesty's reign; greater oppression hath been done to me than to any before. My lord Stafford, sir Thomas Gascoign, and others, had all the liberty they could desire, to enable them to make their defence against their trial; which I have had denied me. But my defence consists of two heads, and I shall rely upon the consciences of the jury for the issue. Though my lady Portsmouth, and Mrs. Wall, and the rest, are pleased to say, that I was not employed nor received money for secret services; yet it is very well known I did so. As to Mr. Everard, when I met with him, though now he hath made a French story, yet if he would tell the truth, he knows that it was otherwise. He told me he was well acquainted with my lord of Shaftesbury and my lord Howard, and in several clubs of the city he knew all their intrigues; and that speech that went by the name of my lord Shaftesbury's, my lord gave it him before it was printed, and he had several other things of that kind. So then I told him it was a business of the greatest consequence that could be, if he would continue those discoveries. And whereas he says I would betray the people to the French interest, it is very well known I was always an enemy to the French interest; but I humoured him in his discourse, and discoursed him to reduce the paper that he accuses me of under some heads: and that paper I no sooner had, but I came to White-hall with it: and though he said, he was to have forty guineas, and so said sir William Waller too, yet it was only forty shillings that he desired, for his poverty, I would lend him. And as to what he talks of three thousand crowns pension, it is a very unlikely business. When I came to Whitehall, I was advised to go to my lord Clarendon, or Mr. Hyde. Accordingly I did shew it to a gentleman who was to give it to my lord Clarendon, but before he could get to him, I was taken. Now, my lord, I hope what I did was with a design to serve the king, in discovering what was designed against him, according as I was employed, though both the secretaries are so unkind as not to declare it: When I know I am in the right I am not ashamed to speak it, though my life be losed upon it; and I refer it to the gentlemen of the jury. I was taken before I could come to the speech of my lord Clarendon. Next, I hope, gentlemen of the jury, you will consider these are great persons that I have to do with; and where great state matters are at the bottom, it is hard to make them tell any thing but what is for their advantage: And so I am left in a sad condition. But, my lord, in the next place, I think it is impossible for any jury to find me guilty, without prejudging of those laws which are not to be judged by any jury or inferior court; for if they judge me and bring me in guilty, it is murder in them; and let the bench tell them

what they will, it is of that dangerous consequence, that it overthrows the government. My lord, here is the impeachment of the House of Commons, and here is a copy of the votes of the Commons thereupon; and though they be not laws, yet they are such declarations of the parliament, as that afterwards no other court ought to meddle with that matter; and the inferior courts do not use to meddle with parliament-matters; And so, gentlemen, you will lay at your own doors what would lie at theirs, if you meddle not. For though the court have over-ruled my plea, yet the matter is plain before you now who are my judges, and my blood will lie at your doors, and you must answer it if you do me not justice. And there is no insufficiency of a plea as to mattter of law will excuse you in point of fact; and you are obliged, as you will answer the contrary to God and your consciences, to do me right. And I hope your lordship and the jury will take particular notice of this. I have been a close prisoner, and had no manner of help, nothing at all allowed me to refresh my memory; which if I had had means to do as I ought, I could say a great deal more. But this I insist upon, if the gentlemen of the jury do bring me in guilty and convict me, they do shed my blood, and overthrow the law and course of parliaments. Whereas, if they bring me in not guilty, my impeachment stands good still, and I am liable to answer that impeachment before the parliament: And I hope you will consider the persons I have had to deal with; and that it cannot be made so plain, as in matters wherein we deal with common persons. I submit to what you shall think fit.

L. C. J. You have done, Mr. Fitzharris?

Fitzh. My lord, I have done; only I would examine one gentleman if he were here, but he does not appear. But here's a copy of the impeachment and votes of the House of Commons, I desire I may deliver them to the jury.

L. C. J. No, no; that can't be.

Fitzh. Sir William Waller does declare upon oath, that for this very thing I was impeached by the House of Commons, and that I desire them to take notice of.

Serj. *Jefferies.* Therefore you are not guilty: Is that the consequence?

Sol. Gen. May it please your Lordships, and you Gentlemen of the Jury, you have heard our evidence, and what the prisoner hath said. The crime, for which he is accused, that is high-treason, and it is treason in conspiring the death of the king, in endeavouring to raise a rebellion here; and that in order to destroy the king and the liberty of all the people, to bring them under the slavery of the king of France. This is the treason that he was indicted for; and the proof of this treason is very full: It is proved to you by three positive witnesses, and all men of credit, of whom you cannot have the least suspicion. They prove to you, that Mr. Fitzharris is the man guilty of this treason; he was the contriver of it, he was the mover of it first to Mr. Everard, and he gave him those instructions to pursue those purposes of raising a rebellion here, in order to destroy the king, by contriving a seditious pamphlet to set the people together by the ears; and he came to him in order to perfect this libel. This is proved by Everard, who upon the first motion of it to him, did acquaint Mr. Smith immediately, and sir Wm. Waller, that such a design was on foot, and desired them to come and be witnesses of it. They both came, and heard the communication between the prisoner and Mr. Everard, to contrive such a libel as hath been opened to you, and they swear it positively. Now what defence does the prisoner make to it? Truly I cannot say, whether it hath more of folly or impudence in it; for it is a defence of a strange nature; for it is inconsistent with itself, and shews what a make he is of: and the latter part is a pursuing the same treason he stands indicted for, which is the rendering the king odious to his people, by those insinuations, that he did this by the king's order. The first part of his defence is, I am not guilty, for Mr. Everard is the man that did contrive it, and he is the author, and it moves from him. Now pray consider the parts of your evidence, and see if there be any possibility for you to be induced to believe any thing like it. It is proved by Mr. Everard positively, that he came to him first; and when you consider this objection that is made by Mr. Fitzharris, and consider on the other side who were the witnesses, and who is the man that makes the objection, you will then see no cause in the world for you to give any credit to it. The prisoner says he was trepanned into it: for that, pray consider he is an Irish Papist, one that hath all along made it his business to defame the proceedings about the Popish Plot, to ridicule it, to deny that there was ever any such a thing, and to laugh at the justice that was executed upon the Popish offenders who died for the Plot. The witnesses that prove it against him have been zealous prosecutors of the Plot, men that have discovered many of those who were guilty of it, and brought them to justice; men that have been material evidences upon the discovery. Mr. Smith is a man that spoke materially in the trial of my lord Stafford, and for which service, I believe, the Papists, and Mr. Fitzharris himself, owe him little thanks. As for sir William Waller, all men know how busy and active he hath been to bring in men that were guilty of the Plot, and he hath suffered for it. Now if you can believe that Mr. Smith and sir William Waller should be guilty of a trepan that was to be put upon Fitzharris, a man of that persuasion you hear of, (and you must believe that, or you cannot believe the defence the prisoner makes) I leave it to you. Mr. Everard could do nothing alone; why then sir William Waller must be guilty of this contrivance, and of setting Fitzharris on work and Everard too. But this is so unlikely a story, that if there were any to assert any such a thing, you could not possibly give any credit

to it. But when you consider what hath been proved, and what hath been shewed you under the hand of Fitzharris himself, then there is no room I am sure to doubt. They do positively swear, both Smith and sir William Waller, they heard him own that he had given instructions to Everard. They prove to you that he mended this libel in several places, they not coming up to the instructions he had before given. They prove part of the libel written with his own hand, and that is treason enough; for that is certainly treason, that it is the undoubted right of people to dethrone the king. I never heard of that doctrine any where but among the Papists, and it is a Papist that preaches that doctrine to you now. As this is an evidence in a matter beyond any contradiction in the world, his own hand writing of part, and his owning the giving the instructions; so there is no room in the world for you to believe that ever he was drawn into this by Everard; or that he was the man that was the original contriver of it, and trepanned him into it. But it appears plainly upon the proof, that it moved originally from Fitzharris; that it was the malice of his heart that promoted it; and that the contrivance was how to raise a rebellion here. For when he had read part of the libel, and Everard told him that it was treason, why, said he, I meant it so; and the more treason, the better; the more odious you make the king to be, the more likely it is to raise the people into a rebellion; and the sooner you raise the people into a rebellion, the more like you are to accomplish the design of bringing the people into slavery to the French king, and so at once to destroy all liberty and property, and all that is sacred. Nobody can believe but Mr. Fitzharris is guilty of this libel and contrivance to dethrone the king, and raise a rebellion here, as the witnesses have sworn. Now as you cannot possibly doubt but this moves from Mr. Fitzharris, so then consider the inconsistency of the second part of his defence, and the impudency of it too. For as before he pretended he was drawn into it by Mr. Everard, so now he would make you believe he did not do it out of a traiterous design, for that he was employed about these affairs; and this comes under the title of secret service: and he would fain have it that you should believe the king should hire him to raise a rebellion against himself, to defame himself, and to incense the minds of the people against him. And this must be the service that he is put upon; he had no traiterous intent in himself, but he was to trepan all the lords that stood zealously up for the Protestant religion and property, and that by direction from whom? From the king, whom Fitzharris would have all people to believe to be a Papist; and he would have people believe that he is an innocent man, that he was only employed upon such a special piece of service; that the king should be at great pains to employ Mr. Fitzharris to destroy himself and the whole nation, and to stain his whole family: and upon what reasons would he have you to believe it? As first, you observed how inconsistent it is with the former part of his defence, that he was trepanned into it; now he did not do it from Mr. Everard, nor with a treasonable intention. But certainly this is a treason that nothing can be said to palliate or excuse, and I am sure he hath said nothing will do it. Yet all the defence he hath made has tended that way. For though he hath not arrived to the confidence to say such a thing is, yet he hath insinuated, by the method of his proceedings, that he would fain have such a thing believed; and that the man had no traiterous design in it. Now what evidence hath he produced for it? He hath produced to you evidence that he hath had money from the king, and hath been sometimes at the dutchess of Portsmouth's. That he had money from the king is true, but it little became him to mention it; for it was charity to relieve a man in necessity, that was ready to starve, and was forced to go all the ways he could to work to raise compassion; he urged the sufferings of his wife's father; you heard the petition read as a ground for supply; and he hath so far prevailed upon the king's charity (which he hath abused) as to have a sum of money given him, and he hath had the benefit of it: But he hath made a very ill return for it; for the thanks he hath given to the king for this his charity, is to fly in the face of him, his family, and the government. He hath endeavoured to raise a rebellion; and when he is brought to his trial, he continues to defame the king, which is an aggravation of his treason, if possible. And now having no proof in the world for these malicious insinuations; and all the witnesses that he hath called to make out what he would fain have believed, and dares not mention, (not proving any such thing) you will have little reason, gentlemen, to believe any thing that comes from him, especially if you consider the nature of the libel itself, it is impossible this man should ever be set on work to contrive such a thing as this, to defame the king and all his family, to raise a rebellion, to overthrow all religion, liberty and the king himself; it is impossible to be believed. But I fear I press too much upon you, as if I did suspect there would be men in this kingdom so bad as to believe such a malicious insinuation. Gentlemen, I leave it to you; you hear what our evidence is, three witnesses that positively swear this treason against the prisoner. Now as you have this positive evidence on the one side, so you have no colour of evidence on the contrary; and it is impossible for you to find him Not Guilty. It is to deny the light of the day; and it is a thing of that consequence, that all ages when they hear of it, will say, that there is no justice to be had, if an English jury do not find a verdict according to their evidence: for what security hath a man for his life and estate, if twelve substantial men of a jury shall dare to go against plain and full evidence? It is all the security an Englishman has for all he enjoys, that he is to pass through the hands of

twelve honest men of his own country. And if it be possible for a Jury to go against evidence so plain as this is, I say, no man is safe in his life or estate.

Serj. *Jefferies*. Gentlemen, I desire to take notice of what Mr. Fitzharris was pleased to conclude withal. He says, his blood is to be required at your hands, and therefore he would fain by that means insinuate you out of your consciences. But I think, if you consider the circumstances that have been given, and all the evidence, it will be impossible for men that have any respect to their credit and their consciences, to acquit this gentleman. In the first place, it is known, and it hath been given in proof to induce the probability of the matter evidenced against the prisoner at the bar, that he is a known Roman catholic; they are all protestants, and good protestants, and you are all protestants too. And then the case goes thus far further: You that are protestants must take it upon your oaths, that these gentlemen have sworn false, and convict them of wilful perjury; and if you do convict them, it must be upon the bare allegation of a papist. And I hope never to live to see the day that men that are of good credit, and protestants, shall by an allegation (though never so confidently affirmed at the bar) be presumed to be guilty of perjury. So that I say, my lord, besides the baseness and venom of this impudent libel, which certainly no honest man in the world will give the least countenance to, here is evidence enough from himself. And you cannot believe it proceeds from any direction from the crown, (as this man would insinuate) and therefore he hath given us the greatest evidence by his libelling at the bar. And he hath not only libelled the crown, but he hath called up some witnesses on purpose to libel the rest of his own. And then I hope you will take notice how he did insinuate with Mr. Everard at the beginning: When you were in the French king's service, said he, and have been neglected ever since you left it; if you will come and join with me, without peradventure you may get encouragement fitter than that poor and mean way that you are reduced to by embracing the protestant interest. He gives him a method likewise to walk by: He thought him the person that had writ some pamphlet before, and therefore was fit for his purpose, and ought to be encouraged. And he does tell you the words not only against the present government, but that which every good protestant must needs abhor and tremble at; he bids him take care to libel the whole family. He tells him withal, you must be sure to say, that the late king, of blessed memory, was concerned even in the Irish rebellion; and that this king hath promoted those persons that his father had countenanced for that action; and he tells him the names of those persons that were so promoted. After this is done, what does Mr. Everard do? he goes and makes a discovery; he tells the circumstances and the persons, to whom and when: And the persons he made that discovery to, do in every circumstance agree with time, place and all. The first night this appointment was, I hope you will remember, that when Mr. Everard had so placed that gentleman, against whom there is not the least word said or imagined to find fault with him; he takes notice of the instructions; owns that he had given him instructions; and takes particular notice of one passage, that when Mr. Everard said, But there may be danger in them, is not this treason? The prisoner made answer, the more treason the better. Ay, but then this is dangerous, how shall I venture upon such matters? Why have you not my hand in it? I am as guilty as you, and in as much danger. What then was the reward? there was to be at present 40 guineas, and an annual pension. But to whom was Mr. Fitzharris to discover this? not to the king, but to the French ambassador, and the confessor was to be the man that was to give the reward. Flanders was first to be subdued, and the parts beyond the seas, and then England would be but a morsel for them, they could take that in the way. All this was done, which is plainly sworn by a witness that had a place made on purpose for him to overhear all that passed. And, my lord, for the next witness there is sir William Waller; there is this, besides what is sworn, agreeing in circumstance: he tells you both, to their very money, that it was forty somewhat, but he cannot say guineas; and he tells you something of the pension, a great many thousand crowns: and he tells you particularly of that circumstance of the French confessor, and the French ambassador. Besides all this, does not sir William Waller tell you this very thing, That he espied him with a pen and ink, that he gave a note of the libel itself, and he heard him give the directions? and when he came into the room, he saw the ink fresh upon the paper; and when he heard him give directions for the alteration of particular words, he said, You have not worded it according to my mind in such and such particular places. But, my lord, there is this venom in it further to be taken notice of, that he gave his instructions to draw it so, as that it might best take effect, according to his intention: For when Mr. Everard thought it might do well to make it with thou and thee, as though it should be the design of the Quakers, he said, No, by no means; but put it in changing the phrase, as if it was the design of all the Protestant Dissenters, and so by that means would draw the odium upon them, and bring them in danger as well as others. And this is confirmed too by sir William Waller: so that in every circumstance he hath shewed the venom of his design. But in the last place, which surely the gentlemen of the jury will not forget what sir William Waller said, that Fitzharris did say, I have taken care already to disperse abundance of libels amongst our party. And when Everard told him of a libel that was some while before, he said he had seen that a great while ago. and there might be somewhat in it to the purpose.

And for the answer that hath been given to it, my lord, I think it does not bear any sort of relation to the charge that is upon him; for whatsoever discourse, or whatsoever he hath urged, is not much to his purpose. He hath brought here a nobleman: but after all, I would put him in mind of one thing that nobleman said, he did believe he came to him in the name of one that sent him not: and so will every body say that hath heard the evidence; for all his witnesses do positively deny that they ever knew of any such matters as he speaks of. And now, my lord, I could be very glad if this gentleman (instead of saying as he hath said) would have come as soon as he had this libel from Everard, and discovered it immediately to some body himself before he had carried it on, as Everard did before the thing was perfected. And so, gentlemen, we do think upon this evidence, we have left you without all manner of excuse: it being impossible, upon such a proof as this is, and considering the nature and venom of the libel itself, the base, venomous, malicious instigations he made use of to effect it, and the ends for which it was done, to bring in the French to set us together by the ears, to render the king odious to his people; and the person it is acted by, a known Irish Papist; I cannot doubt of the issue. And I do hope when I see so many honest gentlemen and Protestants at the bar, they will be loth to forfeit their own souls to eternal damnation, to save a man that is guilty of such a treason as this.

L. C. J. Have you done, gentlemen?

Sir *G. Jefferies.* Yes.

*L. C. J.** Then look you, gentlemen of the jury, here is Mr. Fitzharris indicted for treason against the king, and it is for endeavouring to take away his life, to make him odious to his subjects, to incite them to a rebellion, and to raise arms here in this kingdom against our king, our sovereign. And by the indictment it is said, that he hath declared these endeavours and these intentions, by causing a scandalous and evil pamphlet or libel to be written, with an intent to be dispersed through the kingdom. The words of the libel you have heard particularly read; some of them are taken out and mentioned in this indictment. Mr. Fitzharris hath been arraigned, and hath pleaded Not Guilty; and you are to try the single matter before you, whether Mr. Fitzharris be guilty of this treason. That this is treason, and contains a treasonable matter, gentlemen, is so plain, as no body living can doubt it: but it is a treason of as high a nature as peradventure ever was in the kingdom of England, and tends as much to that which would be the destruction both of the king and kingdom. The king's life, all our lives, all we have that is dear to us, or of any advantage or avail in the world, are concerned in this: for what does it tend to? It tends to a popular insurrection, to raise the people up in arms, that like a deluge would overrun and sweep away all. It is to undo the government and all order in the kingdom, and to destroy the life and being of all that is good amongst us. A more virulent and villainous book certainly was never written; nor any thing that tended more to sedition, or to move the people to a rebellion: such a book as peradventure no well governed kingdom ever heard of the like. It tends to defame the king and all his ancestors, and to blast all that shall come after him, to raise us into a tumult. And what is all this to do? To settle the Roman Catholic religion amongst us. And this is such a piece of the art of the jesuits, which peradventure hath outgone all they have done before. It seems to be their hand directly, and we are all concerned as Englishmen to take care of such villainies. This is the nature of the treason that is comprised in this book. Whether Mr. Fitzharris was the author, or director, or contriver of this book, is the question before you: (For plainly, without any suppose, the book contains in it as high treason as ever was.) And as to that, gentlemen, you must consider that this appears evidently to be a design of the Roman Catholic party; it is a jesuitical design: For this is that they aim at, to confound all things, that they may fish in troubled waters. And you see they have found out an apt instrument, an Irish papist, one that hath been all along continually concerned with them, and intermeddled in several of these plots and papers. Gentlemen, the evidence that is given here against him is by three persons, and there is great evidence from the matter that is produced, besides those persons. There is Mr. Everard does declare to you the whole of this, and Mr. Fitzharris's application to him to write this book. He tells you the intention of it, and he gives you the very grounds upon which this was to be written; that is, to raise a sedition, that was the first instruction; to raise sedition in the kingdom, and this was to busy us at home, that the French king might get Flanders and the Low Countries, while we are confounded at home: And then the catholics have their game to play, and carry all before them. Look you, gentlemen, Mr. Everard is so cautious, that he walks not alone in the case, but with a great deal of prudence declares it to others, that they may be witnesses in the case for him. Mr. Smith does agree in all things for the first night that Mr. Everard hath declared, how that he heard the directions owned as given by Mr. Fitzharris, for the writing this book, and he heard the design of it, he heard there was a reward promised to him for the doing of it, and he tells you some of the instructions. The next night sir William Waller was present; and he tells you all the instructions of that night, and that Fitzharris owned them, that he gave those instructions in the private consult. But that that is not to be answered, gentlemen, is his own instructions in writing; what can be said to that? If you were doubtful of the credit of these gentlemen, yet Mr. Fitzharris's own instructions in writing

* Sir Richard Bulstrode gives in his Memoirs, p. 316, an abridgment of this Charge.

under his hand, are an evidence beyond all controul in the world that he gave those directions; and these are treason, that is plain. And therefore it does seem to be as strong an evidence against Mr. Fitzharris of this treason, as peradventure ever was given against a traitor. There is not any one witness that stands single, but there are two to each night; and his own instructions written by himself do not stand upon the evidence of a single witness, for he owned it in the presence of three witnesses: So that a stronger evidence cannot be given that he was the author and director of this book.

Then, gentlemen, you must consider what he says for himself in excuse of this horrid treason that these witnesses seem to fix so fully upon him. The first witness he brings is Dr. Oates; and he does tell you, that having some discourse with Everard, Everard should say, this was a design of the court, and was to be put into some lords, and I think into some parliament-men's pockets; and then they were to be apprehended. I think this is Dr. Oates's testimony. Mr. Everard is here upon his oath, and he testifies no such thing in the world: It is easy for one to come and say, I heard a man say so; perhaps he said it by way of conjecture; but this is no answer to direct proof. Mr. Sheriff Cornish is the next witness, and he says, he had some discourse with the king, and the king should say, he thought Mr. Fitzharris had been an honest man, and had given him some money.

Mr. Sh. *Cornish.* No, my lord, the king said, he took him to be an ill man.

L. C. J. Then it seems I was mistaken; his majesty did not tell him he took Fitzharris to be an honest man, but an ill man. But that he had formerly some money of the king, upon pretence of doing him some service; now that brings it out what the king's meaning was: For it seems there had been begged some money for him, and the king, at my lady Portsmouth's desire, by way of charity, gave him some little matter of money; he boasting and telling the king he could do him some service. You see what manner of service it is he would have done him and the kingdom. Then as to the rest of his evidence, there is Mrs. Wall, and my lady duchess of Portsmouth; and he hath examined them concerning the money he hath received, and they both declare upon what ground the money was given: It was given, they tell you, for a gratuity from the king to him: and upon his boasting, says Mrs. Wall, that he could do the king service, and bring over persons to his interest. I think there is no other witness very material: For as for Mr. Bulstrode's evidence, it signifies nothing at all; it is not material for him or against him in the case: A discourse about delivering a petition to the king from his wife. Now, gentlemen, you must consider what ill use this gentleman designs to make of the king's charity and favour to him; he gave him some money to relieve his wants, and now would he interpret this, and insinuate this to be given for ill purposes, for to make him trepan his subjects: Which is another piece of virulency that these papists always exercise against the king; they always make an ill use of his best actions, and an ill interpretation of them. For, gentlemen, can it be believed, that the king would ever design such a thing as this is, to blacken his family for ever, to stir up all his subjects against him, to endanger his crown and kingdom, and all that he has in the world? And all this to what purpose? No colourable design can be made of it. This is such a thing, to excuse such a villainy, as never was heard of, by wresting the king's charity and generosity to such ill purposes; but that some men have the confidence to do any thing. I must leave it to you. Here are three witness his own hand to these instructions, and his making a declaration that it was not treasonable enough, nor virulent enough. All these things are strong evidences in the case. And if you believe these witnesses and his own handwriting, it is a plain case, you must find him guilty.

Fitzharris. May I have liberty to speak one word?

L. C. J. Gentlemen, I had forgot one thing. For fear it make an impression in you, because I see he hath inculcated it often and often, and that is, the impeachment that was by the Commons House of treason against Mr. Fitzharris in the Lords House: I must tell you, gentlemen, that is not before you at all; the matter of that was by way of abatement pleaded to the jurisdiction of this court, and that is now over. You must have no consideration, nor can have any consideration, of that now. Your question is not whether we have authority to try this cause; but you are impannelled and sworn to one point, and that is, whether Fitzharris be guilty of this treason or not. Whether the court have authority to do it, is another question proper for our determination, and we have determined it; but there is nothing of that lies before you in this case. Therefore you must not be misled with any thing that he talks so fondly of concerning the impeachment, or concerning his blood lying at your doors, that surely will signify nothing to men of understanding at all.

Mr. *Johnson.* My lord, it is our happiness to come before you under these circumstances. We have understood there is a vote of the Commons of England in parliament, that says this man shall not be tried in an inferior court; now we take ourselves to be the judges of this man in part under your lordship's directions.

Serj. *Maynard.* You are not judges of it, you are only to try the fact.

Mr. *Johnson.* I only offer my sense, and if the other gentlemen think otherwise, they will speak it. I think the office of a juror is such, that it is within his power to acquit or condemn according to the evidence, as it lies within his own conscience. Now if we should acquit this man (we have no assurance we shall acquit him, only suppose it) then there is nothing against him but what lies in a parliamentary

way, and we shall forejudge their cause. Therefore I say, I do not know how far by law we are compellable to give a verdict in this case upon him.

L. C. J. Look you, gentlemen, we would consult your satisfaction as much as we can in all things; and it is reasonable that if you have any doubts you should propose them to us, and to that purpose we are to give you satisfaction, and will in all things. I must tell you as to the jurisdiction of the court, that it is not at all before you: and as to the vote of the House of Commons, alledged by him, if any such there be, that cannot alter the laws of the land, nor justify any of us in departing from our duties, no more than if a letter or mandate should be gained from the prince or chief magistrate of this kingdom, to any of us in derogation of justice (as it is possible by surprise to be) we are to take notice of the one, no more than the other. We are upon our oaths to do justice according to the law of the land: you likewise are upon your oaths, and sworn to do justice in your sphere; and your oath is, that you shall enquire truly whether he be guilty or not; and if he be guilty in your judgments, you can no more spare him, than you can condemn an innocent person. It never was pretended by any man, nor will it be asserted by any man that understands himself or the constitution of the government of this kingdom, that a vote of the House of Commons can change the law of the land. It cannot excuse us, if we deny to try a man that is brought before us; nor will it excuse you, being under an oath, justly to try him. If you should (because the Commons House have voted that he shall not be tried) declare that man innocent, who in your own judgment you believe to be not innocent; you nor we are not to consider what will be the consequence of this if this, man be acquitted or condemned; that is not before us. You and we too are tied precisely to the laws of the land, and by that law must this man be judged. As to our parts we must do it as to the law, and you as to the fact. But I'll tell you further, gentlemen, this doubt was moved to us by the grand jury, before the bill was found; we had an intimation that they would move such a doubt to us as seems to be your doubt now. Therefore for their satisfaction, and the taking away any scruple that might be in the case, all the judges of England did meet together, and seriously debate the matter and substance of all this; and it was not our opinion of this court only, but the opinion of all the judges of England, That we had a jurisdiction to try this man. This we have told you, because we would satisfy all men to go on fairly in the things that are before them. Therefore, that being put out of the case, you must consider of your verdict, and give it in upon this trial.

Mr. *Johnson.* We do not doubt, my lord, but your opinion in this case will indemnify us from any future charge by the Commons of England. But it lies before us to consider what we are bound to do in the case.

Just. *Jones.* Gentlemen, I suppose you do not doubt but we are all of the same opinion. It is no marvel indeed to have a man that stands in Fitzharris's place, to object any thing that may cast a mist before your eyes. And yet it cannot but be wondered at too, that when three protestant witnesses have sworn positively, he should have the confidence to urge any thing of this nature. He who appears by the indictment itself, and the proofs made upon the indictment, to have endeavoured to destroy all the laws of England, all Magna Charta, all our liberty and our religion, and to betray us to the king of France: For that appears plainly the design, if you have any credit to the witnesses that are produced: He that would have pulled down all that is sacred amongst us, is so zealous for the authority of the House of Commons. We have all of us a great reverence for the House of Commons, and for their opinions; but as my lord hath told you, so I tell you my opinion, that a vote of the House of Commons does not in the least sort alter the law: For, indeed if it did, it were to give a legislative power to the Commons, which does only belong to the King, the House of Lords, and the Commons together. And, gentlemen, though Mr. Fitzharris says, if he be acquitted here by you, yet he should remain to be questioned again in parliament; there is no man in the world can doubt, if he were acquitted here, and were questioned in parliament, but he would say, he hath been upon his legal trial by his peers, and that he hath been acquitted by his peers upon solemn evidence. But, gentlemen, you are to consider what is your business: Your office is to be jurors, not to be judges; you are not to take upon you any such authority. Your commission is your oath, and by that oath you are sworn to inquire whether the prisoner be guilty, as he is indicted, or not. If you, as Englishmen, can say he is not guilty, let it lie upon your consciences, and the danger of the king's blood and life be upon you.

Just. *Dolben.* Gentlemen, I desire to speak one word to you, to let you know, I am of the same opinion with my lord, and with my brother; and I cannot but wonder at you for making this scruple: For if there were any thing in what you have said, it concerns us that are judges, and not you at all; for it is a matter of jurisdiction: And whether we have a jurisdiction or not, we must satisfy ourselves that we have a commission to do it; it concerns not you. Do you but consider the oath you have taken, that you will well and truly try, and true deliverance make betwixt our sovereign lord the king, and the prisoner at the bar, according to your evidence: And you have sworn a true verdict to give upon it, and do you now scruple whether you should give any verdict or no, when but even now you have sworn you will give a verdict? If any such thing as this had been in your heads, (for it might be then in your heads, as well as now) why did not you speak of it before you took

your oath? You now lie under the obligation of an oath to give a verdict according to your evidence; and would you acquit him against such an evidence as hath been given? For, besides what sir William Waller, Smith, and Everard have deposed, the very note sworn by sir Philip Lloyd and Mr. Bridgman, to be owned by Fitzharris as his hand, contains treason enough in it if there were no more: Therefore there must be something more in it, than for the sake of such an unreasonable scruple.

Just. Raymond I am of the same opinion, truly.

Mr. *Johnson*. My lord, I took the liberty to speak it now; I could not speak it before: For I was not then to enquire what I was to be sworn to, nor could I know what would be the matter that would come before us, till we were sworn. Therefore I humbly beg your pardon, that I made the motion.

L. C. J. We are not at all troubled at any thing you have said: do not mistake us, we do not take it ill from you, that you acquaint us with your scruples We are ready to give all satisfaction we can, to any that are concerned before us; therefore we are no way troubled that you made any such scruple, but have given you a fair answer to it.

Mr. *Johnson*. My lord, I desire a note of the names of the jury.

L. C. J. Give it him, Mr. Astrey, or else the crowd is so great he may not know them.

[Then the Jury withdrew for half an hour, and at their return being called over and appearing, the clerk took the verdict]

Cl. of Cr. Edward Fitzharris, hold up thy hand: (Which he did,) look upon the prisoner, how say you, is he Guilty of the high-treason whereof he stands indicted, or Not Guilty?

Foreman. Guilty, &c.

L. C. J. I think you have found a very good verdict, and upon very full and strong evidence.

Sol. Gen. Will your lordship please to give judgment?

L. C. J. We will take time for that.

Sol. Gen. Will you give a rule to have him brought up to-morrow?

L. C J. Move us another day for it.

Fitzh. My lord, I hope I may have the liberty of my wife, and some friends now to come to me.

L. C. J. Any friend I think may come to you: But, Mr. Fitzharris, you must be modest in the using that liberty we give you. You have heretofore abused your liberty: I do not love to exasperate things to one in your circumstances, but you must be prudent and careful, knowing your own condition, that you do nothing prejudicial to the king or kingdom.

Upon Wednesday June 15, 1681, Edward Fitzharris was brought to the Bar of the Court of King's-bench, to receive his Sentence.

Att. Gen. My lord, I humbly pray your judgment against Mr. Fitzharris, who is convicted of High treason.

Silence proclaimed during judgment.

Cl. of Cr. Edward Fitzharris, hold up thy hand. Thou hast been indicted and arraigned of High-treason, and hast thereunto pleaded, Not guilty, and for thy trial put thyself upon God and thy country, and thy country have found thee guilty: What canst thou say for thyself, why judgment of death should not be given against thee, and execution awarded according to law?

Fitzh. My lord, I think it will be prejudicial to the king's service, that Sentence should pass before I have made an end of the evidence I have given in against my lord Howard.

L. C. J. Mr. Fitzharris, we can take no notice of any thing of that nature. When you are asked, what you can say why judgment should not pass against you, it is, what legal matter you have, what matter in law to excuse yourself from that judgment? For this is nothing, the saying you are to give evidence; we know nothing of that, it will not delay judgment a minute And for what you say, it will be prejudicial to the king's service, it is the king that prays judgment against you by his attorney.

Fitzh. I beg the king's mercy for transportation, my lord.

L. C. J. We can do nothing in that.

Fitzh. Nor to give me time before my execution? I can say no more, my lord.

L. C. J. Look you, Mr. Fitzharris, you have been here indicted for a very great and heinous treason, a treason that is in truth of the first magnitude; for it is a treason that tends to the rooting up the whole government of this kingdom, and the destroying of us all; plainly, both of the king and of all his subjects.

It does not only destroy the peace and quiet, but it tends in truth to the utter destruction of the whole kingdom, and to bring us into a confusion and disorder, never to be avoided or retrieved, if your designs should have taken effect. You have been here arraigned, and put yourself upon the country, and they have found you guilty of this treason: it is a thing you should well consider; for certainly, you have contracted to yourself a mighty guilt in such a thing as this is. You have endeavoured the destruction of the king, and in such a way, as must have in truth destroyed all his good subjects together with him. Your design hath been to excite the people to a rebellion, and a popular insurrection, that would have swept away all like a deluge, if it had taken effect. In truth, it is a treason against all mankind, the stirring up of the people is; it is of evil example to all mankind, the stirring up of the people against their natural lord, to whom we owe all allegiance and obedience. But your design in this way was by setting the people of England together by the ears, to bring in the Roman Catholic religion upon such as should be left. It seems you are an Irish papist, and sucked in very ill principles where you have lived; and you have here endeavoured to do as

much mischief in this kingdom, by that treasonable book, as lies in any one man's power perhaps to do. It is a mercy and a happiness, that it hath pleased God in his providence to deliver us out of your hands; for this was your design, if you could have brought it about: but it hath pleased God now to bring you to justice for it, and the judgment of the law must pass upon you. Now that judgment is this: 'You must return to the Tower, from 'whence you came, and from thence you must 'be drawn through the streets of the city of 'London to Tyburn; there you shall be 'hanged by the neck, but cut down before you 'are dead; your bowels shall be taken out and 'burnt before your face, your head cut off, and 'your body divided into four quarters, to be 'disposed as shall please the king; and I pray 'God to have mercy upon your soul, to give 'you a sight of your sin, and repentance for 'it.'

Fitzh. My lord, I hope I may have the liberty of my wife to come to me, and any friend.

L. C. J. You have that liberty already.

Fitzh. No, not without the presence of a warder.

L. C. J. We will not restrain them as to that, let them come to you.

Officer. There is no rule of court for it, my lord.

L. C. J. We will not restrain any thing of your wife's coming, there is no rule to restrain her; but let him have that liberty that other prisoners in his condition usually have had in the Tower, his wife to come to him, or any other friend or Protestant minister whatsoever.

Officer. Pray let it be put into the rule of Court, my lord.

L. C. J. We make no rule, there does not need any. Look you, Mr. Fitzharris, we lay no restraint upon your wife, or any other friend; but if your wife be in another condition, that she cannot come to you, we cannot meddle with that.

Justice *Jones.* We are not to deliver her out of prison.

L. C. J. No, we make no rule, but take off the hands of the Court from restraining any one to come to you.

Then the prisoner was taken away, and in pursuance of this Sentence, the last day of the said Trinity-term, being the 22d of June, 1681, a writ issued out of the Court of King's-bench directed to the lieutenant of the Tower of London, reciting the judgment, and commanding him to deliver the prisoner to the sheriff of Middlesex, upon Friday the first day of July next following to be executed according to the sentence. Which writ followeth in these words.

'Carolus Secundus Dei gratia Angl. Scot. 'Franc. et Hibern. Rex, fidei defensor, &c. 'Loc. tenen. Turris nostræ London. salutem. 'Cum nos in Cur. nostra coram nobis consideraverimus quod Edwardus Fitzharris nuper 'de Parochia S. Martini in Campis in Com. 'Midd. Gen. pro quibusdam aliis proditionibus 'unde ipse coram nobis indictat. est; ac super'inde per quandam Juratam Patriæ inde inter 'nos et præfat. Edwardum capt. convict. et 'attinct. existit, ac Turr. nostra London. per 'medium Civitatis nostræ London. præd. usq; 'ad Furcas de Tyborne trahatur, et super Fur'cas illas ibidem suspendatur, et vivens ad 'terram prosternatur, ac interiora sua extra 'ventrem suum capiantur, ipsoque vivente 'comburentur; Et quod Caput ejus amputetur, 'quodq; Corpus ejus in quatuor partes divi'datur, et quod Caput et Quarter. ill. ponantur 'ubi nos ea assignare voluerimus: ideo tibi 'præcipimus firmit. injungend. quod die Ve'neris primo die Julii prox. futur. apud Tower-'Hill cum Vic. Midd. convenias, et præd. Ed'wardum Fitzharris eidem Vic. Midd. delibe'rari facias, ut idem Vic. executionem inde 'in forma præd. fieri faciat, prout inde nobis 'respondere volueris. Teste Francisco Pem'berton apud Westm. xxii die Junii, Anno 'Regni nostri xxxiii. 'Per Cur. Astry.'

And another writ at the same time was issued out of the same Court, directed to the sheriff of Middlesex, to receive the prisoner from the lieutenant of the Tower at the time appointed, and to execute him according to the sentence. Which writ was in these words:

'Carolus Secundus Dei gratia Angl. Scot. 'Franc. et Hibern. Rex, fidei Defensor, &c. 'Vic. Midd. salutem. Cum nos in Cur. nostra 'coram nobis consideraverimus quod Edwardus 'Fitzharris nuper de Parochia S. Martini in 'Campis in Com. Midd. Gen. pro quibusdam 'aliis proditionibus unde ipse coram nobis in'dictat. est, et superinde per quandam Jur. 'Patriæ inde inter nos et præfat. Edwardum 'capt. convict. et attinct. existit, de Turr. nos'tra London. per medium Civitatis nostræ 'London. præd. usq; ad Furcas de Tyborne 'trahatur, et super Furcas illas ibidem suspen'datur, et vivens ad terram prosternatur ac 'interiora sua extra ventrem suum capiantur, 'ipsoq; vivente comburentur; Et quod Caput 'ejus amputetur, quodq; Corpus ejus in qua'tuor partes dividatur et Quarter. ill. ponantur 'ubi nos ea assignare voluerimus: ideo tibi 'præcipimus firmiter injungen. quod cum Loc. 'tenen. Turr. nostræ London. præd. die Ve'neris primo die Julii prox. futur. apud Tower-'Hill convenias, et ipsum Edwardum Fitz'harris de præfat Loc. tenen. recipias, et Ex'ecutionem de eo in forma præd. facias prout 'decet. Teste Francisco Pemberton apud 'Westm. xxii die Junii Anno Regni nostri 'xxxiii. Per. Cur. Astry.'

Upon the day appointed, viz. July 1, Edward Fitzharris was, near the Tower-Gate on Tower-Hill, delivered into the custody of the sheriffs of London and Middlesex, viz. Slingsby Bethel and Henry Cornish, esquires; who in the place signed a discharge for him to the lieutenant of the Tower. Then he was put on a sledge, and thence conveyed through the city

of London to Newgate, where he overtook Oliver Plunket, who was just before on another sledge, passing to the same place of execution.

Where being come (soon after Plunket's private prayers, &c.) Fitzharris asked capt. Richardson, Whether the sheriffs had a warrant for the disposal of his body? Capt. Richardson answered, Yes. Then he desired Dr. Hawkins's assistance, which the sheriffs readily granted, and called for him to go to him on the sledge; which the doctor did, and on his knees embraced him, and continued a private discourse with him for some time.

Sheriff *Bethel* asked Mr. Fitzharris, what have you to say?

Mr. *Fitzh.* answered the Doctor of the Tower would answer for him, he having left his mind with him.

Mr. Sheriff *Bethel.* You will do well to discharge your conscience.

Fitzh. I have left it all with the Doctor in writing under my hand, who will communicate it with witness, to the world.

Doctor *Martin*, of Woodstreet, being at the same time in the presence of the sheriffs, desired Mr. Fitzharris to declare, whether he died a Protestant or a Papist. He answered, having left his mind fully with Dr. Hawkins, he hoped it might be satisfactory. The Doctor replied, it would be more satisfactory to declare himself there, and that it was no shame to die a Protestant. To which Mr. Fitzharris replied as before.

Then Mr. *Fitzharris* said, Good People, this infamous kind of death is much more irksome to me than death itself: such judgments as these my sins against God may justly bring upon me, and I do most humbly submit unto it. But as to the crimes which I now die for, I take God to witness, I was no further concerned in the Libel, than to discover to the king what practices of that kind were against him, being employed to that end; though those that employed me, refused to do me justice at my trial. And I call God to witness, I never had a farthing of money of the king in my life, but on the account of the like service. And as to the witnesses that have sworn against me, I do here solemnly declare now at my death, that I have not seen the French ambassador since the beginning of the breaking out of the Plot, neither have I had any acquaintance with him. And as to his confessor, I never spoke with him in my life; neither had I any dealing, either directly, or indirectly, in my life with them, though sir William Waller and the rest swore most falsly to the contrary. And how like is it that the French ambassador would give three thousand crowns for writing that libel, I leave the world to judge. What I may further declare, I have left with Dr. Hawkins. I forgive all the world, and do hope that God will forgive me. I beg the prayers of all good people for a happy passage into the other world.

Mr. Fitzharris desired to know of the sheriffs, whether his body might not be at the disposal of his wife, without quartering. Upon which the sheriff read him the warrant.

Soon after which he was executed.

The PAPER* referred to was as follows:

"I Edward Fitzharris, having been indicted of high-treason, for endeavouring to dethrone the King, was thereupon found Guilty, and sentence of death passed on me. I the aforesaid Edward Fitzharris do voluntarily and freely, without any hopes to save my life, but a dying man, and to discharge my conscience towards God, and for the better satisfaction of the world, make this declaration following, in the presence of God, and unto Dr. Francis Hawkins, chaplain of the Tower of London.

"I do profess and declare my religion in the general to be that which hath been truly and anciently delivered in the first four general councils; and in particular, my belief is that true faith of a Christian, briefly contained in those three Creeds, commonly called the Apostles Creed, St. Athanasius's, and the Nicene Creeds: and I die a member, and in the communion of Christ's holy Catholic church, hoping for mercy, through the alone merits of the Passion of our Lord and Saviour Jesus Christ.

"I do also confess and declare, as to the crimes which I die for, I was no further concerned in the libel, than as employed to give the king notice of what libels or other accusations, there were against him; and to this intent, and no other, I endeavoured to get this libel: which at length I did from Mr. Everard, all written under his own hand, and carried it to Mrs. Wall, by whose means I conveyed all matters of this, or the like nature, to the king. I told her I had a business of great consequence

* "This Paper contains many notorious falsities, which were impossible to be true; and carries with it gross marks of artifice and contrivance practised on him, while he was entirely under the management of Dr. Hawkins, minister of the Tower, who soon after was made Dean of Chichester. Fitzharris's wife was not then admitted to him; but he wrote several Letters to her, one the very morning on which he suffered, informing her, how he was practised on with hopes of life, if he would accuse the earl of Shaftsbury and lord Howard of the libel: he declared, that they were innocent, and that what he had deposed against the Papists was true; he charged her by no means to be prevailed on to swear falsly against any. These Letters had such a tendency to destroy the credit of Hawkins's Paper, that the Court got her to deliver them upon the promise of a pension." Note to former edition.

This Paper was published under the title of 'The Confession of Edward Fitzharris, esq. Written with his own hand, and delivered to Dr. Hawkins Minister of the Tower, July 1, 1681. Being the day of his Execution. London: Printed for S. Carr, 1681.'

to acquaint the king with: but she answered me, That my lord Sunderland being out, there would be no money had for secret service, and advised me to go to the lord Clarendon or Hyde; but before I could do this, I was taken. As for that part of the libel which I left with Everard, as a pledge, to assure him I would not betray him, I received it of the lord Howard: and the money I received from the king, was for bringing a libel called, "The King unveiled, and the Lady Portsmouth's Articles." I call God to witness, I never had a farthing charity from the king.

"I do further confess and declare, that the lord Howard told me of a design to seize upon the king's person, and to carry him into the city, and there detain him till he had condescended to their desires. Heyns and myself were privy to this design, and had several meetings with the lord Howard; and as an encouragement, the lord Howard assured us of breaking the settlement of Ireland, taking off the additional revenue of the bishops, forty-nine men, and grantees, whose estates were to be shared amongst the party.

"I do confess and declare, That while I was in Newgate, the sheriffs, Bethel and Cornish, came to me, with a token from the lord Howard, which I knew to be true, and brought heads with them from Everard, wherein he accused me of being a court emissary, or Yorkist, put on by the king to put the libel into Protestant houses to trepan them. But I declare upon my death I had no such intent, nor do know any such thing. The sheriffs likewise told me, I was to be tried within three or four days, that the people would prosecute me, and the parliament would impeach me, and that nothing would save my life but discovering the Popish Plot; and then the sheriffs aforesaid gave me great encouragement from my lord Howard, that if I would declare that I believed so much of the Plot as amounted to the introducing the R. C. or if I could find out any that could criminate the queen, R. H. or make so much as a plausible story to confirm the Plot, that the parliament would restore me to my father's estate, with the profits thereof, since his majesty's restoration. I finding myself in the condition I was, in Newgate, fettered, moneyless and friendless, my wife ready to lie in, without any subsistence, my children in a miserable condition, and must needs be in a worse by my death, and I could see no other refuge for life, but complying with them; so not with ambitious intent, but to save my life, I did comply. The sheriffs brought instructions, which they said came from the Lords and Commons who met that day in order to address the king in my behalf (if I should confirm the instructions) and they made use of my lord Shaftesbury's name, and others, what advantage I might have thereby. At the first I made a formal story concerning the Plot, which was not prejudicial to any body, but most relating to general heads known publicly; upon which Mr. Cornish told me these were things cried about the streets two years ago: I replied, I could say no more. Mr. Sheriff said, he was sorry for me with all his heart, but thought I could say more if I would, and pressed me hard to speak to several heads; unto which, unless I spoke, he said, there was no hope of life; the heads I was to speak to, is what the examination taken by sir Robert Clayton, and sir George Treby contains, and a great deal more that I did not say then, relating to the queen, R. H. earl of Danby, declaring French pensioners, lord Halifax, Hyde, Clarendon, Feversham, Seymer, and others; the burning the Fleet, Forts and Governments in Popish hands, Meal-Tub Plot, Prentices Plot, the Contrivance of the Libel on the lady Portsmouth, being a French design to destroy Protestants. These and many other heads were brought to me by the sheriffs.

"I do further confess and declare, that sir Robert Clayton, and sir George Treby, coming to me to examine me, sir Robert Clayton asked me what I could say concerning Godfrey's murder? I answered something. He replied, It may be I was in a confusion; recollect yourself. And what I said concerning Father Patrick, was forced out of me, and what I said concerning him is not true. Sir George Treby was with me three hours, or thereabouts, and pressed me to say something concerning Godfrey's death: and said, Unless I could speak to that murder, I could say nothing; whereupon I said something I had from others. He asked me if I could say no more? I replied, is not this enough to save my life? Am not I rogue enough? The Recorder hereupon swore, Zounds, what were you ever but a rogue? Then the Recorder entered upon the heads of the examination; which being done, he told me, All this would not save my life, unless I would speak to the libel, which was a court trick; and it was not for nothing that I have been so often seen at the lady Portsmouth's. The lord Shaftesbury said, You know more of these matters than any man. Sir George would have me speak to the consult; that the duke was at it, the lords Bellasis, Arundel, and Powis, were at it; you have seen them go to it at St. James's, without doubt they were there; do you but say it; we have those that will swear it.

"I do further declare and confess, that what I said against the queen and the duke, I was put upon, in the matter of sir Edmundbury Godfrey's murder; and do further declare, That what I swore against the earl of Danby; the threatening words that were uttered, I did (to the best of my remembrance) hear, but whom they concerned I could not well know, by what my lord himself said. And what de Puis told me concerning my lord of Danby, I do believe was spoken out of ill-will; and what I said against him was to stave off my trial till a parliament; and they were the more desirous to accuse the lord Danby of Godfrey's murder, because the crime of murder is not inserted in his pardon. I am sorry for what I have said

against the queen, his royal highness, and the earl of Danby; I desire God to forgive me the wrong I did them, and do heartily beg their pardon.

"I do further declare and protest, That this confession and declaration of mine I own sincerely, as a dying man, and not to save my life; and I call God and his angels to witness the truth of it; and I renounce mercy at the hands of God Almighty, if this be not true.

"And I do further declare and protest, as a dying man, unto James Walmesly, Edward Pettel, and Mary Walmesly, That I have made this confession and declaration unto Dr. Hawkins freely, and of my own voluntary accord, without any manner of promise made, or hopes given me by him from the king of saving my life by this confession, I having given him to understand beforehand they were matters of consequence, and such as chiefly concerned the good of the king and kingdom.

"I give the doctor my hearty thanks for all his prayers, counsel, and charitable offices he hath done me, and I pray God to bless him for ever for it. I forgive all the world, and desire all the world to forgive me; and the Lord have mercy on my soul.

"EDWARD FITZHARRIS."

In the same Year, 1681, *and we may suppose shortly after the Execution of Fitzharris or Fitz-Harys, the following Articles were published: viz.*

A NARRATIVE, being a true Relation of what Discourse passed between DR. HAWKINS and EDWARD FITZHARYS, esq. late Prisoner in the Tower; with the Manner of taking his CONFESSION. Published by Authority. London: Printed for Samuel Carr, 1681.

TO THE READER.

THERE will need no other apology for the exposing of these Papers, than the command and warrant of the following Order of Council for their publication:

'At the court at Whitehall, this 2d day of July 1681. By the king's most excellent majesty, and the Lords of his majesty's most honourable privy council.

'It was this day ordered by his majesty in council, That the confession of Edward Fitzharris, this day delivered by Dr. Hawkins to the board and here read, be, and it is hereby ordered to be forthwith printed and published. And the said Dr. Hawkins is desired to take care to see the same done: And likewise to cause to be printed and published a narrative of what communication he had with the said Fitzharris upon that subject. PHIL. LOYD.'

Now, as I did not at the first intermeddle with Mr. Fitzharris but by order, so neither have I done any thing in the business concerning him without a sufficient authority for what I did. And it will appear likewise that I have put it off as long as I could, till now at length the unreasonable clamours and calumnies of ill disposed men have rendered it absolutely necessary, as well for the vindication of common justice, as of my particular duty.

As to the truth of what I now deliver, and the confession of Mr. Fitzharris, formerly published, I do solemnly here declare unto the world, upon the word of a minister of the gospel, that this is a candid impartial report of what I had from his own tongue and pen, as his own voluntary act, without any art or inducement of mine directly, or indirectly, to draw it from him.

And as I have made a conscience of keeping myself exactly to the truth in this relation, without any injury to the memory of the dead, so I have done all I could, on the other side, to spare the names of the living, separating the fact from the persons reflected upon in the story; my business being only to communicate the substance of the discourses I had with Mr. Fitzharris. But as I have, upon a point of tenderness, left only spaces for, instead of mentioning several names concerned in this Narrative, I shall be ready to discharge myself upon my oath in that particular also, whenever required by a lawful authority so to do.

A TRUE RELATION of the occasion of Dr. Hawkins's going to Mr. Fitzharris, late prisoner in the Tower, sentenced to die, and since executed at Tyburn; of the manner of taking his Confession, and of all that passed between Fitzharris and him.

Upon Friday the 17th of June, about four o'clock in the afternoon, I received orders from captain Cheek lieutenant of the Tower, to go to Mr. Fitzharris, who (as Mr. Lieutenant of the Tower had before informed me) seemed to be disturbed in his mind, and was very troublesome to his warders and those about him. As I entered his room, he saluted me, and said, I was welcome to a poor prisoner, and if I would come and see him now and then, it would be a great comfort to him in his sad condition. Sir,

(said I), I shall be ready to do all that becomes me, and will do you all the service I can. Then Mr. Fitzharris began to complain of some hard usage, in that his wife and friends were not permitted to come to him; whereas it was, (he said) the only favour he begged of the court after sentence was passed, that his wife and friends might have liberty to see him; but, (said he) I hear my wife is in custody, and not one friend of mine can come near me: this troubles me extremely, and makes me restless in my mind, and so uneasy to my keepers. I desired him to have patience, and said, I durst assure him, the Lieutenant of the Tower would not deny him any favour the court had granted him. Then he desired we might be alone; but I told him, I had no orders to be in private with him. He spoke to one of the warders to go to the Lieutenant of the Tower to know his mind in it; and the messenger return- presently with leave for us to be as private as we would, so the keepers withdrew.

Then I laid before him the danger of his condition, and the indispensable necessity of doing all that lay in his power to make his peace with God; that he must needs discharge his conscience, and give the world satisfaction before he died. He answered, he had already done all that he could; he was heartily sorry for all the sins he had committed, and he hoped God would have mercy upon him. I told him, I would pray for him, and was come to proffer him my assistance. He thanked me, and desired me to assist him with my prayers. Then he began to relate how he came to fall into that great misfortune he was in; he told me how he had lived abroad, and his fortune being small, after his return into England, he took upon him an employment which (he said) was much against his inclinations, but he must do something to live; his father lost his estate in Ireland, which was the ruin of their family; and he most unfortunately took upon him to find out libellers against the king, which led him into the company of ill men, and had brought him to that condition. Would you (say I) hazard your life, only to live? You should have brought down your mind to your fortune, and endeavoured to have been content with your condition, for nothing runneth gentlemen into ill courses like a mind above their con- condition. I need not ask your religion, I suppose you are a Papist. He answered he was brought up in the Roman Catholic Religion, yet never had a good opinion of the Jesuits, for they are, said he) an order of men, who, for their meddling with government, are ill thought of in all parts of the world. Their principles, (said I) do strangely influence their minds to be tampering with government; the pope's supremacy (of which they are the great upholders) must needs interfere with the power of the civil magistrate; and to keep up the authority of their church, they will ever be lessening the power of princes, but while they so contend for a superiority over kings, they bring a disparagement upon their religion; for any opinion in religion that encourages the subject to attempt against his prince's, either person or government, is false and antichristian. He wept on and said, he ever held the bond of allegiance indissoluble, and had subscribed that position, that no power, either spiritual and temporal, could dispense with the duty of allegiance. I asked him, whether he had ever taken the oaths; and he answered, he quitted a lieutenant's commission, because he refused to take them.

Yet (he said,) he was in a good measure satisfied, he might lawfully take them, for he had the opinion of some learned men about them; and particularly of an acquaintance of his, a doctor of Sorbon, and canon of St. Bennets in Paris, who told him, the oath of supremacy might lawfully be taken by all the catholic subjects of the king of England; it was no more than what the catholic church of England had done, before they were forbidden by the pope's order; which order, being but a private order of the pope's and not of a general council, was not according to the canon, and therefore of no force.

Why did you not, said I, take the oaths, seeing you was so well satisfied about them? He replied, it was the test that went more against him than the oaths; beside, I was advised, said he, by a person of quality, not to take the oaths; and he gave me this reason for his advice: That so long as I was not obliged to the king by oath, I might act against him with the more freedom. That, said I, was a special friend to the government: But you say, it was the test went against you. He said, he would not be compelled by an act of parliament to declare his opinion of the Sacrament of the body and blood of Christ. Points in religion, he said, were not to be determined in parliament. My answer to this, was, That when the bishops and those of the clergy of the convocation, commanded by the king's writ, have met, and consulted, and are agreed in a point in religion, it is afterwards brought into parliament to receive a civil sanction. If I could, said he, be satisfied about the real presence, I could come up to all things else in the church of England; as for the word transubstantiation, I do confess, I never understood it. Sir, said, I this is not a time for you to puzzle yourself about difficulties in religion, your business is repentance; yet for your better satisfaction, I will turn you to a short answer in our church catechism: Where the question being asked, What is the inward part, or thing signified by the outward elements? Answer is made, The body and blood of Christ, which is verily and indeed taken and received by the faithful. Endeavour to understand these words in their proper sense, and you need trouble yourself no further. As you cannot, without offering violence to both your reason and your senses, believe the elements upon the words of consecration, to be turned into the natural body and blood of Christ. So not to believe Christ to be present in that Sacrament in a more especial manner than many do, that talk of sym-

bols and figures, naked elements, is a mean opinion, and unworthy the greatest mystery in the Christian religion: The body and blood of Christ is verily and indeed taken and received by the faithful. You and I will not dispute the manner of it at this time. I enquire no further, said he, I will receive the Sacrament of you before I die, and the Lord fit me for it. Amen (said I;) and since you have made this resolution of your own accord, you must give me leave to mind you of it. He said, there was nothing hindered him from receiving, but the disturbance he was in, for the absence of his wife and friends; he could give no directions concerning his poor wife and children, and until he had seen his wife, and disposed the affairs of his family, and thereby settled his mind, he durst not receive. I told him, he must not discompose himself; the seeing his wife was not his great concern, he must prepare to die, and if he were not fit to receive the sacrament, he was not fit to die: Wherefore, said I, you must needs lay aside all thoughts of this world, and prepare for another, you must examine yourself, and set your sins in order, and lament the follies of your past life; the work you have to do is great, and your time is but short, and you stand upon the very brink of eternity; and if you neglect, or be not sincere and hearty in what you do now, you are lost and undone for ever.

Here Mr. Fitzharris began to be very much moved, and fell a weeping, and said, he would deal ingenuously with me; he thanked me for my admonitions, and falling upon his knees begged of me to hear him; for he was resolved, he said, to give the world satisfaction. I lifted him up, and desired him to keep his chair. Sir (said he) you are a stranger to me, and to my knowledge, I never saw you before in all my life; yet the good opinion I have of you, that you deal faithfully by me, shall oblige me to say that to you, which I have refused to say to others; I will declare to you all that I know of public matters. Mr. Fitzharris, said I, I have no orders to hear you in those matters; I come to you as a divine, as a guide to your soul, to help your devotions, and to complete your repentance; I am not a fit person to whom you should declare yourself in things of state; you have had some of the greatest ministers of state with you, who came to you on purpose to have you declare your mind; they were the fittest persons to whom you should have done it; they could have served you, I cannot; I can give you no hopes of life, whatever you declare: Let me desire you to send for them again, I will go to them from you, and acquaint them, that you desire they would come to you once more, and you will speak your mind. No, said he, they are great men, and I dare not to speak before them; beside, what I shall declare, is for the discharging of my conscience, and not out of hopes to save my life by it; I do not believe the king will pardon me; and those assurances that have been given me from others have made me obstinate; I have been made believe all along that I should be brought off; but I see, now it is too late, that I have been deluded; and to declare to the king's ministers would be to no purpose, I shall not save my life by it; yet, if you will hear me, I will declare the truth, and you may acquaint the king with it; for they are things of consequence, and such as concern the good of the king and kingdom. Well, said I, if you are resolved to declare, I am obliged to hear you, and if they be things of moment, I can do no less than let the king, or some lords of the privy council know, what you declare; but as for any hopes to save your life, I can give you none: It is towards evening, and I have neither pen, nor ink, nor paper; I will take my leave of you for to night, and will be with you (God willing) again in the morning; a good night to you, and I pray God be your comfort.

Saturday June the 18th, about 10 o'clock in the morning, I went up to Mr. Fitzharris again; and after some discourse concerning his hopes of a better life after death, he began to declare, how he had been employed to find out libels and things of that nature against the king; as you have it in his confession; and he further declared how Mr. Everard methodized and put the libel for which he suffered, into form, and writ it fair; and when he came to Mr. Everard for the libel, he scrupled delivering it, unless he could be secured, Mr. Fitzharris would not betray him: So Mr. Fitzharris left part of the libel (mentioning those eight heads, he said, he had of ———) with Everard as a pawn for his fidelity then Everard gave him the libel, perfected, and fair written with his own hand; and Fitzharris said, he went presently to court with the libel, but could not deliver it that night: In the mean time sir William Waller, whom Everard had made privy to the secret of the libel, with an intent to discover Fitzharris, goes to a secretary of state, and informs against him, as the author of the libel, who is thereupon ordered to be taken into custody, and being brought before a secretary of state, and examined; after some interrogatories, he took sir William Waller aside, in the secretaries chamber and told him, that if he designed he should accuse the ——— he was mistaken, he would run any hazard before he would betray friendship. This I took in short notes, as he spoke it, and then repeated it to him, and asked him, whether I understood him right, and charged him to say the truth, as he would answer it to God, and he protested it was true, and I have it under his hand. What he declared next, was the design to seize the king; of this he spoke often, and said, when they (the party he always called them) had seized the king, they would have obliged him to call a parliament, which should sit until the bill of exclusion against the duke was passed; all evil counsellors removed; and men of their chusing put into places of trust; the militia settled, and the navy put into good hands; all grievances redressed, and all things ordered to their own liking: And had this de-

sign succeeded, he said, the bishops and others of the clergy would have suffered severely. The party that were engaged in this design, he said, were men of interest, and had 60,000 men at command, at very short warning: Besides the encouragement mentioned in his confession, he told me, that himself was to have had a company of foot, Heyns a company, and one John O'Neil a company; and a person whose name he purposely concealed, was to have had the command of a man of war. This I likewise writ down, and repeated, as before; and this way I took in all that he declared unto me; and then I demanded of him to speak as a dying man whether this that he had declared, concerning the design to seize the king, were true, and he called God to witness, that it was every word true.

Then he went on, and declared what happened to him while he was in Newgate, how the secretaries of state came to him to examine him; and how he was carried to Whitehall to be examined before the king about the libel: He told me likewise all that passed between Mr. —— and himself; that Mr. —— brought him instructions, first, by word of mouth, and afterwards in writing, from persons whom he named; and that he pressed him hard to confirm the instructions: he said moreover, what encouragement he gave him, if he would confirm them; that certain lords and commoners, about 40 in number, met that day at a club in the city, in order to the drawing up an address unto the king on his behalf; and that they would use their interest when the parliament sat, to get him restored to all his father's estate in Ireland, with the profits thereof since his majesty's restoration: I, said he, considering the condition I was in, in Newgate, fettered, moneyless and friendless, and could see no refuge for life, but by complying with them, desired to be examined again by the secretaries of state, but I was still loath to say any thing that might be prejudicial to any man: After this, he was examined a third time by the secretaries of state, at which third examination, he said, he spoke several things which he had from others; as what father Gough, father Parrey, and the marquis Monticuculi said, concerning the king's being to be destroyed, and the Roman Catholic religion to be established in England: But the marquis, he said, did not impose any oath of secrecy upon him, nor did he engage to kill the king; but he spoke very unworthily of the king, and said, it were no matter if the king were made off. Then he told me, how Mr. —— came to him, with a token from ——— and the token was this, Tell Fitzharris, that I, —— to Mr. —— spoiled a certain lord's going into the withdrawing room at Whitehall, by saying, he spoke against the queen; I forbear to mention the lord's name, out of respect to his lordship. The use of this token was to assure Fitzharris, that —— and Mr. —— were acquainted, and that the instructions he brought him came from ——.

After this, he declared, how sir [illegible] —— came to him to examine him; [illegible] said, did not stay long; he only asked [illegible] few questions, and bid him recollect [illegible]; but sir —— was with him about three hours, and was earnest with him to speak to several heads, chiefly to the murder of sir Edmundbury Godfrey; and when he came to this of sir —— swearing at him, I said, surely sir —— would not swear: But he answered, that he did swear those very words mentioned in his confession; and he vowed it so amazed him, to be hectored to speak against his conscience, that he wished himself dead rather than live to be so used. When I had taken this in writing, I read it to him, and he affirmed it to be true, falling down upon his knees, and wishing he might never see the face of God, if all this that he had declared to me were not true.

He declared several times, that he was sorry with all his heart for what he had said against the queen and the duke, and sworn against the earl of Danby; what he deposed against the earl of Danby, he said, he was put upon it, and it was purposely designed to stave off his trial until a parliament; and he desired me when I saw the earl of Danby next, to tell his lordship, he humbly begged his lordship's pardon for the wrong he had done him. I complied at the first, said he, with them merely to save my life, and not being then upon my oath, I did comply; but withal considered, that before they could make use of me as a witness, they must procure my liberty, which so soon as they had done, I was resolved to have made my escape beyond sea, and to have sent over a public declaration, that all that I had declared in that examination (which was published in my act, when nothing was more against my conscience) was purposely to save my life. And he said, he would have retracted publicly what he had said against the queen, and the duke, and sworn against the earl of Danby.

Then I took my leave of him for that time; and the same day June the 18th, I went to Windsor to acquaint the king or some of the lords of the privy council with what Fitzharris had declared to me; and at my lord Conway's lodgings, I related to his lordship, to my lord Hyde, to Mr. Seymour, and Mr. Secretary Jenkins, all that he had declared; and the next day June the 19th, I related the same again to the king: Before I was dismissed, I humbly desired directions what I should do; The king was pleased to say, he would give no directions in such a case; but Mr. Secretary [illegible] advised me to assist Mr. Fitzharris, as a divine, and if he said any thing more, to take notice of it, and acquaint them with it. So on Monday June the 20th I returned to the Tower, and as soon as conveniently I could, I went up to Mr. Fitzharris, who had sent for me often in my absence. I asked him how he did, and prayed God be his comfort; and gave him an account of my journey to Windsor.

Upon Tuesday the 21st of June, in the af-

ternoon, Fitzharris writ the substance of what he had declared under his own hand, which occasioned my going to Windsor a second time, to deliver that paper to the king; in the close of that writing, Fitzharris begged mercy of the king, but withal said, while he was writing, that he did not do it with hopes of having his petition granted, for he was sure, he said, the king would not forgive him, yet he would not omit to ask pardon. His majesty rejected the petition; and so I returned June the 23d, and let Fitzharris know what I had done in this matter. When he understood the king's answer to his petition, he said, he hoped God would forgive him; God's will be done, he was not afraid to die.

Then we discoursed of things of another nature, and such as concerned his soul, and we went to prayers; and from day to day, I was with him twice or thrice in a day, sometimes an hour and sometimes two at a time, and some days, I scarce went from him, from morning until night. In his repentance he was free and open hearted to tell me the sins of his constitution, and such as by his nature he was most prone to; he shed an abundance of tears daily; and in his devotions he was very earnest; he made often confessions of his sins to God, and was continually turning the penitential Psalms into confessions. There was one thing undone, and which, I desired by all means, he would do, and that was to receive the sacrament; I frequently minded him of it, and he would say, there was nothing he desired more, but he must dispose of the business of his family first; and ever when I put him in mind of receiving, he made me this answer; and his wife not coming to him, but once (and then she staid not long, and in company of the warders) until the night before he was executed, he did not receive at all; on the morning of his execution, he said, he hoped God would accept the will for the deed, for his desire all along was to receive.

One day as we were sitting and talking together of the matters contained in his confession (for he talked daily of them) he desired me to give him a piece of paper, on which he writ this passage. That captain Cheek told him before Dr. Burnet, that he would appear a witness against him, on the behalf of ——; that he told him in the boat, that he could say nothing against —— as to the libel, but could sufficiently in other matters; I cannot, says he, charge my memory, that I said such a thing; but suppose I did, I did not design to impart my mind to him, neither did I understand the libel and the heads —— gave me, to be the same thing.

Upon Friday, June 24, he was saying, how the queen, R. H. and the earl of Danby were the persons chiefly aimed at; and, said he, Mr. —— told me, that prince Don Mario Pluti, a prisoner in the Fleet, would appear a witness against the duke. And Fitzharris said, that to his knowledge Heyns was tampered with to come in against the queen, the duke, and the earl of Danby. And he told me, how a considerable person of his acquaintance, whose name he mentioned, said to him, I prithee Fitzharris find me out men that will swear the murder of Godfrey against the duke; and, said he, to comply with his humour, I answered, there are men if there were money; the person replied, find me the men, and the money shall not be wanting.

And at another time, the same person declared to Fitzharris, in the presence of two other persons, that he would not stay a day longer in England, than he could fire a pistol at the duke, if he were sure the duke were to come to the crown. This Fitzharris told me the same day June 24.

He told me moreover, that a Paper of instructions was put into his pocket in Westminster-hall, wherein he was bid to speak boldly and not to spare the greatest (meaning the king) if he were present; and if he did not speak against the queen, R. H. the lord Powis and his lady, lord Arundel, lord Bellasis, lord Peters, lord Danby and the lord Peterborough, all his friends would forsake him: This paper, he said, was under-writ by his wife, with these words: My dear, these instructions come from your solicitor: and, he said, he believed, they are written with his hand. Upon Sunday, June 26, in the evening, Mrs. Fitzharris and her maid came to see him, and I was with him at the same time; when I asked Mrs. Fitzharris where that paper of instructions was? And she told me, she knew where the paper was, and could produce it; I desired her to take care the paper were not lost, but might be forthcoming when there might be occasion for it.

Upon Monday, June 27th, he told me, that while his wife was with him overnight, she had whispered him, how a certain person (whose name he gave me) had been with her, from a great lord (whose name also he mentioned) to desire her, to persuade him, to say nothing when he came to die, and they did not value what he had said to me elsewhere; and if she could persuade him not to declare any thing against them when he came to be executed, they (the party) had promised to continue their allowance to her of three guineas a week, and to make her the same present of three hundred guineas (that was the sum he mentioned to me) on the day of his execution, which should have been made him on the day of his trial, had he been acquitted. Mr. Fitzharris desired me to acquaint Mr. Secretary Jenkins with this, which I did, and to move Mr. Secretary, that the place of execution might be appointed somewhere near the Tower, for he was loth to be put into the hands of the sheriffs, and said, he feared, they would endeavour to make him unsay all that he had said to me; but he would never do it, yet he did not care, he said, to be tempted to it by them.

Upon Wednesday, June 29, he desired me to let him write a letter to his wife, which he would leave with me, seeing he did not expect to see her any more; so I furnished him with

a sheet of paper, and he writ a long letter of directions to his wife, how he would have her dispose of herself and her children; the letter begins thus: My dear, having no hopes to see you, which you may be sure makes my condition distracted enough, I submit to God's will, he knows what is best, and so forth. About the middle of the letter, he writes: I thought you might have obtained that my body might not have been broken, but now I have no hopes thereof. And in a Postscript, he tells her, that the doctor, meaning myself, and Walmesley, one of his warders, were to go with him to execution; and he desires her, not to let his poor dear mother know that he came to such an infamous end; and he begs his father's and his mother's blessing. This letter, I desired Mrs. Fitzharris, that I might keep it to compare hands with his confession, if there should be occasion.

Upon the same day, June 29, and not before, he writ his last confession, in the form and words in which it is published; and that is the true, whole, and only confession, written with his own hand, that he left with me at his death. When he had writ it, I found he had omitted several things which he had before declared unto me; I would not prompt him, nor would I ask him to alter, or put in a word into the whole confession; he would often say to me, his confession would injure his poor wife and children; the allowance, he said, would be withdrawn, and she would lose those who were now her best friends.

The same day, in the evening, he sent for me, almost as soon as I was gone from him, and when I came to him, his business was to tell me, he heard there was a new prisoner come into the Tower, whose name was Rouse; he said, he did not know the man, but his wife had sometimes spoke of him, that she had received money of him, both for her own, and for Heyns's use.

Upon Thursday, June 30, I was with him most part of the day, which we spent in prayers, and discourse concerning another and an eternal state; in the evening his wife and his maid came to him from Hampton Court, and told him how unsuccessful they had been in all their endeavours to save his life; the ill news made him weep at the first hearing, but he soon cleared up again, and said, God's will be done.

July 1. The day of his execution, I was with him early, and we went to prayers, and he prayed earnestly, and wept extremely, and earnestly desired me to give him the absolution of the Church of England, which I did; and afterwards we talked together, of the manner of his death; I encouraged him to go to his execution, both like a man, and a good Christian.

Between the hours of seven and eight in the morning, I proposed to him the signing his Confession, and said, Mr. Fitzharris, we are about to call in witnesses to your confession; before we do it, I do charge you, as you must suddenly answer it to God, that you tell me whether the matters in your confession be true, or whether you have invented them with a design to save your life; if they be things which you have thought of merely to save your life; instead of calling in witnesses to the truth of your confession, I desire they may be called in to hear you retract it, and do you declare before them, that what you have said to me, and with which I have acquainted the king, were things invented to save your life; but if they be true, then let the witnesses hear you own the truth of them. He was a little concerned that I should question the truth of what he had declared, and said, Sure you do not take me for so great a villain, that I would tell lies just as I am going out of the world. I must confess, nature doth incline me to wish I might have lived, yet whether I were to live or die it is all one; my confession is true in the words of a dying man; and this I protest in the presence of Almighty God, falling upon his knees. Then I called in the three witnesses, which attest his confession; and he protested and declared before them, That he had made his confession freely, without any promise made, or hopes given him to save his life; he also signed his confession and delivered it to me as his act, in the presence of the said witnesses, as appears by their oath since made before the lieutenant of the Tower.

'Memorandum, that the 11th day of July, 'in the three and thirtieth year of the reign of 'our sovereign lord king Charles the 2nd, &c. '1681. James Walmesley, and Edward Pattle 'two of the yeoman warders of his majesty's 'Tower of London, and Mary the wife of the 'said James Walmesley, came before me Thomas Cheek, esq. Lieutenant of the said 'Tower of London, and one of his majesty's 'justices of the peace of the county of Middlesex, and made voluntary oath, as followeth, 'viz. That Edward Fitzharris, esq. late prisoner in the said Tower, on Friday the first of 'July instant, between the hours of seven and 'eight in the morning, did in the presence of 'these deponents make this protestation following. I Edward Fitzharris do declare and 'protest unto James Walmesley, Edward Pattle, 'and Mrs. Mary, that I have made this my 'confession (holding it in his hand) unto Dr. 'Hawkins freely and of my own voluntary 'a conf. without any promise made or hopes 'given me by him from the king, of saving my 'life by this confession. And then he signed 'his confession, and delivered it to the said Dr. 'Hawkins, as his own act. And more say not.

'THO. CHEEK.'

'Memorandum, That the day and year 'first above written, the said James 'Walmesley, Edward Pattle, and 'Mary Walmesley took the aforesaid oath, in the presence of us,

'T. HAWLEY, O. REYNOLDS.'

When he had made this Declaration and signed his Confession before these witnesses, he called for a glass of wine, and drank one glass

to me and to the witnesses, and said, I thank you for all your kindness; I have nothing more to do, but to die.

About half an hour after came his wife and his maid, and he told them he had signed his confession, and that I would give them a copy of it, if they desired it. His wife answered, 'My dear, what shouldest thou trouble thyself about confessions, thou art basely betrayed; thy life is taken away; I have done all that I could to save thy life, but to no purpose.'

Something after nine o'clock, he was guarded out of the Tower, and delivered to the sheriffs of London and Middlesex at the bars on Tower-hill. I accompanied him thither, and offered to go with him on the sledge; he said, it was enough that I would meet him at the place of execution, which I did; and when he called for me, I stepped on the sledge to him, and said a prayer for him; then we went up into the cart together, where he kneeled down, and desired me to give him the absolution of the church of England.

Then the sheriffs spoke to him to declare his mind before he died; He answered, that what he had to say, he had left with me. They pressed him again to speak there at his death, for they knew not, they said, what he had left with me. Then he began to say how he had been employed to find out libels against the king, and was at a stand, and referred the sheriffs for the rest, to what he had left with me. This moved the sheriffs a third time to desire him to speak; Mr. Fitzharris asked me whether I had his short speech about me? I produced the speech and he read it, and gave it to me again. The sheriffs said the speech was theirs, it belonged to them. I answered, Mr. Fitzharris had given it to me; and he seconded me, and said, he had given his speech to me, and they might have a copy of it; which they had before I came away. And because Fitzharris had in the close of his speech, referred the people to something more which he had left with me; the sheriffs were earnest to know what it was and where? I told them, they were papers which probably were not in my power to produce. I had them not about me, but they should be delivered to whom they did properly belong; and for that Fitzharris had mentioned his Confession left with me; and I having notice before of the design to stifle his confession by his not owning it at his death, desired him to declare whether all that he had left with me were true? The sheriffs seemed to be much concerned, that I should put this question to Fitzharris, and said, I had nothing to do to put questions there, nor should I. I urged again, shall I not bid the dying speak the truth? Mr. Fitzharris turned to me and said, Yes, it is true. Then I took him by the hand and recommended his soul to God, and so took my leave of him; I went down from the cart and stood close by it. When Mr. Bethel said, Mr. Fitzharris you declared when you were in Newgate, that you knew more of the Popish-Plot than any man, you ought to say what you know before you die. He referred the sheriff to what he had left with me. Then Mr. Cornish spoke to him and said, Mr. Fitzharris, if you know any thing that may save innocent blood, you ought to declare it. He referred Mr. Cornish likewise to what he had left with me. Then Dr. Martin asked him if he died a Protestant, and bid him declare his religion. He referred the doctor also to what he had left with me. He asked whether his body were to be broken. Mr. Cornish read the warrant. Mr. Fitzharris desired me to take care of his body; I answered the employment was very unbecoming me, there were others appointed to do it. He prayed —— to continue their kindness to his poor wife and children; his last words were, I desire your prayers for an happy passage.

Truth Vindicated: or a Detection of the Aspersions and Scandals cast upon Sir Robert Clayton and Sir George Treby, Justices: and Slingsby Bethell and Henry Cornish, esqrs. Sheriffs of the City of London, in a Paper published in the Name of Dr. Francis Hawkins, Minister of the Tower, intituled 'The Confession of Edward Fitzharris, esq.' &c. The Copy of which Paper is herewith printed for the Reader's clearer Judgment in the Case. London: Printed for Rich. Baldwin, 1681.

OUT of a just care that the Protestant Religion and interest may not suffer, nor our own reputations be blasted by the most odious scandals causelessly cast upon us in the execution of our several offices, we are constrained to make known unto the world the abominable falsehoods and fictions of that pretended Confession of Fitzharris, published by Dr. Francis Hawkins, minister of the Tower.

We could not indeed suddenly resolve whether it were needful to open the villany of that paper, in regard it carries in its own forehead so many evident marks of malice and falsehood to every observing man that knows what happened about Fitzharris.

But having heard that some have been deceived by that paper, and induced to believe that it was written by Fitzharris, *bona fide*,

from some compunction of conscience or sense of obligation to reveal the truth at his death, we hold it our duty to discover the Popish practice and contrivance in the forming and publishing that pretended Confession.

The poor deluded, timorous wretch consenting perhaps to the wickedness, whilst he was persuaded it should save him from the gallows, though he was conscious to himself, that the matters pretended to be confessed were a parcel of falsehoods invented to serve base designs; the whole paper having no face or appearance of a dying criminal's open-hearted confession of his sins, nor any expressions of remorse of conscience for them. No more notice is taken of any of those (too well known) debaucheries and wickedness of his life, than if he had lived like a saint or angel, no acknowledgment or mention is made of those odious repeated perjuries to the secretaries of state, to sir Robert Clayton, &c. and to the judges of the King's-Bench, of which he must have known himself to be guilty, if he had thought this pretended Confession to be true. There is nothing in it that looks plain, clear and natural, as seriously intended to discharge his conscience, and satisfy the world about the matters formerly sworn by him, and published by authority. If any such purpose had been really in his heart, like a true penitent sinner, he must naturally have descended to the particulars of what he had sworn, and have declared to the world, whether his ghostly father, Gough, did really tell him in the year 1672 (as he had deposed) "of the Papists designs to bring the duke of York to be king, to restore popery, and of killing the king to make way for it." He could not but have confirmed or denied the truth of his oath, That his other ghostly father Parry, (the Portuguese embassador's confessor) told him in 1678, "That a council of Roman Catholics had resolved, that seeing the king failed in the expectations they had from him, he should be destroyed, and that the business was near, and he should soon see it done." If his conscience had been to be unburdened in this confession, he could not have forborn to say clearly, that he deposed truly or falsly, "That the marquis Montecuculi in 1679, swore him first to secrecy, and then offered him 10,000*l.* to kill the king either in his own person, or by any other."

And if this pretended Confession were conscientiously taken by Dr. Hawkins, as from a penitent sinner whom he absolved from his sins (as he says) he could not be so negligent or ignorant in his priestly office, or so false to the king and the religion he professes, as not to exhort the sinner when he seemed to retract what he had sworn before, to confess the truth in matters of such concern to the life of the king, and the being of the Protestant religion, and the public justice of the kingdom, knowing that his Confession about those things had been published to the whole world.

But this Paper shews itself, when duly examined, to be a studied artificial contrivance to cover the Popish treasons, without an impudent direct forswearing the particulars that have been evidently proved, and a design by equivocations and sly insinuations mixed with downright falshoods and fictions, to persuade the world that there are amongst the Protestants abominable practices of subornation of perjuries against the Papists, wicked conspiracies against the king, queen and duke of York, and vile designs against the Lords of the council. We doubt not but time will discover how, and by whom this pretended Confession was modelled and put together, and how long it was upon the anvil to fashion it, and how the miserable man was prevailed upon to give a seeming consent to it, against the dictates of his conscience, with hopes to save his life by serving such designs, though he was seemingly to renounce those hopes, to make himself the better to be believed.

For the present, let it suffice that we anatomize this Mock Confession, and shew its shameful falshood out of its own matter and form.

It is to be observed, how he begins his Confession; not like a man that had before confessed upon his oath many Popish treasons and designs against the Protestants, their religion and lives; and from whom (being now attainted of treason) was to be expected a clear account of all the Popish intrigues he knew: but without apology or preamble, he tells the world, believe it who can, "That the treason of the libel whereof he was convicted, came from a Protestant, viz. the lord Howard; and that he was no further concerned in it, than as he was employed to give the king notice of such libels, which he was wont to do by Mrs. Wall, the lady Portsmouth's woman."

But the conscience of this poor wretch could not but witness within him, that he had often protested before God, that the lord Howard knew nothing of the libel, and that he had bitterly complained sometime to sheriff Cornish, and sometime to sheriff Bethel in Newgate, that he was pressed with the powerful argument of saving his life, to accuse my lord Howard and my lord of Shaftesbury of the libel; and that he was so importuned thereunto, that he was forced to down of his knees, and beg that he might not be further pressed therein, the lord Howard being innocent of it, and the lord Shaftesbury being such a stranger to him, as he had scarce ever spoke to him: adding with great asseverations, that if it were to save his life, he could not be guilty of so base a villany; but would rather die than accuse the innocent. What large offers were also made to some of his friends, to persuade him to accuse the lord Howard, may hereafter be proved. He also knew (as many thousands do) that the evidence given at the King's-bench, upon his trial, was full and clear, That he provided and furnished all the matter of the libel, and dictated other parts of it, and that it was drawn into form at his request, and for him. And himself confessed he shewed the papers of the libel to the lord Arran. But per-

haps the miserable man was deluded to think his life might be saved, by accusing the Protestants, and excusing himself as a spy upon them. Therefore he next proceeds (in his sham Confession) to a Protestant Plot, viz. "That the lord Howard told him of a design to seize upon the king's person, to carry him into the city, and there detain him till he had condescended to their desires; and that himself and Heyns were privy to the design."

Here is a wonderful tale of a Protestant Plot between two Irish papists and a Protestant lord; one English sheep in conjunction with two Irish wolves, to hunt and pursue the same prey, and this is told, to be believed and swallowed like the articles of the Popish faith, without chewing or asking question about the particulars, or the probability or possibility of the thing.

Doubtless, if those words have any sense in them, viz. "by detaining the king until he hath condescended to their desires," it must be meant, until he hath passed acts of parliament, or laws suitable to the Protestant desires.

Surely the inventor of this, never considered that such a design was of a thing impossible, unless the parliament did concur and act in such a treason, and prepare and frame their desires into bills for that purpose; and unless the government, and also the force of the city did join with the parliament to detain the king in custody for the same ends; and doubtless it was an absolute impossibility to know the mind and sense of a parliament before it had a being; and another, to understand the resolutions of the vast body of the city in a matter never propounded to any of their assemblies. Yet this sham Confession hath the confidence to say, that Heynes and Fitzharris were privy to this design, and had several meetings with the lord Howard, and particularizeth the revocation of the act for the settlement of Ireland, as one of the acts that was to be passed in the execution of this design.

Yet there is nothing of circumstance, or particular, pretendedly discovered to induce the weakest of men to believe it. If this counterfeit confessor were privy to such a design, and met to consult it, he must certainly have known what forces were thought of to master the King's Guards, and who was to command them, and out of what ground they were to spring up in a night, like mushrooms, and which of those newborn regiments were to carry the king prisoner to London; he must have also heard who were to prepare and prevail with the members of parliament to pursue this design. Fitzharris and Heynes, two Irish papists, and neither of quality, parts, estates, or interests, were doubtless well chosen instruments, to apply to the members of parliament, to revoke the settlement of Ireland, and were likely to be admitted into secrecy with them about this design and treason.

We ask pardon that we cannot speak more gravely of this matter, this feigned discovery of a Protestant Plot being more ridiculous than the birth of the mountains; and for that reason, we think it needless to relate the frequent protestations made by Fitzharris, that he knew nothing of any design of the lord Howard against the king or government: this very Confession itself, when examined, being the clearest evidence of its own wickedness and folly.

Now this Mock Confession having told this vain story of a design against the king by the Protestants, he applies himself in the next page, by false insinuations, to persuade the world, in effect, that there was no Popish Plot, and that the Protestant officers and magistrates have wickedly endeavoured to suborn him, to make a Confession that might confirm a Popish Plot.

He declares, that in Newgate, the sheriffs Bethell and Cornish, came to him with a token from the lord Howard, which he knew to be true, and told him nothing would save his life, but discovering the Popish Plot, and gave him great encouragements from the lord Howard, that if he would declare that he believed so much of the Plot as amounted to the introducing the Roman Catholics, or if he would find out any that would criminate the queen, royal highness, or make so much as a plausible story to confirm the Plot, that the parliament would restore him to his father's estate, with the profits thereof since his majesty's restoration.

We have no way left us in nature to evince the falshood of this whole story, but by circumstances, or the testimony of such as were present when the sheriffs were severally with him, or their own averments upon oath, which they are ready to give, that all those particulars are false and groundless inventions.

It is so far from the least appearance of truth, that the sheriffs went to him with a token from the lord Howard, that they will severally depose, that they never saw or heard from the lord Howard in any kind, whilst Fitzharris was in Newgate; and capt. Richardson and the keepers can witness that they never came together to Fitzharris, or discoursed him together, or were in Newgate at the same time whilst he was there, save only that sheriff Bethell on the 10th of March was coming out from Fitzharris, when sir Robert Clayton and sir George Treby, with sheriff Cornish were coming in to examine him; but sheriff Bethell made then no stay, but left them forthwith; nor did he ever see Fitzharris in his life, until Wednesday the 9th of March last, which was four days after he had made his first confession of the Popish treasons to the secretaries of state, the same in substance with that, printed by order of the Commons in parliament; and sheriff Bethell had not then come to Fitzharris, if he had not sent to him the day before to desire to speak with him.

Sheriff Cornish likewise never saw Fitzharris, until Sunday the 6th of March which was after the Secretaries of State's first examination of him, and he then discoursed him

only in the presence of captain Richardson, who can testify the falsehood of those suggestions, that he pretended to come from the lord Howard with a token, &c. And can prove that sheriff Cornish chiefly advised him to make an honest true confession about the libel, and its authors and abettors; but Fitzharris of his own accord and motion, told him, that he had known the proceedings of the Popish Plot for seven or eight years, and that he could make great and considerable discoveries, wherein his majesty's life was still in danger, for that the grand Plot (so he called it) was still carrying on. And further said, that he could discover considerable things about the Popish Plot, and Godfrey's murder, not yet discovered. Then he desired sheriff Cornish to take his examination, who told him, he could not, for he was not in the commission of the peace: then Fitzharris prayed him to send a justice of the peace to him, but sheriff Cornish forthwith applied himself to his majesty, and acquainted him with the discourse herein related; and thereupon, Monday March the 7th, the Secretaries of State and the king's Attorney, came and examined him a second time, and the next day a third time, before sir Robert Clayton and sir George Treby ever saw his face, their examination of him being taken on Thursday March the 10th; so that neither of the sheriffs, or the city justices ever spake word in private with Fitzharris until he had been fully examined at three several times by the Secretaries of State, and before them sworn to the substance of all his printed examination.

We hope from these matters of fact which are here truly related, it will appear to be a wicked device in the mock confession, to insinuate most falsly to the world, a consultation and confederacy between the lord Howard and the sheriffs (who never saw nor heard from his lordship in the case) to suborn Fitzharris with promises of rewards, mixed with threats, to confess the Popish Plot, or to put him upon charging the queen, his royal highness, or any man else, as is suggested.

But the stupid folly of this false tale, if considered, may be alone sufficient to render it worthy of no credit, in that it makes the sheriffs so void of understanding, as to have thought a declaration from such a wretch as Fitzharris, of his belief of the Popish Plot to have been of great value, and that it was worth a high reward for him to have invented a plausible story to confirm the Plot, after the villany of it hath been declared in so many Proclamations of his Majesty's, the votes of four successive parliaments, and sentences of death given against the Popish Plotters in all the highest judicatures of the kingdom.

Who but Dr. Hawkins could have had faith enough in such a story, to suffer his pretended penitent (as he did) to renounce before him, all the mercies of God Almighty, if it were not truth?

With the like falsehood in the same paragraph, the sham confession chargeth the sheriffs to have brought heads with them from Everard, to have accused Fitzharris for a Yorkist, put on by the king to put the libel into Protestants' houses to trepan them; and Fitzharris denies that he knew of any such thing.

We could not have easily thought the heart of any man so vile, to have formed out of nothing this horrible slander; but the wicked intent herein is not hard to be discerned.

If the king can be induced to believe it, the popish ends are compassed; he must needs be highly incensed against the sheriffs: and if he should think (as it is insinuated) that they did it by consent with other Protestants, his royal heart must pass severe censures upon them, and be jealous of base designs against him. And if any artifice can prevail upon his majesty to distrust the loyalty of any number of his Protestant subjects, it is matter of triumph to the Popish party and their adherents.

Other wicked uses of this slander, might be to blunt the edge of the evidence given upon Fitzharris's trial, about a trepanning use intended to be made of the libel, and to make the world believe, that he was a wretched counterfeit, when he desired the sheriffs, as they came severally to him (with seeming uprightness and sincerity) to advise my lord Shaftsbury, and other members of parliament from Fitzharris himself, to take heed to their pockets, for that there was a design to slip treasonable papers into them, and then seize them, whilst they had them about their persons.

The next business of the Mock Confession is, to persuade such as will be deceived, that the confessions he made about the Popish Plots, and Godfrey's murder, were altogether false, and forced from him by the sheriffs. "I" (saith the Paper) "finding myself in Newgate, fettered, moneyless, friendless, and I could see no other refuge for life, but complying with them" (i. e. the sheriffs) "so to save my life I did comply."

This looks something like the practice of that infamous Popish midwife, Mrs. Celier, who attempted to cozen the world into a belief, That the Protestants, upon false accusations, cast some innocent papists into Newgate, and there tormented them in irons, and otherwise, to extort false confessions from them of a Popish Plot.

But the truth will be attested by many witnesses, that Fitzharris was never fettered, or put into irons, or harshly used whilst in the sheriffs' custody; but on the contrary, treated with all the civility his case would permit, and so he declared at the gallows; and thanked the sheriffs even with his dying breath, when he ought to have expressed just indignation against them, (and a dying, repentant sinner could not have forborn it) if he had thought (as this sham confession says) that they had forced or persuaded him to defile his conscience with so many perjuries, and to blot the names of his ghostly fathers, and whole popish party, and many great persons with so many black treasons and other crimes.

And it will be as evident from circumstances, that there was no more force put upon Fitzharris's mind by the sheriffs, to procure his confession, than was upon his body.

The sheriffs jointly (as is said before) never discoursed him, and neither of them took any confession upon oath from him, or pretended to any power so to examine him, nor had it in their power to reward or punish him. Whatsoever this mock confession saith, Fitzharris could not think the sheriffs a refuge to save his life, whom he knew not to have power to save a hair of his head.

There is another invention in this sham confession as false and as ridiculous as any of the former, never dreamt of by the sheriffs, nor perhaps by any body else, save the inventors of it, till that vile paper came forth, viz. That the sheriffs brought instruction from the Lords and Commons (as they said) who met that day in order to address to the king in his behalf, if he should confirm the instructions: which must be intended surely, if he should swear as they would have him, that is, as the mock confession explains it, to the heads, which the examination taken by sir Robert Clayton and sir George Treby contains; and a great deal more relating to the queen, his royal highness, and the earl of Danby; declaring French pensioners, lords Halifax, Hyde, Clarendon, Feversham, Seymor and others; the burning the Fleet, Forts and Government in Popish hands, Meal-Tub Plot, Apprentices Plot, and these and many other heads Fitzharris is made to say, were brought him by the sheriffs.

Surely this was contrived to persuade the credulous papists in foreign countries, that the Lords and Commons were then sitting in parliament; and that the sheriffs consulted and confederated with them to suborn Fitzharris to be a witness of the popish plots and practices, which they had declared to the world; or at least that some Lords and Commons were privy and parties to the subornation of Fitzharris by the sheriffs, to swear as they should instruct him; and that those Lords and Commoners intended to use their interest with his majesty for his pardon, to make him, though false, their legal witness.

But as in truth there was no parliament sitting whilst Fitzharris was in the sheriffs custody, nor in ten days after, and the place of their sitting, is well known was to be at Oxford, and not at London; so there were no instructions for him to confirm, or swear to, either from Lords or Commoners, none of the heads mentioned, nor any others brought to him by the sheriffs, or either of them; no address for his pardon imagined, or thought of by either Lords or Commons, nor mentioned by the sheriffs or either of them; no meeting for any such intent, no discourse between the sheriffs and any man or men under the sun, about such an address; every circumstance of this hellish tale coming out of the forge of the father of lies.

Yet it may be this was thought an hopeful invention to take off from the credit of all the evidence given in courts of justice, concerning all the popish designs enumerated under those heads and instructions; and indeed it seems to be a crafty way, to throw dirt at all those solemn declarations made in parliament concerning the abettors of those popish and French designs, and the adherents to them, by whose countenance all their plots have been managed, that have so endangered the king and kingdom.

And though this false poisonous tongue seems to spit its venom directly at the sheriffs, yet it endeavours to do the greatest mischief to the king and the parliament, and to defame to the whole world all the late proceedings of parliaments against the popish plotters, and their favourers.

The mock confession goes on further to defame (if his tongue be a slander) sir Robert Clayton, and sir George Treby, justices of the peace for the city, darkly insinuating that they would have induced him to say more than was true, and plainly saying that what he deposed before them concerning Father Patrick, was forced out of him, and was not true; and he so represents sir George Treby's carriage in taking his whole examination, that he would have the whole thought to be of no validity.

But doubtless Mr. Fitzharris did not, nor could he possibly have believed himself, if he consented to have it written, that sir Robert Clayton, and sir George Treby dealt unfairly with him, or forced out of him either what he swore concerning Father Patrick, or any thing else of his confession.

He knew very well that they came to take his confession, not officiously, but upon his own earnest reiterated intreaty, at several times, to each of the sheriffs apart, that some justices of the peace might be sent to him, to whom he might make a full discovery of matters not before discovered in the Grand Popish Plot, (as he called it.) He knew also that they came not till Thursday in the afternoon, the 10th of March, and that he had been thrice examined by the secretaries of state, lord Conway, sir L. Jenkins, and the Attorney General, before sir Robert Clayton, and sir George Treby, ever saw him; and he was conscious to himself, that he had first sworn before the secretaries all that he would now retract concerning Father Patrick, as forced out of him by sir Robert Clayton, and sir George Treby, and the other matters also in substance, that are contained in his printed examination, by sir Robert Clayton, and sir George Treby, except that one passage in it about De Puy; and the whole House of Commons at Oxford are witnesses herein, That when sir George Treby read Fitzharris's Examination to the House, Mr. Secretary Jenkins declared, That he had before confessed the same in substance to the lord Conway, the Attorney General, and himself, except that about De Puy. Yet for what reason we know not, the contrivers of this sham retractation, or declaration, took no care to retract or excuse his swearing the same matters before the secretaries of state.

Perhaps, because those examinations were never printed, and scarce any foreigner, nor many Englishmen did know that Fitzharris had thrice sworn to the same confession in substance before the secretaries of state, which he did the fourth time before sir Robert Clayton, and sir George Treby.

Besides, it best answered the design of this sham confession, to conceal the first Examinations as much as could be, and to represent it to the world, as if sir Robert Clayton, and sir George Treby, had forced out of him the confession of all those popish treasons mentioned in his printed examination, as it was reported to the parliament. There is a trial of skill also for the same purpose in this mock confession to wrest some of sir Robert Clayton's, and sir George Treby's words from their honest sense wherein they were spoken, and to separate them from their other words, properly joined with them (as the devil used the Scripture) that they might seem to imply a wicked intent, to draw Fitzharris to say what was not true.

When it was late in the night, and Fitzharris complained he was tired, having been about three hours upon examination, and was asked what he could say concerning Godfrey's murder: and he answered in general only (something.) Could any thing be replied more harmlessly by sir Robert Clayton, than to wish him to recollect himself against the next day, when it was intended to examine him further, if he had not been removed out of their power? Yet even these words of sir Robert Clayton's are recited, as if they implied some ill practice by him upon the examinant, or at least some sinister intent of his in that matter.

The sham confession further craftily insinuates (though it doth not expressly say it), that this wretched man's depositions about the counsels held at St. James's and Windsor concerning Godfrey's murder, were taken by sir Robert Clayton, and sir George Treby (which is utterly false); then the confession declares that he was put upon what he said against the queen and the earl of Danby about that murder; and that sir George Treby would have had him say that the duke, the lord Bellasis, Arundel and Powis, were at the consult, and that he had seen them go to it at St. James's. Surely these sham confessions are thus methodized and put together, in hope to abuse or deceive the world into a belief, or opinion, that whatsoever this Fitzharris deposed first, and last, about the popish plot, and Godfrey's murder was done by the practices, force and inducements of the city sheriffs and the justices of the peace.

Whereas it is most notoriously known, that it was upon Fitzharris's own motion to the judges of the King's-bench, that his depositions were taken before that court, about Godfrey's murder, and that then, and not before, he discovered the councils held at St. James's and Windsor about Godfrey's murder and the persons concerned and present therein; and the words he heard from the earl of Danby coming out from the consult, and the account he then had from De Puy, of the resolutions taken for that murder.

And this was in the term, after that the parliament at Oxford was dissolved, and above six weeks after his most close imprisonment in the Tower, where the city-sheriffs, or magistrates, or any from them, were never admitted to see him. Indeed the counterfeit confession (to avoid a plain conviction of its falshood) durst not say by whom Fitzharris was put upon saying that he did, of the queen and earl of Danby about Godfrey's murder.

But as the matters are conrected, it is strongly implied to have been by the city-magistrates, none other being named or referred unto.

And to persuade the world, that the vilest wickedness may justly be believed of them (viz.) the city-officers, the impudence of hell is assumed to bring in sir George Treby, desiring or willing him to accuse the earl of Danby and the Popish Lords in the Tower, thus speaking (as if the worst of devils had spoke in him) do but you say it, we have those that will swear it. If such as know not sir George Treby can believe him to be so vile a wretch, as he is rendered, and could also think sir Robert Clayton could have been guilty of the same wickedness in consenting to it, or silently conniving at it, to which a thousand worlds could not have hired him: yet when they shall hear of sir George Treby's profession of the law, his reputation and place, surely it is impossible for them to believe him to have been so exceeding silly, as to discover to an Irish Papist whom he had never seen before, such a strange mystery and secret of darkness amongst the Protestants, and city-magistrates, viz. That they had a pack of knights of the post, godless perjurous wretches, in readiness to swear whatsoever they would have them.

If they had been so provided with false witnesses against the duke and the Popish Lords, as this counterfeit confession suggests, and if there had been a wicked design against them, there was no need of Fitzharris his saying any thing about them; no body can think that he was better able than sir George Treby to instruct a false witness against them, especially when the sham-confession represents him first instructing Fitzharris, what he should say against the duke and Lords, that then the sons of Belial might come from their lurking-places, and swear to his words.

Surely it had been the wiser, the safer, and the shorter way for sir George Treby, to have given his swearers (if there had been such) their lessons immediately, without desiring Fitzharris (as is vainly suggested) first to say it over after him, that then the witnesses might swear it.

Neither the false suggestions nor the perjuries could have gained any weight or credit from the authority of Fitzharris, by his saying what they were to swear.

In fine, they must desire to be cozened, that seem to believe so black, so vain, so

unlikely, and so foolish a slander of sir Robert Clayton and sir George Treby, only upon Dr. Hawkins's saying, (if he hath said true) that he had the words of Fitzharris for it; who hath convicted himself of forty perjuries, if the pretended confession to Dr. Hawkins had been *bona fide* made by him.

But this pretended confession having loaded with infamy the sheriffs and justices of peace employed in Fitzharris's examination, takes wonderful care with all the art and skill the contrivers had, that the earl of Danby might be wiped clean from Godfrey's murder, for which he was indicted by the occasion of Fitzharris's oath.

For that purpose the words of this confession are so framed, that the world may think, that the sheriffs or justices of the city, were the practisers with him in that deposition, the paper saying, "They were the more desirous to accuse the lord Danby of Godfrey's murder, because the crime of murder is not inserted in his pardon."

The word "they" will be understood to relate to sir Robert Clayton and sir George Treby, who only were mentioned before, or the sheriffs, though Fitzharris was never examined about the lord Danby by any of them, nor had any of them ever heard the least of the matters sworn by him against the lord Danby, about that murder, until they were public at the King's-bench-bar, which was six weeks after Fitzharris's removal from the sheriffs custody to be close prisoner in the Tower.

And if he knew before his oath against the lord Danby, that murder was not in his pardon (which we do not believe) he was better informed than sir Rob. Clayton or the sheriffs, and the most men of England. But it seems strange that this mock-confession did not, for the help of this Popish Plot, absolutely retract the whole evidence given by Fitzharris at the King's-bench court; whereas those parts of it are now left as true, that deposed the councils held at St. James's and Windsor, and that the lord Danby coming out of one of them, breathed out the threatening words (as Fitzharris remembers) and that De Puy that was then in hearing of the council, presently told him, that Godfrey's murder was then resolved upon, &c. but a fine, thin excuse is invented since his oath that he believes De Puy spoke out of ill will to the lord Danby. Yet nothing is said to shew, how he now comes so to believe, more than when he was sworn in the court to speak the whole truth, and nothing but the truth.

We hope we have said enough to convince every impartial reader, of the impiety, fraud, and mockery of the pretended confession; yet we should not have taken this trouble, if we could have suffered with patience, that all the popish treasons and wickednesses lately dicovered, against our religion, the king and kingdom, should be represented to the world, as the devices and practices of the Protestants, their officers and magistrates against the papist, and that a seeming conscientious confession of a dying man should be cried up by the papists, at home and in foreign countries, as a ground to have it so believed.

We have reason to fear, that the sufferings of the Protestants beyond the seas, are upon this occasion already encreased, our English papists there daily decrying the popish Plot, and catching at occasions to scandalize all Protestants in authority that oppose them, and to stir up enmity and rage thereby against the oppressed Protestants.

We must acknowledge that we were surprised with astonishment, when we first saw this mock-confession of Fitzharris published; and the more, that it should be done by a Doctor of the English church, either Fr. Hawkins, or Hawkesworth, (which name he will own, we cannot yet learn) but that a Doctor of our church should, upon pretence of his private conference with a papist, attainted of treason, publish in print to the whole world for truth, that two justices of the peace, and two ministers of justice, high-sheriffs of the city of London, have combined with certain Lords and Commons of the Parliament, in a horrid conspiracy against the queen, duke of York, and many privy-counsellors, and in wicked practices against the papists, and endeavoured to prevail with Fitzharris to perjure himself, by forming a plausible story to confirm the popish Plot.

We say again, That a Doctor of our church should cause to be sent into all kingdoms and countries such black scandals of so many persons of quality and authority in our kingdom, to render them (as much as in him is) more infamous and odious, than words can express; at this we were struck with horror; and so much the more, when we consider, that the doctor was not ignorant, that these pretended words or confessions of Fitzharris, were contrary to his most solemn oaths, sworn before the king's ministers, as well as before those justices; and that all the Commons of England in parliament, had by order caused what he had so sworn to be published. And the doctor could not be ignorant, that the whole scope of that mock confession, was to throw the odium of a plot against the king's person upon some Protestants, and to discredit and prevent the prosecution of the popish Plot.

The doctor also might with very little pains have satisfied himself by undoubted evidence of the falshood of several of the matters of fact in the confession; and surely his function as a divine, his duty as a neighbour, and much more as a christian, required that he should in some kind have heard, at least, some of the parties accused, in their own behalf, (to whom he might have had easy access) before he had proclaimed them to the world, to be guilty of such infamous crimes: He cannot excuse himself for want of time, this mock confession was taking and forming, as we can prove, a week at least before Fitzharris's death: And we have reason to think, that the miserable deluded man understood many things in it, as they were modelled, as little as he did the doctrine of the

four general councils, which he owned for his faith, whosoever put it upon him.

But the doctor took care that none of the parties accused might see the arrows intended to wound them, till their good names should feel them, and therefore kept his confession in secret until the poor wretch was dead and cold, that would perhaps have shewed the fraud with his last breath, if he had been absolutely certain that it was to be his last; but that the doctor assured him of the contrary even very near his last hours, in due time will be proved.

The sheriffs at the gallows remembered Fitzharris of his promise made to each of them in Newgate, "That if they did put him to death, before he could discover to the parliament what was yet undiscovered of the Popish Plot, which he said he reserved for them, he would leave it behind him in writing." He answered them, That he had left it with Dr. Hawkins.

The sheriffs demanded of the doctor that it might be read to the people, whilst the man was living to own it; but the doctor only refused it, not the man, (how he was awed we know not), then the sheriffs demanded a copy of it from the doctor as their due, as what belonged to Fitzharris; but after some shuffling answers that he had it not about him, and that a great man had it, he promised them a copy; but either he thought he was not bound by his promise, or else he made no conscience of breaking the bond.

We doubt not but time will bring to light the whole contrivance of obtruding upon the world this mock-confession, and make it appear that Dr. Hawkins, or Hawksworth, knew that Fitzharris never intended it should pass for a true and real confession, if he died for the treason.

And perhaps for that reason there was no one person of quality or authority about the Tower, or any other of eminency and integrity called in all the days of its contrivance, before whom Fitzharris might own any article of the confession, though doubtless if there had been only fair dealing, the doctor must needs have desired it for his own safety and credit, nor is it accountable why it was done; it may be also those two obscure men, and the woman, whose names are set to the printed paper as witnesses, knew no more what the confession and declaration was, which Fitzharris protested to them he had made to Dr. Hawkins freely, than the sheriffs knew what the further discovery was of the popish plot, which he also told them with his dying breath, he had left with Dr. Hawkins, no shadow of any such discovery having yet been produced by him: but on the contrary this odious sham confession to perswade the world, that the noise of popish Plots hath been from the wicked practices of some Protestants.

We have only left to pray, That the God of truth may bring to light all the hidden works of darkness, that no wicked device formed against the Protestant religion, his majesty and the kingdom, may ever prosper; and let every good man say, Amen.

Here followed the Paper printed in the text, at p. 396.

Remarks on FITZHARRIS'S Trial, by Sir JOHN HAWLES, Solicitor General to King William the Third.

Sir John Hawles, who was Solicitor General to King William the Third, published,

"REMARKS on the Trials of EDW. FITZ-
"HARRIS, STEPHEN COLLEDGE, Count CO-
"NINGSMARK, the Lord RUSSEL, Colonel
"SIDNEY, HENRY CORNISH, and CHARLES
"BATEMAN; as also on the Earl of Shafts-
"bury's Grand Jury, Wilmer's Homine
"Replegiando, and the Award of Execu-
"tion against Sir Thomas Armstrong:"
with the following Introduction:

THE strange Revolution which hath of late happened in our nation, naturally leads one into the consideration of the causes of it. The danger of subverting the established religion, and invading property, alone could not be the causes. For if it be true, that the same causes have generally the same effect; it is plain, that in the reign of a precedent monarch, the subversion of the established religion was as much designed, or at least was believed to be so, as of late; and it is not material whether what was suspected was true, or not; and property was as much invaded as of late, by imposing Ship-Money, and other taxes in the nation, but more especially Ship-Money; which at first was light and easy, but in progress of time was increased, according as it was found the nation would bear it. And at length it was feared, as there was just reason so to do, that it would become as burthensome as what is now imposed on the French nation by the French King; and yet, when the war broke out, if the history of those times, or the persons who lived about those times, are to be believed, the majority of the nation took part with the king. There were therefore some other reasons for the disaffection of the nation to the late government, and they may be ranked under these six heads:

Exorbitant Fines; cruel and illegal Prosecutions; outrageous Damages; seizing the Charters; dispensing with the Test and Penal Laws: and undue Prosecutions in criminal, but more especially in capital matters.

For the First, I shall only observe, that when the House of Commons, in the parliament 1680, took that matter into consideration, and intended to impeach several persons for the same, the highest Fine, at that time complained

of, was but 1,000*l.* and yet in few years they were heightened to 10,000*l.* 20,000*l.* 30,000*l.* and 10,000*l.*

For the Second, the punishment of Oates, Dangerfield, and Mr. Johnson; and the close imprisonment of Mr. Hampden, sir Samuel Barnardiston, and of several other persons, as they were against the law, so they were without precedent.

For the Third, though the Damages given to Bolsworth were the first outrageous damages given, which were taken notice of, and in truth were such; yet in little time damages for matters of like kind were quickly improved to 10,000*l.* 20,000*l.* 40,000*l.* nay 100,000*l.* the truth of which a great many living witnesses, to their sorrow, can testify.

For the Fourth, the seizing the City, and other Charters, upon the pretences on which they were questioned, was without example.

For the Fifth, the dispensing with the Test and Penal Laws was as mischievous as it was illegal; it making persons capable, who were incapacitated by law of being in places, of exercising offices, for whom the persons who had power to confer or bestow the same, had more affection, than for the persons who at that present enjoyed them: The consequences of which were quickly seen, in turning out the present possessors, to make room for others; which was the thing, which, as a Scotch bishop said of another matter, 'set the kiln a-fire.'

Of these five particulars something hereafter may be said; at present, this treatise is only to consider how far the proceedings in capital matters, of late years, have been regular or irregular: and as to that, I shall not at all consider how far the persons hereafter mentioned were guilty of the crimes of which they were accused, but how far the Evidence against them was convincing to prove them guilty, and what crimes the facts proved against them in law were.

REMARKS *on* FITZHARRIS'S TRIAL.

THE first person I shall begin withal shall be Fitzharris; and that it may not be wondered, that the trial and condemnation of a person, who was confessedly an Irish Papist, should be complained of; and one whose crimes were such, that if the law declared had not made capital, it had been just, in respect of the malefactor, for the legislative power to have enacted, That he should suffer the severest punishment usually inflicted for the highest crime: yet, in respect of the common good, it had been just and fit to have pardoned him, if he would have confessed who were his conspirators and setters-on; for I am apt to think, that if that matter had been thoroughly looked into, some persons, afterwards witnesses in the lord Russel's, colonel Sidney's, and Mr. Hampden's Trials, had either never been produced, or had not been credited if produced; nor would my lord of Essex's throat have been cut; and my lord Russel and colonel Sidney might have worn their heads on their shoulders to this day.

All will agree, that there was a great struggle between the Whigs and Tories, as they were then called; for hanging or saving that man: Both agreed he deserved to be hanged; the first thought it their advantage to save him if he would confess, the last thought it was fit to hang him for fear he would confess. And to explain the matter, it is fit to go a little higher: It cannot but be remembered, that before the breaking out of the popish plot, Mr. Claypole was imprisoned in the Tower for designing to kill the king, in such place and manner as Oates afterwards discovered the papists intended to do it. In Trinity term, 1678, he had an Habeas Corpus to the King's-bench, and was brought thither in order to be bailed, and produced persons of worth to bail him: but the penalty of the bail set by the court was so high, and the court so aggravated the crime for which he was committed, and the likelihood of the truth of it, that the bail refused to stand, and Claypole was remanded to the Tower. But the term after, when the matter, of which he was accused, appeared barefaced to be the design of other people, he was let go, for fear the examination of it should go further in proving the popish plot than any thing at that time discovered. And if it were now discovered, upon whose and what evidence he was committed, it would go a great way in discovering the truth of many matters, as yet in the dark (but that design miscarried, because the intrigue was discovered before it took effect; and yet a like design was still carried on, and many of the clergy of the church of England had been prevailed with to cry the popish up as a fanatic plot). The papists and the clergy of the church of England being in the late times equally sufferers, and oppressed by the fanatics, they naturally grew to have a kindness for each other, and both joined in hating the fanatics; and therefore pretended, at least, that they did not believe any thing of the Popish plot, but that report was given out by the fanatics, whilst they themselves were designing something against the church of England. The papists having so great a part of the clergy of the church of England, ready to believe any thing of a fanatic plot, which they should forge, and observing that that which gave credit to the Popish plot, was writings concurring with oral testimony, which it did; for very little of the truth of the Popish plot depended on the credit of Oates, Bedlow, or any other person, most of the facts of that design, when discovered, proving themselves: To instance in one; Oates discovered Coleman had intelligence with La Chaise of a design on England, and that Coleman had papers testifying as much; when those papers were seized, and owned by Coleman, and the purport of them was what Oates said they were, it was not material, whether Oates was a man of truth or not; the papers, without Oates's further evidence, sufficiently

proved the design. I say, the papists having observed what the evidence was which gave credit to that plot, resolved to pursue the same steps, and therefore Dangerfield was made use of to leave papers in col. Mansel's lodging, who was an acquaintance of my lord Shaftsbury's, importing a plot;* but that was so foolishly carried on, and the the then Attorney General (sir Creswel Levinz,) who had the examination of that matter, not being qualified with the assurance his successor had to carry on a thing that had neither sense nor honesty in it, made such a scurvy report of the matter to the king and council, that they were enforced to vote Mansel innocent, Dangerfield guilty, and that it was a design of the papists to lay a plot to the dissenters charge, and a further proof of the Popish plot. But that Attorney General being removed to a place of more honour, though of less profit, and another (sir Robert Sawyer) put in his place, the papists resolved to carry on the same design, and no person a fitter instrument than Fitzharris, in respect of his religion and his acquaintance; but before his design came to perfection, it was discovered.

He was first imprisoned in Newgate, where some persons (amongst whom Mr. Cornish, as I remember, then Sheriff, was believed to be one, and it was not the least of his crime that he endeavoured to look into that Arcanum) went to examine him as to the particulars of that design, which was quickly taken notice of, and the prisoner, in breach of the Habeas Corpus act, removed from thence to the Tower, where he was kept close prisoner.

The parliament at Oxford meeting soon after Fitzharris's apprehension, and the House of Commons being informed of as much of his designs as was then discovered, they thought themselves highly concerned to examine him; but how to do it they knew not; only they resolved (upon a report which one of their members made them of one Hubert, who confessed himself guilty of firing the City of London,† upon which it was resolved to examine him in the House of Commons the next morning, but before the House sat, Hubert was hanged) that Fitzharris should not be hanged without their knowledge and consent; and to effect it, they remembered [illegible] design to try the five popish lords in the Tower upon Indictments, whereupon, if they should be acquitted, it was thought that the acquittal might be pleadable to impeachments. To prevent which, the House had exhibited general impeachment of high treason against them in the House of Lords, which had such success that the lords were [illegible], and the judges gave their opinion that they could not be tried on the indictments, as long as the impeachments were in being; [illegible] the House of Commons exhibited a general impeachment of high-treason in the House of Lords against Fitzharris, which was received; after which the House of Lords made an order, that Fitzharris might or should be tried in the King's-bench for the same treason; suddenly after which that parliament was dissolved. Whether Fitzharris's business was the break-neck of that parliament, I know not, but it was shrewdly suspected it was.

There was at that time a Chief Justice in the King's bench, (sir William Scroggs,) who was himself under an impeachment of high-treason, and had not, for that reason, sat in court for some terms preceding; and the trial of Fitzharris being generally looked upon to be as illegal as it was odious, it was thought convenient to carry it on by a person of better credit; whereupon one who had been a puisne judge of that court, (sir Francis Pemberton) and had behaved himself very plausibly, and had gained credit by being turned out, was thought to be the fittest person to undertake it, and accordingly the then present Chief Justice was removed, and the other was preferred to his place.

It being resolved that Fitzharris should be tried, the business was, how to get Witnesses to give evidence to a purpose, and how to get juries to find the bill and to convict the prisoner, which were [illegible].

A person ([illegible]) who had been one of the [illegible] Commons which had examined [illegible] was the principal witness, but it being [illegible] on the [illegible] he might be [illegible] questionable and [illegible] liable for it, when the parliament should sit again; but at last this person was prevailed upon to give evidence, but by what means is best known to himself. And as for the juries, grand and petty, they were satisfied with the direction of the court, that they not only might, but ought to find the bill and verdict, according to their evidence. And I think the court was so far in the right.

That matter being adjusted, a Bill of High Treason was found against the prisoner, whereupon he was presently arraigned, and after much contest and declaration of the court, that they could hear nothing till he had pleaded in chief (which he had done, the plea he [illegible] pleaded which was the jurisdiction of the court [illegible]), he had leave [illegible] to plead the special matter of the impeachment, and accordingly counsel were assigned him to draw up and argue his Plea [illegible] to the jurisdiction of the court, which was [illegible] in a superior court [illegible].

[illegible] to have the plea [illegible], without so much as hearing the prisoner's counsel [illegible] maintaining it. The pre[illegible] that the prisoner on his plea ought to have produced the record of his impeachment, and that the plea of the impeachment for High Treason in general was naught, without specifying what the High Treason was for which he was impeached, for an impeachment, or an indictment of High Treason in ge-

* See the note to Cellier's Case, *ante*, vol. 7, p. 10[illegible]5.

† See vol. 6, p. 807, of this Collection.

neral was naught; that the king had power to proceed on an impeachment or indictment for the same thing, at his election: That the allegation, "that Fitzharris was impeached, which impeachment stood in full force," not having mentioned an impeachment before, was naught. But afterwards the Attorney General demurred, and the prisoner joined in the demurrer. And then a day was given to argue the plea till Saturday the 7th of May, at which time the Attorney added to the exceptions he took to the plea, Whether a suit in a superior court can take away the jurisdiction of another inferior court, who had an original jurisdiction of the cause, of the person, and of the fact, at the time of the fact committed?

To maintain the plea, the counsel for the prisoner alledged, that an impeachment differed from an indictment; the first was at the suit of the Commons of England, and was like an appeal, or rather an appeal resembled an impeachment; that the proceeding were different in the trials: in the first, the trial is by the House of Lords; in the last, of a commoner, by a jury of Commons. In the last, but little time was allowed for giving or considering of the evidence; in the first, a much longer time. That this matter was never practised before; that the king may pardon a criminal prosecuted by an indictment, but not by an impeachment no more than if prosecuted by an appeal. If he should be acquitted on the indictment it might be a question, whether that may be pleaded in bar to the impeachment; and if not the prisoner should be brought twice in jeopardy of his life for the same crime contrary to the rule of law.

To the objection, That the Plea was not certain; it being pleaded as an impeachment of High-Treason, not setting forth the High-Treason in particular; it was answered, that an impeachment differed from an indictment: for by the custom of Parliament, which is the law of the land, such a general impeachment is good; but by the law, a general indictment of High-Treason, without specifying what, when, where, or how, is not good; and therefore the plea of an indictment and an impeachment is variant.

To the objection, That there was no impeachment mentioned before the averment of *quæ quidem impetitio*, it was frivolous; for it was before mentioned that he was impeached, and then by a necessary consequence there was an impeachment.

As to the objection, That the king might, in which court he would, prosecute for High-Treason, it was little to the purpose; for the case did not come up to it, the impeachment being the suit of the Commons, and not of the king; and that the courts of Westminster-Hall had refused to meddle with matters relating to the parliament. That though the impeachment was general, yet it was made certain by the averment; that it was for the same crime for which the indictment was: That the Attorney-General might have taken issue, that there was no such impeachment as was pleaded, or else he might have said, that the impeachment was not for the same treason for which he was indicted; but having demurred, he had confessed both to be true. That at common law, if an appeal of murder had been brought, the king could not proceed on the indictment, till the appeal was determined; that the judges, whereof some were then in court, had given their opinions to the king and council concerning the five Popish Lords, that they could not be tried upon indictments, so long as general impeachments were depending for the same treason: and yet their cases and this deferred; there the indictments were found before the impeachments preferred, and here, after the impeachment.

In the reply to vitiate the Plea, it was insisted, That it did not conclude 'si curia procedere 'debeat' as well as 'vult,' as was usual for Pleas of that nature to do; that perhaps this matter, if the prisoner had been acquitted upon the Impeachment, might have been pleaded in bar to the Indictment, but it was not pleadable to the jurisdiction of the court; that in the case of the Five Lords, the Indictments were removed into the House of Lords; that appeals in treasons are taken away by the first of Henry the 4th; that in the Plea it ought to be averred, what Lex et Consuetudo Parliamenti are; that till Articles carried up, no man impeached is obliged to answer; that in all cases of Appeals, a man is put twice in jeopardy of his life, if he be tried upon an indictment within a year.

To take a short review of what hath been recited, it was thought the king's counsel run the court upon a rock, and it was hard for them to get off. The court had advised them to take time to consider what course they would take but the king's counsel were hasty, as they always were, when they were resolved to carry a matter right or wrong; and having three bad ways, they chose the worst.

If they had taken issue on the record, or the averment, that the impeachment and indictment were not for the same treason, they might have pretended that the Journal of the House of Lords was not a record, or that the Debates in the House of Commons were not good evidence; or if they had replied, the order of the House of Lords for trying the prisoner in the King's-Bench, to the plea, they might have insisted on the power of the House so to do; but having demurred, they confessed the truth of all the matter of the plea, and waved the benefit of that order, and stood upon points of law, either conceded by the court, or resolved by the judges before, or such necessary inferences from them as were impossible to be denied.

It could not be denied, but a general impeachment of high treason, by the custom of parliament, was good; it could not be denied, but, by the resolution of the judges in the case of the Lords in the Tower, a general impeachment of high treason stopped proceedings upon an indictment for the same matter. It did not differ the case, that the indictments in the King's-Bench against the

Lords were removed into the House of Lords, for every one knows new indictments might have been preferred against them for the same crimes. And if that had been the reason of the judges resolution, why did not the judges then in court, all, or most part of whom were judges at the giving that opinion, deny the opinion, or the reason alledged? which they did not. It was not a reason to disallow the plea, because particular articles use to follow general impeachments, and the impeached are not bound to answer till the particular articles were exhibited, which is true; for by the same reason, a defendant cannot plead an action depending against him for the same matter in a superior court, unless the plaintiff hath declared against him in the superior court, which is not true. It was not a reason that all records in inferior courts must be pleaded particularly, as indictments, and the like; because such records must be certain and particular, or else they are erroneous, and cannot be pleaded; but an impeachment may be general.

Where the matter of a plea is naught, no form can make it good; though where the matter of a plea is good, an ill form may spoil it. If therefore a general indictment or record is naught, as in all the cases cited against the plea, it was no special averment to reduce it to a certainty, or any form can make it a good plea: but a general impeachment is good, and therefore it may and must be pleaded generally; and pleading it specially would make it false, if there were no subsequent articles, as in this case there were not, to ascertain it.

It is to no purpose to run through all the ramble of the counsel or court against the plea, when they all said the matter of the plea was not in question, but the form; and yet when so often asked, in what of the form it was defective, they were not able to answer. If it be agreed that the matter of a plea is good, but it is defective in form, they always shew how it ought or might have been mended; which in this case was never done: and as this case was new in several particulars, so it is in this, that in reading all the arguments of this plea, no man knows, by what was discoursed, what was the point in question.

After the arguments, the chief justice, in show at least, very favourably offers the prisoner's counsel liberty to amend the plea, if they could; which they (apprehending as they had reason, for I think none can shew how it might have been mended, rather a catch than a favour) refused to do; whereupon the court took time to consider of it, and on the 11th of May, there being a great auditory, rather to hear how the judges would bring themselves off, than to know what the law of the plea was, the chief justice, without any reasons, delivered the opinion of the court, upon conference had with other judges, that his brothers, Jones, Raymond, and himself, were of opinion that the plea was insufficient; his brother Dolben not resolved, but doubting concerning it, and therefore awarded the prisoner should plead to the indictment, which he did, Not Guilty; and his trial ordered to be the next term.

I think it would puzzle any person to shew, if ever a court of Westminster-Hall thought a matter to be of such difficulty as fit to be argued, that they gave their judgments afterwards without the reasons: it is true, that the courts of civil law allow debates amongst the judges to be private among themselves; but the proceedings at common law always were, and ought to be, in *aperta curia* * Had this practice taken place heretofore, † as it hath of late (but all since this precedent), no man could have known what the law of England was, for the year-books and reports are nothing but a relation of what is said by the counsel and judges in giving judgment, and contain the reasons of the judgment, which are rarely expressed in the record of the judgment; and it is as much the duty of a judge to give the reasons why he doubts, as it is of him who is satisfied in the judgment. Men sometimes will be ashamed to offer those reasons in public, which they may pretend, satisfy them, if concealed; besides, we have a maxim in law undeniable, and of great use, that any person whatever may rectify or inform a Court or judge publicly or privately, as Amicus Curiæ, a friend to the Court, or a friend to justice: but can that be done, if the standers-by know not the reason upon which the Court pronounce their judgment? Had the three judges, who were clear in their opinion, given their reasons of that opinion, perhaps some of the standers-by might have shewed reasons unthought of by them, to have made them stagger in, if not alter that opinion; or if justice Dolben had given the reason of his doubt, perhaps a stander-by might have shewn him a reason unthought of by him, which would have made him positive that the plea was or was not a good plea.

If a man swears what is true, not knowing it to be true, though it be logically a truth as it is distinguished, yet it is morally a lye; and if a judge give judgment according to law, not knowing it to be so, as if he did not know the reason of it at that time, but bethought himself of a reason for it afterwards, though the judgment be legal, yet the pronouncing of it is unjust.

Judges ought to be bound up by the reasons given in public, and not satisfy or make good their judgment by after-thought of reasons. How very ill did it become the chief justice Popham, a person of learning and parts, in the attainting sir Walter Raleigh, of which trial all since that time have complained? when he gave his opinion, that the affidavit of the lord

* 2 Co. Inst. 103.

† Of old time before Edw. 3, the reasons used to be entered on record in cases of difficulty; but ever afterwards were constantly pronounced by the Court, that they might be published in the Books of Cases and Reports, 4 Co. Inst. 4.

Cobham, taken in the absence of sir Walter, might be given in evidence against him, without producing the lord Cobham face to face to sir Walter (which was desired by him although the lord Cobham was then forthcoming). When he summed up the evidence, he said, 'Just then it came into his mind, why the accuser should not come face to face to the prisoner, because he might retract his evidence; and when he should see himself must die, he would think it best that his fellow should live to commit the like treason; and so in some sort seek revenge.'* Which, besides that it is against the common law, and reason, it is against the express statute of Edw. 6, which takes care, that in treason the witness shall be brought face to face of the person accused.

Did it become a just man to give his opinion, and bethink himself of a reason afterwards? And I am mistaken if it will not herein appear, that many persons complained of, have not been guilty of the same weakness or injustice, call it which you will; so foolish are the best lawyers and plausible speakers, when they resolve to carry a point, whether just or not: however they may deceive the ignorant, yet they talk and argue very absurdly to the apprehension of the majority of mankind. And they had been sooner discovered, but that the discoverers were quickly suppressed and crushed, as scandalizers of the justice of the nation. And I think this may be justly called the first mute judgment given in Westminster-Hall.

But to return to Fitzharris's trial, which came on the 9th of June; and then the king's counsel made use of their arts in managing the jury. And first, there were a great many persons for jurors to whom Mr. Attorney had no stomach; some challenged for cause, for that they were no Freeholders, as John Kent, Giles Shute, Nathaniel Grantham, and several others; and the challenge allowed to be a good challenge by all the Court; for though the chief justice only spoke, yet all the Court assent to what one judge says, if they do not shew their dissent. I do not take notice of this, as complaining of it, for I think it is a good cause of challenge in treason; but then I cannot but wonder at the assurance of the same king's counsel, who denied it to be a good cause of challenge in the lord Russel's trial. It is true, that was a trial in the city, but that matter had no consideration in the judgment; for after the lord Russel's counsel had been heard, all the judges delivered their opinions, that at common law, No Freehold was no challenge in treason; and that the 1 and 2 Phil. et Mar. had re-stored the trial in treason to be what it was at common law: of which number of judges, sir Francis Pemberton and sir Thomas Jones were two; nay, sir Francis Pemberton asked Mr. Pollexfen, whether he found any resolution at common law, that no freehold was a challenge in treason. And that judgment is afterwards cited in colonel Sidney's trial, as the opinion of all the judges of England, That no freehold was no challenge to a juror in treason at common law; and colonel Sidney's trial was in a county at large.

But if it was not a challenge at common law, I would know how it came to be a challenge in Fitzharris's case? There was no intervening act of parliament to alter the law between the two trials, that I know of.

Another art used, was to challenge for the king without cause, where no cause could be shewn, such jurors as they did not like.

The prisoner was troubled at this, and appeals to the Court, whether the Attorney-General was not obliged to shew his cause of challenge; but is answered by the Court, that he need not till all the pannel was gone through, or the rest of the jurors challenged, which is true, but had the prisoner been advised to challenge the rest of the jury, as he would have been if he had had counsel, the attorney must have waved his challenge, or put off the trial. And since he was not allowed counsel, why should not the Court, according to their duty, as they have said it is, advised him so to do? I am sure, in count Coningsmark's trial,† when sir Francis Winnington challenged a juror without cause for the king, the Court presently asked the cause; and such answer was made by the prosecutor's counsel as was made to Fitzharris: whereupon the Court told the count, that the way to make them shew their cause of challenge, was to challenge all the rest of the jury; and thereupon the challenge was waved. They were different practices, tending to different ends; and accordingly it succeeded; Fitzharris was convicted, and the count acquitted.

Upon the trial the evidence was thus; Fitzharris was, the 21st day of February 1681, with Everard, and gave him heads by word of mouth, to write the pamphlet in the indictment mentioned, to scandalize the king, raise rebellion, alienate the hearts of the people, and set them together by the ears; the libel was to be presented to the French ambassador's confessor, and he was to present it to the French ambassador; and it was to set these people together by the ears, and keep them clashing and mistrusting one another, whilst the French should gain Flanders, and then they would make no bones of England: for which libel Everard was to have forty guineas, and a monthly pension, which should be some thousands of pounds. Everard was to be brought into the cabal, where several Protestants and parliament-men came, to give an account to the ambassador how things were transacted. Everard asked what would be the use of the libels? Fitzharris said, we shall disperse them we know how; they were to be drawn in the

* See vol. 2, p. 31, of this Collection.

* See the Note to the Case of Don Pantaleon Sa, vol. 5, p. 466, and that to Twyn's Case, vol. 6, p. 516, of this Collection.

† See the Trial, *infra*.

name of the Nonconformists, and to be put and fathered upon them. This was the sum of Everard's evidence.

Mr. Smith proved Fitzharris's giving instructions to Everard; and sir William Waller and others proved the libel, and the discourse about gaining Flanders and England: other witnesses were examined to prove Fitzharris's hand. For the prisoner, Dr. Oates said, Everard told him the libel was to be printed, and to be sent about by the penny-post to the protesting lords, and leading men of the House of Commons, who were to be taken up as soon as they had it, and searched, and to have it found about them. He said the Court had a hand in it, and the king had given Fitzharris money for it already, and would give him more if it had success.

Mr. Cornish said, when he came from Newgate to the king, to give him an account in what disposition he found the prisoner to make a discovery; the king said, he had had him often before him and his secretaries, and could make nothing of what he did discover; that he had for near three months acquainted the king he was in pursuit of a Plot, of a matter that related much to his person and government, and that in as much as he made protestations of zeal for his service, he did countenance and give him some money; that the king said he came to him three months before he appeared at the council-table.

Colonel Mansel said, that sir William Waller gave him an account of the business in the presence of Mr. Hunt, and several others; and said, that when he had acquainted the king with it, the king said he had done him the greatest piece of service that ever he had done him in his life, and gave him a great many thanks: but he was no sooner gone, but two gentlemen told him, the king said he had broken all his measures, and the king would have taken him off one way or other: and said that the design was against the Protestant Lords, and Protestant Party. Mr. Hunt confirmed the same thing; and added, that he said the design was to contrive those papers into the hands of the people, and make them evidences of rebellion; and appealed to sir William Waller, who was present, whether what he said was not true? Mr. Bethel said, Everard, before he had seen Bethel, or heard him speak a word, put in an information of treason against him, at the instigation of Bethel's mortal enemy; which information was so groundless, that though it was three years before, yet he never heard a word of it till the Friday before.

Mrs. Wall said, Fitzharris had 250*l.* 200*l.* or 150*l.* for bringing in the lord Howard of Escrick; she added, that Fitzharris was looked upon to be a Roman Catholic, and upon that account it was said to be dangerous to let him go near the king; that he never was admitted to the king.

The lord Conway said, that the king had declared in council, that Fitzharris had been employed by him in some trifling businesses, and that he had got money of him; but added, as of his own knowledge, that the king never spoke with him till after he was taken, which was the 28th February last.

All the Evidence being over, it was summed up by the counsel, That upon all the circumstances of it, Fitzharris was the contriver and director of the libel; that it was a treasonable libel, and a jesuitical design; that the excuse he made, as if Everard drew him into it, or trepanned him into it, was in vain, nothing of that being proved. That Everard could do nothing alone, and therefore sir William Waller must be in the contrivance; but that was unlikely: that the prisoner would insinuate that the king hired him to do it, because the king gave him money, but that was out of charity; and therefore concluded, with a great many words, that an English Protestant jury of 12 substantial men could not but find the prisoner Guilty.

The Court added, that though Dr. Oates said. Everard said it was a design of the Court, and was to be put on some Lords, and into some parliament-men's pockets; yet Everard was there upon oath, and testified no such thing in the world; and for the Impeachment in the Lords House, they were not to take notice of it.

After which the jury informed the Court, that they heard there was a vote in the House of Commons, that the prisoner should not be tried in any inferior Court: to which the chief justice said, that that vote could not alter the law, and that the judges of that Court had conference with all the other judges concerning that matter; and it was the opinion of all the judges of England, that that Court had a jurisdiction to try that man. After which, justice Jones was of opinion, that if he were acquitted on that indictment, it might be pleaded in bar to the impeachment; and justice Raymond delivered his opinion to the same purpose. It is strange that all the judges should be of that opinion; yet before it was said, justice Dolben doubted. It is more strange, that if justice Dolben was not of that opinion, he would hear it said he was, and not contradict it. It is most strange, that if the Judges of that Court were of that opinion, they had not declared so, in the arguing or giving judgment on the Plea; for that was the matter of it, being pleaded to the jurisdiction of the Court, that they had not power to try the prisoner for that crime, so circumstanced.

If the Plea had been over-ruled as to the matter, none would have been so impertinent as to go about to maintain the form of it.

Now, to say truth in behalf of the public, and not on behalf of Fitzharris, the evidence was unfairly summed up; for Fitzharris never pretended Everard drew him in, or was to trepan him: it is true, he asked Everard what the design of the pamphlet was, and whether he was or not put upon it to trepan others? Who answered, he was not. But afterwards

being too nearly pressed by the Attorney-General, he said, Fitzharris told him the use of the libels were to disperse them he knew how; that they were to be drawn in the name of the Nonconformists, and put upon them. And Oates said, Everard said the libels were to be printed, and sent abroad by the penny-post to the protesting Lords, and leading men of the House of Commons, and the persons seized with them in their pockets; which is all strong evidence that the libel was designed to trepan others; and that was all along the import of Fitzharris's questions, though cunningly not answered by some of the witnesses, and as cunningly omitted in summing up the evidence.

It is true, the chief justice said, Everard said no such thing as Oates had said; but why was not Everard, who was then present, asked, whether he said what Oates had given in evidence?

There cannot be shewn any precedent where a witness contradicts, or says more or less than a witness that went before him, by the hearsay of that witness; but the first witness is asked, what he says to it? Why was not sir William Waller, who was also present, asked what he said to the evidence of Mr. Mansel and Mr. Hunt? And who it was that informed sir William what the king said? It was no way in proof, nor pretended by Fitzharris, that any person was concerned in that matter, but Everard and Fitzharris, though it was shrewdly suspected by the House of Commons; and no man that reads the trial, but believes there were many more concerned not yet discovered: but the counsel might have brought in any judge of the Court by the head and shoulders to be a confederate, as well as sir William Waller, who was a Jack-a-lent of their own setting up, in order to knock him down again.

It was not pretended by Fitzharris that the king gave him any money to frame that, or any other libel; there was evidence, that he had got money of the king for some little matter he was employed in, perhaps for bringing in libels dispersed abroad, or discovering Plots.

Upon the whole evidence, it was plain that Fitzharris was an Irish papist; it was plain he was the only visible contriver of the libel; who were behind the curtain is not plain, and to know them, was the design of the impeachment.

It was plain it was a devilish jesuitical design, as the Court and counsel, in summing up the evidence, agreed it to be; it was plain, that the libel was such, that if dispersed with intention to stir up the king's subjects against him, it had been high-treason within the statute of the 13th of the king: but what the intention of the contriving of the libel was, was not very certain; and therefore, consequently, what the crime of it was, was uncertain.

To take the evidence all the ways, as to the design of the contriving of the libel, it is capable of being interpreted; the easiest construction is to say, he framed a libel with intention to pretend to the king, that he had intercepted a libel privately dispersed; and to make it more likely, it should be framed in the Nonconformists names, to make his report the more credible (for of papists or church-men it could not be believed), to get more money of the king; and that matter, by all his questions to the witnesses, he most drove at: and that would at most be but a cheat.

A more criminal, but less credible construction, is to believe he designed to disperse them, to excite and prevail upon the discontented to take up arms.

For what effect had that pamphlet, when it was (for it was afterwards) dispersed, upon the minds of the people? Or what effect could any man of sense think it could have? For though it was a virulent, yet it was as foolish a contrived libel as ever was writ; yet I own, if it had been writ and dispersed with that design, it had been high treason within the statute of Edw. 3.

But the most natural construction of the worst design of it, was to trepan the parliament-men, and make the libels evidences of a rebellious conspiracy: this Everard confesses Fitzharris told him was the use to be made of them; and Everard could not know the design of them, but by what Fitzharris told him. And Oates well explains what Everard meant by the words, in his evidence, 'put the libel on 'the Nonconformists,' by what Everard told him.

But yet even that, though in itself the highest crime a man can be guilty of, next putting it in execution, is but a conspiracy; which was mildly punished in Lane and Knox their case, though this exceeded that; that being a design only against one person, this against many.

Yet though this was of no higher crime by the law, as now established, than a misdemeanor, it was fit for the legislative power to have punished it in the manner it was punished; which yet the legislative power ought to resent as an injury, for an inferior Court's snatching the exercise of that power out of their hands, which only belongs to the supreme authority. That this crime, upon construction of the evidence taken in the best sense, is no treason; though the libel should in all probability incite the subject to levy war, which it was not likely to do, or if in fact it had been the cause of a rebellion, yet if it was not designed by the contriver to that purpose, it was not treason by the statute of Edward 3, or Charles 2, for in the last statute, it is designing to levy war, and in the statute of Edward 3, it is a strained construction, to make designing to levy war, treason; yet none ever pretended to strain the sense of that statute farther than designing to do it.

If the ill effects the libel did, or might produce, made it treason, then sir Samuel Astrey who read it in court at the trial, and the printer that afterwards printed and published it, and sir William Waller who read it to Mr. Hunt, and others, were guilty of Treason; for the libel carried no venom or charm with it the

more, for being framed by Fitzharris or Everard, or for being published by either of them, than if published by another person.

The difference is, Astrey read it aloud, as his duty; the printer printed and published it for gain; sir William Waller published it as a novelty; and if Fitzharris contrived it, to put it upon the nonconformist, or parliament-men, and not to stir up a rebellion, though it tended to all the ill consequences mentioned in his indictment, yet it was not treason.

But it will be urged, how shall Fitzharris's intentions be proved? It was a question which made a mighty sputter in arguing the plea. How shall it be proved, that the impeachment was for the same treason for which the indictment was? But in the trial of Fitzharris, that question was fully cleared; for it was proved there, that the very libel then produced in court, was the same libel read in the House of Commons, upon which the impeachment was voted.

And to say truth nothing can be put in issue, but is capable of trial: *quo animo* a thing is done in all overt acts of a design, is one of the main questions;* or to speak in law phrase, whether done *proditoriè* or not, an adverb of great use and sense, though heretofore slighted; and under which, I believe, a great many persons will be enforced to shelter themselves from being punished by the law established.

No man will pretend that libel did any man mischief but the contriver; nor in probability could have done, if not used to the purpose Everard said to Oates. Yet other persons have been guilty of as illegal acts, of worse consequences in prospect, and much worse in effect, and it did not amount to treason. I dare say, the allegation, that they disturbed the kingdom by their acts, and war caused to be moved against the king, is true of them, and they are guilty of all the aggravations used in indictments of treason.

To instance in some of many; did it not make a mighty heart-burning in the city against the government, and raised great jealousies between the king and people, when the sheriffs, North and Rich, were imposed on the city? Did not the taking away the city's right of electing sheriffs, and the suspicions for what end it was done, besides the illegalities that followed; if what sir Edward Herbert says in his late Vindication, fol. 16. be law, as it hath an aspect as if it were, that grand juries returned by such as are sheriffs in fact, but not in right, are illegal, and convictions on their presentments are illegal and void, give great disturbance: and that opinion seems to be countenanced by my lord Coke's third Instit. fol. 32. in his comment on the 11th of Henry 4. and consequently my lord Russel's, and other attainders void? Did it not add to the heart-burning, the punishing those citizens as rioters who were at Guildhall, innocently contesting their right of electing? Was it not an increase of the mischief, the bringing the Quo Warranto against the city, whereby the credit of the city was lost, and many orphans starved, and more impoverished, beyond the possibility of recovery? And it was yet heightened by the judgment given in the highest case that ever came into Westminster-hall, by two judges only, and that without one word of reason given at the pronouncing, according to the pattern of Fitzharris's case, and was the second mute judgment. Did it not fright all honest men from being on criminal juries, when Wilmer was so illegally prosecuted for not giving a verdict against his conscience, by an *homine replegiando* and information? And did not that make all merchants, who had transactions beyond sea, afraid to send their servants thither, for fear they might be laid by the heels till they fetched them back again? Did it not startle the Lords and the leading men of the House of Commons, mentioned so often in Fitzharris's trial, when the earl of Essex, lord Russel, colonel Sidney, Mr. Hampden and several others, were clapped up close prisoners in the Tower? Did it not deter an honest man from appearing to witness the truth, when sir Patience Ward was convicted of perjury; Did it not provoke two great and noble families, when the lord Russel and colonel Sidney were so illegally and unhandsomely dealt withal, as shall be hereafter declared? Did it not provoke all the nation, except the clergy and soldiery, when all the charters of England were seized, and not regranted, but at excessive rates, to the starving the poor, who should have been fed with the money which went to purchase the new charters, and reserving the disposition of all the places of profit and power, within the new corporations, to the king, but which indeed the confederates shared among themselves? Nay, the very election of burgesses, the freeness of which is the great fundamental of the government, was monopolized, and put into a few hands. Did not the unreasonable fines and cruel punishments inflicted, oppress many, terrify all, and consequently made the government odious to the subject? Did not the cruelties acted in the West, enrage above a third part of the nation? Did not the turning out many of the soldiery and clergy, without any reason: and for that purpose erecting arbitrary courts, and granting dispensations to persons by law disabled, to enable them to have and enjoy the places and offices of such as were illegally turned out, and of all who should be in like manner turned out? And was it not seen what the consequences of those things would be, by all who did not wink their eyes, or who were not blinded by the profit they made of such illegal and cruel acts? Was not the king at last sensible, that the consequence of what is before recited would be what afterwards happened? And did he not in less than a month's time, when too late, throw down all that Babel of confusion which had been so long a-building? and did all in his power, and would have done more if he could,

* See the Trial of Woodburne, *post*, A. D. 1721.

to have set things as right as they were before the parliament of Oxon? for from thence the extravagancies may be dated. But als [illegible] much [illegible] can be, and was done by weak [illegible], than the best wits can retrieve; those that were dead could not be brought to life: the restitution of the city's charters was but mean relief. How shall all those defend themselves who have acted under all the illegal [illegible] constituted, and [illegible] elected? How shall [illegible] defend themselves who have [illegible] officers appointed by the new charters [illegible] the [illegible] if they never [illegible] been? How shall [illegible], and other officers, which [illegible] now [illegible] prisoners, and having not taken the test [illegible] to the validity of a dispense believe them selves? Shall they continue to keep them prisoners in custody, or let them go? If the last, they are subject to actions of escape; if the first, they are liable to false imprisonment. These, and a great many more mischiefs, not yet seen, are the natural result of these illegal actions.

I never reflect on these things but I remember Tully, in his Offices, lays down as a rule that nothing is profitable but what is honest, and gives many reasons for it, but nothing so convincing as the examples he brings in public and private matters. And though the empire was vast, and he bore a great [illegible] in it, and was very knowing, [illegible] well read in the Greek and Roman histories, yet he was not able to bring a hundredth part of examples, to prove his position, as have been in this little island in the space of eight years. And the persons, by whose advice these [illegible] were transacted, are the more inexcusable, if it be true what a certain nobleman (who bore a considerable character in the two late kings' council) once said to me was true. He was complaining that the king was ruled by the advice of his lawyers. I asked him whether the king put his judges and counsel upon doing what was done without considering whether it was lawful, as the common [illegible] did, or that his lawyers first advised what to be done, was law? He answered me, [illegible] his honour, the king's counsel at law first advised the king might do it, [illegible] what he would have done, before he commanded them to do it.

Yet I agree, none of these matters, though [illegible] inconvenient and [illegible] are treason by the statutes of Edward or Charles.

For profit in some cases, revenge in others, the endeavouring means to escape punishment, and a natural propensity to cruelty in many, were the true ends driven at, and not the bringing their prince into the hatred of his subjects, though that was a necessary consequent of all recited, and of many more matters omitted. And let Fitzharris's crime, and those recited, be but examined, his was but a peccadillo to the least of those; though this was acted by an Irish papist, and these by English protestants, sons of the church of England as by law established, as they call themselves, though I doubt, not sincere protestants, as my lord Russel said, words which were matter of [illegible] to those who brought him to the block.

But though neither Fitzharris's crime, taken in the first sense, nor the above crimes, were high treason by any statute, and the judges have not power to punish any other treasons; yet in all times the parliaments have practised, and it is necessarily incident to all supreme [illegible], in all governments, to enact or declare extravagant crimes to be greater than by the established law they are declared to be, not by [illegible] the clause in the statute of Edward the third, which by some have by mistake thought that a power was reserved to the parliament to declare other matters treason than what is [illegible] expressed. For admit that clause had been omitted, there are none can doubt, but in point of power, the parliament could (how [illegible] justice they might, is another question) have declared any other matter to be treason; and the words of that clause are very improper expressions either to vest or serve a power in the parliament; for the words are only prohibitory to the judges to adjudge any other matters treason than those expressed in the act, though they were somewhat like those expressed, and therefore might be supposed treasons; and it is a sort of monition to offenders, that they should not [illegible] to be guilty of enormous crimes upon presumption that they were not treason within that act. For in the preamble it is said, because many other like cases of treason (which in sense are cases like treason declared in that act) may happen in time to come, which could not be thought of or declared at that present, therefore if any such should happen before any justice, the justice should tarry, and not proceed to give judgment of treason on it, till it should be [illegible] in parliament treason or felony. How well the judges, in late days, have observed that prohibitory law let the world judge; and most certainly the parliament might have declared in Fitzharris's case, as they may in the [illegible] that the crimes were treason, felony, misprision of treason, trespass, or what other crime known in the law, and inflict what punishment they thought fit; and it is no injustice in the supreme power to punish a fact in a higher manner than by law established, if the fact in its nature is a crime, and the circumstances make it much more heinous than ordinarily such crimes are. It was not injustice in the parliament of the second and third of Philip and Mary to enact, that Smith and others, who were supposed to be guilty, as accessaries to a barbarous murder, and were equally, if not more guilty than the principal, to enact, as they did, that if they should be found guilty as accessaries, they should not have their clergies, which at the time of committing the fact accessaries to murder were allowed to have. It is true, to declare or enact a fact, after it is committed, to be a crime, which when committed was in itself none, such

as transporting wool beyond sea and the like, would be high injustice.

It has already (in a Note to p. 270) been intimated, that this Case of Fitzharris presents an [illegible] the proof of the unsettledness and irregularity of the 'Lex et Consuetudo Parliamenti.' In the dispute which occurred in the year 1671, concerning the right of the Lords to alter Money bills they required to see the "charter or contract by which they had divested themselves of that right, and appropriated it to the Commons with an exclusion of themselves," to which requisition the Commons replied they might "answer by another question: What is that record or contract by which the Commons submitted that Judicature should be appropriated to the Lords in exclusion of themselves. When [illegible] your lordships find the first record, they will [illegible] it [illegible] indorsed upon the back of the same Roll." It may be questioned whether this conceit was worthy of introduction into a solemn debate between two great legislative bodies [illegible] some of their most important rights, and after all the [illegible] not [illegible] novelty: it was merely [illegible] of the old jocular call upon the Pope to produce Constantine's Grant of the [illegible] Patrimony. Mr. Hatsell's four volumes (but especially the [illegible]) of "Precedents" abound in proofs of the unsettledness [illegible] of the Lex et Consuetudo [illegible] in matters of most essential importance, [illegible] as whether [illegible] the House of Commons is a Court [illegible] vol. 3 [illegible] whether the House of Commons can administer an oath (see vol. [illegible]). His observations upon this [illegible] he concludes with [illegible] He [illegible] says [illegible] that the House of Commons having [illegible] [illegible] solemn examinations upon oath, it will never be proposed to recur to that [illegible] it is highly essential in this, as well as in every other part of their conduct, that the House of Commons should not appear desirous of exceeding the limits of their acknowledged authority, or of going beyond those bounds which are set to their power by the law and constitution of the country."

The first earl of Chatham very [illegible] repelled the doctrine of the [illegible] of what is called Privilege of Parliament. In replying to a Speech of the first earl of Mansfield, he said:

"The principles of the English laws are sufficiently clear: they are founded in reason and are the master-piece of the human understanding; but it is in the text that I would look for a direction to my judgment, not in the commentaries of modern professors. The noble lord assures us, that he knows not in what code the law of parliament is to be found; that the House of Commons, when they act as judges, have no law to direct them but their own wisdom; that their decision is law; and if they determine wrong the subject has no appeal but to Heaven. What then, my lords, are all the generous efforts of our ancestors, are all those glorious contentions, by which they meant to secure to themselves, and to transmit to their posterity, a known law, a certain rule of living, reduced to this conclusion, [illegible] the arbitrary power of a [illegible] must submit to the arbitrary power [illegible] If this be true, [illegible] exchange? Tyranny, my lords, is detestable in every shape; but in none so formidable as when it is assumed and exercised by a number of tyrants. But my lords, this is not the fact, this is not the constitution; we have a law of parliament, we have a code in which every honest man may find it. We have Magna Charta, we have the Statute Book, and the Bill of Rights. If a case should arise, unknown to these great authorities, we have still that plain English reason left, which is the foundation of all our English jurisprudence. That reason tells us, that every judicial court, and every political society, must be vested with those powers and privileges which are necessary for performing the office to which they are appointed. It tells us also, that no court of justice can have a power inconsistent with, or paramount to, the known laws of the land; that the people, when they choose their representatives, never mean to convey to them a power of invading the rights, or trampling upon the liberties of those whom they represent. What security would they have for their rights, if once they admitted that a court of judicature might determine every question that came before it, not by any known positive law, but by the vague, indeterminate, arbitrary rule, of what the noble lord is pleased to call the wisdom of the court? With respect to the decision of the courts of justice, I am far from denying them their due weight and authority; yet placing them in the most respectable view, I still consider them not as law, but as an evidence of the law; and before they can arrive even at that degree of authority, it must appear, that they are founded in and confirmed by reason; that they are supported by precedents taken from good and moderate times; that they do not contradict any positive law; that they are submitted to without reluctance, by the people; that they are unquestioned by the legislature (which is equivalent to a tacit confirmation); and what, in my judgment is by far the most important, that they do not violate the spirit of the constitution. My lords, this is not a vague or loose expression: we all know what the constitution is; we all know, that the first principle of it is, that the subject shall not be governed by the arbitrium of any one man, or body of men (less than the whole legislature), but by certain laws, to which he has virtually given his consent, which are open to him to examine, and not beyond his ability to understand."

278. The Trial* of Dr. OLIVER PLUNKET,† Titular Primate of Ireland, at the King's-Bench, for High Treason: 33 CHARLES II. A.D. 1681.

THE 3rd of May, 1681, in Easter 33 Car. Dr. Oliver Plunket was arraigned at the King's Bench bar for high-treason, for endeavouring and compassing the king's death, and to levy war in Ireland, and to alter the true religion there, and to introduce a foreign power: and at his arraignment, before his plea he urged for himself, that he was indicted of the same high-treason in Ireland and arraigned, and at the day for his trial, the witnesses against him did not appear; and therefore he desired to know if he could be tried here for the same fact. The Court told him, that by a statute made in this kingdom, he might be tried in the court of King's-Bench, or by Commission of Oyer and Terminer in any part of England, for facts arising in Ireland; and that this arraignment there (he being never tried upon it) was not sufficient to exempt him from being tried here; because till a trial be passed, and there be a conviction or acquittal thereupon, an arraignment, barely, is no plea: for in such cases the party is put twice in danger of his life, which only is the thing the law in such cases looks after to prevent.* He then desired time for his witnesses, which they told him he could not do till after plea pleaded; whereupon he pleaded Not Guilty, and put himself upon the country for his trial. And after some consideration had about time to be allowed him to bring his witnesses from Ireland, the court appointed the day for his trial, to be the first Wednesday in next term, which was full five weeks time.

And accordingly on Wednesday the 8th of June, in Trinity-Term, he was brought to his trial; and proclamation, as in such cases is usual, being made, it proceeded thus:

Cl. of Cr. Oliver Plunket, hold up thy hand, those good men which thou shalt hear, called, and personally appear, are to pass between, &c.

Plunket. May it please your lordship, I have been kept close prisoner for a long time, a year and an half in prison: when I came from Ireland hither, I was told by persons of good repute, and a counsel'or at law, that I could not be tried here; and the reasons they gave me were, that first the statute of Henry 8, and all other statutes made here were not received in Ireland, unless they were an express mention made of Ireland in them: so that none were received there but such as were before Poyning's act. So I came with that persuasion that I could not be tried here, till at my arraignment your lordships told me it was not so, and that I must be tried here, though there was no express mention made of Ireland. Now, my lord, upon that, whereas my witnesses were in Ireland, and I knew nothing of it, and the Records upon which I very much rely were in Ireland, your lordship was pleased to give me time from the 4th of the last month to this day; and in the mean time, as your lordship had the affidavit here yesterday, and as captain Richardson can testify, I have not dispatched only one, but two to Ireland, into the counties of Armagh, Dublin, &c. and where there were records very material to my defence; but the clerk of the crown would not give me any copy of any record at all, unless

* 'I do appoint Francis Tyton and Thomas 'Basset to print the Trials of Edward Fitz-'Harris and Oliver Plunket, and that no others 'presume to print the same. F. PEMBERTON.'

† "Plunket, the Popish Primate of Armagh, was at this time brought to his trial. Some lewd Irish priests, and others of that nation, hearing that England was at that time disposed to hearken to good swearers, thought themselves well qualified for the employment: so they came over to swear, that there was a great plot in Ireland, to bring over a French army, and to massacre all the English. The witnesses were brutal and profligate men: yet the earl of Shaftsbury cherished them much: they were examined by the parliament at Westminster: and what they said was believed. Upon that encouragement it was reckoned that we should have witnesses come over in whole companies. Lord Essex told me, that this Plunket was a wise and sober man, who was always in a different interest from the two Talbots; the one of these being the titular archbishop of Dublin, and the other raised afterwards to be duke of Tirconnell. These were meddling and factious men; whereas Plunket was for their living quietly, and in due submission to the government, without engaging into intrigues of state. Some of these priests had been censured by him for their lewdness: and they drew others to swear as they directed them. They had appeared the winter before upon a bill offered to the grand jury: but as the foreman of the jury, who was a zealous Protestant, told me, they contradicted one another so evidently, that they would not find the bill. But now they laid their story better together; and swore against Plunket, that he had got a great bank of money to be prepared, and that he had an army listed, and was in a correspondence with France to bring over a fleet from thence. He had nothing to say in his own defence, but to deny all: so he was condemned; and suffered very decently, expressing himself in many particulars as became a bishop. He died denying every thing that had been sworn against him." Burnet, 502.

* See the Case of Whitebread and others in this Collection, vol. 7, pp. 79, 311.

he had some express order from your lordship. So that whether it were that they were mistaken, or wilfully refused, I could not get the records, which were very material for me. For in some of those records, some of those that accuse me were convicted of high crimes, and others were out-lawed and imprisoned, and broke prison; and there were other records also of excommunication against some of them, and I could not get the records, unless your lordship would instruct me in some way or other, how I can get over them that are most material for my defence. The servants that I sent hence, and took shipping for Ireland, were two days at sea, and cast back again, and from thence were forced to go to Holy-Head, and from Holy-Head in going to Dublin they were 13 or 14 days, the winds were so contrary; and then my servant went about to go into the county of Armagh and Derry, that were 100 miles from Dublin and Meath, and other places: so that in so short a time, my lord, it was morally impossible for them to have brought the witnesses over; and those that were ready to have come, would not stir at all, unless they had a pass from hence, because some of them were Roman Catholics, and they had heard that here some were taken prisoners that were Roman Catholics, and that none ought to come without a pass; and they being witnesses against the king, they might be clapped up here, and brought into very ill condition; so they sent one over, that made affidavit.

L. C. J. (sir Francis Pemberton). It was the affidavit that was read here yesterday.

Plunket. So that, my lord, I conceive your lordship will think I did it not out of any intent to put off my trial; for captain Richardson is here, who knows that I writ by the post and desired them to come with the pacquet-boat, and they writ over to the captain after they were landed; so that I depended upon the wind and the weather for my witnesses, and wanted your lordship's order for the records to be brought over, and that their examination might be brought into court, and their own original examination here might be compared with it. So I humbly beg your lordship's favour, the case is rare, and scarcely happens in five hundred years, that one should be in my circumstances. I am come here where no jury knows me, nor the quality of my adversaries: If I had been in Ireland, I would have put myself upon my trial to-morrow, without any witnesses, before any Protestant jury that knew them and me. And when the orders went over that I should be tried in Ireland, and that no Roman catholic should be upon the jury, and so it was in both the grand and other jury; yet then when I came to my trial, after I was arraigned, not one appeared. This is manifest upon the record and can be proved.

L. C. J. There was no prosecution of you there.

Plunket. But, my lord, here is no jury that knows me, or the quality of my adversaries; for they are not a jury of the neighbourhood that know them, and therefore my case is not the same with other cases. Though I cannot harbour, nor do not, nor will not, nor ought, the least conceit of hard measure and injustice; yet if I have not full time to bring records and witnesses all together, I can't make my defence. Some where there, some afar off, so that it was a miracle six or seven counties they could do so as they did: But they got in seven or eight of them, yet there were five or six wanting. Therefore I beseech your lordship, that I may have time to bring my records and witnesses, and then I will defy all that is upon the earth, and under the earth, to say any thing against me.

L. C. J. Look you, Mr. Plunket, it is in vain for you to talk and make this discourse here now; you must know that by the laws of this kingdom, when a man is indicted and arraigned of treason and felony, it is not usual to give such time; it is rare that any man hath had such time as you have had, five weeks time to provide your witnesses: If your witnesses are so cautious, and are such persons that they dare not, or will not venture for fear of being apprehended, or will not come into England without such and such cautions, we cannot tell how to help it; we can't furnish you with witnesses, you must look to get your witnesses yourself: If we should stay till your witnesses will come, perhaps they will never come here, and so you will escape out of the hands of justice. Do not be discouraged in this, the jury are strangers to you peradventure, but they are honest gentlemen, and you shall have no other upon your jury; and you may be confident that if there be not some fact proved against you, that may amount to treason, you shall be discharged; there are persons that understand so much, and we will direct them so much. You shall have as fair a trial as if you were in Ireland; but for us to stay for your witnesses, or send you back to Ireland, we cannot do it: Therefore you must submit to your trial. We heard your affidavit yesterday, and we did then tell the gentleman that moved it, as much as we tell you. You are here to be tried, look to the jury as they are called, and except against them if you will.

Plunket. My lord, I desire only to have the favour of some time, some time this term.

L. C. J. We can't do it.

Cl. of Cr. Swear sir John Roberts.

Plunket. I humbly present this to your lordship, I am then in imminent danger of my life, if I cannot get ten days to have my witnesses over: I desire I may have but to the 21st of this month, and then if they do not come, you may go on.

L. C. J. We cannot do it, you have had five weeks time already.

Plunket. I desire but a few days.

Clerk. Sir John Roberts, take the book, look upon the prisoner: You shall well and truly try, &c.

Plunket. My lord, I desire to know, whe-

that they have been of the juries of Langhorn, or the five Jesuits, or any that were condemned.

L. C. J. What if they have? That is no exception.

Then the jury was sworn, whose names follow: Sir John Roberts, Thomas Harriot, Henry [illegible]hurst, Ralph Bucknall, Richard Gowre, Richard Pagett, Thomas Farsby, John Hayne, Thomas Hodgkins, James Partherich, Samuel Baker, William Hardy.

Cl. of Cr. Oliver Plunket, hold up your hand. You of the jury look upon the prisoner, and hearken to his charge.

"He stands indicted by the name of Oliver Plunket, late of Westminster, in the county of Middlesex, doctor in divinity, for that he is a false traitor against the most illustrious and most excellent prince our sovereign lord Charles 2, by the grace of God, of England, Scotland, France, and Ireland, king, and his natural lord, the fear of God in his heart not having, nor weighing the duty of his allegiance, but being moved and seduced by the instigation of the devil, the cordial love, and true and due natural obedience, which true and faithful subjects of our said sovereign lord the king, towards him our said sovereign lord the king do and of right ought to bear, utterly withdrawing, and contriving, and with all his might intending the peace and common tranquillity within the kingdom of Ireland, as also of this kingdom of England, to disturb, and war and rebellion against our said sovereign lord the king in the kingdom of Ireland, then being the dominion of our said sovereign lord the king, in parts beyond the seas, to stir up and move, and the government of our said sovereign lord the king there to subvert; and our said sovereign lord the king from his regal power and government there to depose and deprive; and our said sovereign lord the king, that now is, to death and final destruction to bring and put; and the true worship of God within the said kingdom of Ireland, by law established and used, to alter to the superstition of the Romish church: The first day of December, in the year of the reign of our sovereign lord Charles the Second now king of England &c. the two and thirtieth, and divers other days and times, as well before as after, at Dublin in the kingdom of Ireland, in parts beyond the seas, with divers other false traitors unknown, traiterously did compass, imagine, and intend the killing, death, and final destruction of our said sovereign lord the king, and the ancient government of his said kingdom of Ireland aforesaid to change, alter, and wholly to subvert; and him our said sovereign lord the king, that now is, from the crown and government of his kingdom of Ireland aforesaid to depose and deprive, and the true Protestant religion to extirpate, and war and rebellion against the said sovereign lord the king there to move and levy. And to fulfil and accomplish his said most wicked treasons, and traiterous compassings, imaginations, and purposes aforesaid, he the said Oliver Plunket, the said first day of December, in the abovesaid two and thirtieth year of the reign of our said sovereign lord the king, that now is, with force and arms, &c. at Dublin, in the kingdom of Ireland, then being the dominion of our said sovereign lord the king in parts beyond the seas, maliciously, devilishly, and traiterously did assemble and gather together himself, with divers other traitors unknown, and then and there devilishly, advisedly, maliciously, subtlely, and traiterously did consult and agree our said sovereign lord the king, that now is, to death and final destruction to bring, and from his crown and government aforesaid to depose and deprive, and the religion of the Romish church into the kingdom of Ireland aforesaid, to introduce and establish. And the sooner to fulfil and perfect his said most wicked treasons, and traiterous imaginations and purposes, he the said Oliver Plunket, with divers other false traitors unknown, then and there advisedly, maliciously, and traiterously, did further consult and agree to contribute, pay, and expend divers great sums of money to divers subjects of our said sovereign lord the king, and other persons unknown, to procure them the said persons unknown, our said sovereign lord the king, that now is, traiterously to kill, and the Romish religion into the said kingdom of Ireland, to introduce and establish. And that he the said Oliver Plunket, and other traitors unknown, afterwards, to wit, the said first day of December, in the two and thirtieth year of the reign of our said sovereign lord the king abovesaid, at Dublin aforesaid, in the kingdom of Ireland aforesaid, within the dominion of our said sovereign lord the king, with force and arms, &c. unlawfully, maliciously, devilishly, and traiterously did receive, collect, pay, and expend divers great sums of money to divers persons unknown, to persuade and induce divers other persons also unknown, the said false traitors in their said treasons to help and maintain, against the duty of his allegiance, and against the peace of our said sovereign lord the king, that now is, his crown and dignity, and against the form of the statutes in that case made and provided."

To this Indictment he hath pleaded, Not Guilty.

Mr. *Heath.* May it please your lordship, and you gentlemen of the jury, this is an indictment of high treason against Dr. Oliver Plunket, the prisoner at the bar; and it sets forth, That the two and thirtieth year of the king, at Dublin in the kingdom of Ireland, he did compass and imagine the death of the king, and to deprive the king of his kingdom of Ireland, and to raise war to extirpate the Protestant religion in the kingdom of Ireland, and to establish the Romish religion there. And it sets forth further; that for the accomplishment of these treasons, the defendant, with several others, did meet together at several places at Dublin in the kingdom of Ireland, and elsewhere, and at these several meetings did con-

sult and agree to put the king to death, to raise war, to extirpate the Protestant religion, and set up the Romish religion. And the indictment further sets forth, that to accomplish these treasons, the defendant did raise great sums of money in the kingdom of Ireland, and did get several persons to contribute several sums for these treasons, and that the defendant with others did disburse several sums of money to several persons, to persuade them and entice them to be aiding and assisting in these treasons, and to recompence them for them. To this indictment the defendant hath pleaded, Not Guilty. If we prove these things, you are to find him Guilty.

Serj. *Maynard.* My lord, we will quickly come to the evidence: But in short, you have heard his charge is as high as can be against the king, and against the nation, and against all that is good. The design and endeavour of this gentleman was the death of the king, and the destruction of the Protestant religion in Ireland, and the raising of war: and to accomplish this, we charge him, that there was a confederacy made, assemblies and consultations had to these ends, and raising money to accomplish it. Gentlemen, Dr. Plunket was made, as we shall prove to you, as they there call him, primate of Ireland; and he got that dignity from the pope upon this very design. He did by virtue of that power, which he thought he had gotten, make out warrants, significations, I know not what they call them, to know how many men in Ireland could bear arms from sixteen to forty; he raises taxes upon the people and the clergy there. But, my lord, the particulars will best fall from the witnesses that we shall call and prove it by, and we need not make any aggravation; for such a thing as this cannot be more aggravated than it is.

Attorney General. (Sir Robert Sawyer.) May it please your lordship, and you gentlemen of the jury, the character this gentleman bears, as primate under a foreign and usurped jurisdiction, will be a great inducement to you to give credit to that evidence we shall produce before you. We shall prove that this very preferment was conferred upon him upon a contract, that he should raise 60,000 men in Ireland, for the pope's service, to settle popery there, and to subvert the government. The evidence that we shall give you, will prove how it leads to destroy the king; and I take it according to the resolutions that have been, to raise war in the kingdom, and to introduce a foreign power, will be certainly evidence of an attempt and machination to destroy the king. As soon as he was in possession of his primacy, he goes about his work. There are two great necessaries to be provided, men and money: for men, having this great spiritual jurisdiction, whereby, indeed, all that are under it are become slaves, he issues out his warrants to all the clergy of Ireland, to give an account, and make return from the several parishes, and all the men in them above fourteen, and under sixty. And returns were accordingly made by them, that he might accordingly take a [illegible] sure what men to pick out for the [illegible] next thing was money; my lord, [illegible] lordship takes notice, that when the [illegible] slaved, the [illegible] nay all the body [illegible] He issues out his warrants to his [illegible] make a collection of money; in all [illegible] sums were levied, and when they were [illegible] we shall give you an account by our [illegible] that several sums were issued out, and [illegible] it to France to further the business. There was also provision made of great ammunition and arms; and we shall prove in particular, several delivered out by this gentleman's [illegible] to carry on this thing; and to go [illegible] stitch with this business, he takes a view of the several ports and places in Ireland, where it would be convenient to land; for they were to have from France an auxiliary force, and upon his view he pitched upon Carlingford as the place. We shall prove the several correspondencies between Rome and him, and France and him, and several messengers employed, and monies issued out from time to time for their maintenance. This will be the course of our evidence; and we will begin first with some that do not speak so particularly to this Doctor, but prove there was a general design in all parts of the kingdom of Ireland, to bring in the king of France, and extirpate the Protestant religion. And then we shall call the particular persons to the particular facts against him. First, we call Florence Wyer, (Who was sworn.)

Sol. Gen. Are you sworn, Sir?

Wyer. Yes, Sir.

Sol. Gen. Pray give the Court and the jury an account of what you know of any Plot in Ireland, to introduce the Romish religion, and bring in the French king.

Wyer. Yes, I know there was a Plot, both before Plunket's time, and in his time; for it was working in the years 1665 and 1666, but it was brought to full maturity in the year 1667. For then col. Miles Rely and col. Bourne were sent to Ireland from the king of France, with a commission to muster as many men as he could, promising to send an army of 40,000 men with a commission, upon St. Lewis's day in August next following to land at Callingford, to destroy all the true subjects, to destroy the religion as it was established there, and to set up the French king's authority and the Roman Catholic Religion. And one Edmund Angle, that was a justice of peace, and clerk of the crown, sent for all the rebels abroad in the North to come up into the county of Longford, and they marched into the head-town of the county, and fired the town; the inhabitants fled into the castle: then they came up to the gaol, thinking to break it open, and by setting the prisoners free, to join them with them; but then Angle was shot, received a deadly wound, and dropt off of his horse, and they fled. So then when they were without the town, one Charles Mac-Canal alighted, and took away all the papers out of his pocket; which if they

had been found, would have discovered all. This occasioned col. Hodge to be suspected; and being so suspected, he was taken prisoner, and turned to Newgate in Dublin. Then col. Hely fled away again to France, and the Plot lay under a cloud during the life of primate Raley the prisoner's predecessor. This primate Raley died beyond sea. Then many of the Popish religion would have had the primacy conferred upon one Duffy; but the prisoner at the bar put in for it; which might have been opposed, if the prisoner had not engaged and promised that he would so manage affairs, that before the present government were aware, he would surprise the kingdom; provided the pope and king of France would send a competent army to join with theirs for the effecting of it. So the first year of his coming over I was in the friery at Armagh; I was an acquaintance of the Friers, and they invited me; and one Quine told the prisoner, that they thought Duffy would have been primate? Said he, it is better as it is; for Duffy hath not the wit to do those things that I have undertaken to do; meaning that he did undertake to supplant the Protestant religion, to bring in popery, and put the kingdom under subjection to the king of France.

Sol. Gen. How do you know that?

Wyer. Those were the words, and the meaning I knew before, because I had heard it talked of.

L. C. J. Who was the first of these primates you speak of?

Wyer. Edmund Raley; he set this business on foot first.

L. C. J. About what?

Wyer. About calling the rebels together out of the North when they came to Longford.

L. C. J. What year was that?

Wyer. It was in 1667.

L. C. J. When died he?

Wyer. He died a little while afterwards.

L. C. J. Then Duffy would have it conferred upon him?

Wyer. Yes, after Raley's decease he would have had it conferred upon him; and there was a contention between him and the prisoner, who did engage he would bring things to that full maturity, that before the present government were aware he would do the work.

L. C. J. How do you know this?

Wyer. I know this, because I had an account of it from certain school-fellows that were with me in Ireland, then studying in Rome; they wrote this to me, desiring me I would take a good heart with the rest of my countrymen, and assuredly in a short time the kingdom would be relieved, and the Irish restored to their former patrimonies.

L. C. J. This you speak of their information. What do you know of your own knowledge?

Wyer. All that I know is, he coming into the friery of Armagh ——

L. C. J. About what time?

Wyer. It is either 10 or 11 years ago, and there was a fast there, and I was invited by the Friers, being their acquaintance; one Quine, one of the Friers, told him——

L. C. J. Told whom?

Wyer. The prisoner, that he did expect Duffy should have been primate; but the prisoner made answer, it is better as it is; for Duffy had not the wit to manage the things that I have undertaken for the general good of our religion.

L. C. J. Now tell me this: what things were those he had undertaken? Did he explain himself?

Wyer. No farther than those words: but I did conceive this was his meaning; because I knew partly of it myself, knowing of the former Plot.

L. C. J. I ask you only what words came from him; and you say they were that Duffy had not the wit to manage what he had undertaken for the general good of their religion.

Wyer. Yes, and then again in his assembly, kept by him, he charged his inferiors to collect such several sums of money as he thought fit, according to the several parishes and dignities, to assist and supply the French forces when they came over.

L. C. J. How know you that?

Wyer. I have seen the money collected, and I have seen his warrant, 'sub pœna suspensionis,' to bring it in, to redeem their religion from the power of the English Government. Again, there were those rebels that went to Longford———

L. C. J. What time were those collections?

Wyer. From time to time since he came into Ireland

L. C. J. About what time?

Wyer. Nine years, eight years, seven years ago, and the last year of all.

L. C. J. Then it was several times, you say?

Wyer. Yes, and he procured the Macdonels a piece of money out of the Exchequer, pretending to do good service to his majesty; but he sent them for France, meaning they should improve themselves, and bring themselves into favour with the king of France, and come over with the French king to surprise Ireland. This one of the rebels told me. So I have seen the prisoner's letter directed to the grand Tory Flemming, desiring that they should go to France, and he would see them, in spite of all their enemies in Ireland, safe ashore: and Flemming should return again a colonel to his own glory, and the good of his country.

Att. Gen. Do you know his hand?

Wyer. Yes, I do, as well as my own. I have seen capt. O'Neal, son of general O'Neal, coming every year into Ireland, and carrying three regiments to the French king into France; and he used to come over to Ireland every year to get a recruit; and he did get my brother to go with him, and so much importportuned me, that I could hardly withstand him; but I did not yield to his desire. He told me, it was to improve me for my good, to improve myself in military discipline; and then I should return for Ireland a captain

under the French king, to surprise the kingdom and settle the popish religion; and then I should be restored to my estate.

L. C. J. Who told you this?

Wyer. Captain O'Neal. And in the mean while, says he, I hear Dr. Plunket is the only man intrusted in Ireland to make these preparations, and get things ready against the French king's coming, who is to land at Carlingford.

Att. Gen. How often were you in the Doctor's company?—*Wyer.* Not very often.

Plunket. I never saw him with my eyes before in my life.

Wyer. I have seen him in the priory the first year that he came over to Ireland; and you know the meetings held at George Blyke's house in the Fives, and I have seen him in his own house.

Justice *Dolben.* How came you to know the prisoner's hand?

Wyer. Because I was well acquainted with his hand, seeing his hand among the priests.

Justice *Dolben.* Did you ever see him write?

Wyer. Yes, in the priory, and in his own house.

Justice *Dolben.* How often?—

Wyer. Not often.

Justice *Dolben.* How often?

Wyer. Ten or a dozen times. I should know his hand from all the writing in London, if it were among never so many. Let me but see it, I will know it.

L. C. J. Have you ever heard him own himself primate?

Wyer. Yes, my lord he writes himself "Oliverus Armicanus, Primas et Metropolitanus totius Hiberniæ," that is his stile.

L. C. J. Who did he say made him primate?

Wyer. The pope, my lord.

L. C. J. Have you heard him say so?

Wyer. Yes, I heard him discourse of it in the priory.

Att. Gen. He was a public officer, and they might well know his hand.

L. C. J. I believe any body that hath seen us write but a little, would soon know our hands.

Wyer. His hand is as well known over Ireland, as mine is among my acquaintance.

L. C. J. Well, go on.

Wyer. During the time of his imprisonment, I have seen his commands to some of his inferior dignitaries, commanding them, 'sub 'pœna suspensionis,' to bring in the monies assessed for bringing in the French army; and that there was no better time than the time of his imprisonment to bring it in.

L. C. J. Who were they, you say, that were commanded 'sub pœna suspensionis?

Wyer. Since his taking, I have seen in the time of his imprisonment his commands to his inferior dignitaries, not to be forgetful of the monies that were assessed towards the supplying the French army; and that there was no better time to bring in the French, than when he was in prison.

L. C. J. How long ago was this? [illegible]

Wyer. The 1st of February, 16[illegible] 2nd and last of it was in July and Nov[illegible]

L. C. J. And this was to bring in the m[illegible]

Wyer. Yes, to supply the French [illegible] And that there was no better time than d[illegible] his imprisonment, and they should no[illegible] much suspected.

L. C. J. And these mandates you have [illegible] under his hand.

Wyer. Yes, I have, my lord.

Att. Gen. What do you know of his summoning or issuing out these warrants for lists of men?

Wyer. I have not seen any of the warrants; but the priests have told me they were commanded by his warrants to let him know how many there were in all their parishes from sixteen to sixty.

Att. Gen. You say you never saw the Mandates?

Wyer. No, I did not.

Serj. *Jefferies.* What do you know about the prisoner's viewing the ports?

Wyer. I have seen him going about from port to port, to Derry, to Carricfergus, Castly, Down, and Carlingford, and all about.

Serj. *Jefferies.* When he went to take a view of those ports, can you tell to what purpose he did it?

Wyer. Yes, I heard it among the church, that he went on purpose to view the sea ports, to know the strength of all the garrisons, and to see which was the most convenient way to bring in the French army.

Serj. *Jefferies.* Did you ever speak with the prisoner at the bar about his going?

Wyer. No.

Serj. *Jefferies.* What place did he pitch on as most convenient?

Wyer. Carlingford.

Att. Gen. Were you in the prisoner's company when he viewed the ports?

Wyer. I have seen him go to and fro; I did not go all the circuit round with him.

Plunket. Did you ever see me at Carlingford?

Wyer. No.

Plunket. Did you ever see me at any other of the ports?

Wyer. I have seen you at Hamilton's coming back from Derry. Do you not remember that you lodged at at sir Geo.

Plunket. I never lodged there in my life.

Sir *Fra. Withins.* Have you any thing more to say concerning the plot in general?

Wyer. No, in general I have not.

Serj. *Jefferies.* He hath not only given an account of the general, but fixed it upon the prisoner.

Att. Gen. Dr. Plunket, will you ask him any questions?

Plunket. You say you remember you saw me at my first coming as primate ten years ago, and that you were at the priory when I was there?

Wyer. Yes.

Plunket. You were invisible to me.

L. C. J. If you will ask any question, do; but do not make these kind of observations.

Plunket. Tell me this, why did you not acquaint some justice of the peace then with what you knew, that which you had heard seven years ago?

Wyer. When I first knew it, I was as willing to have it concealed as they.

L. C. J. What is your question, Dr. Plunket? Pray tell it us.

Plunket. He says, my lord, that ten years ago I had such a design in hand, and he knew the money was collected for these very ends, and he knew of the design from that same captain O'Neal, whom I employed and sent abroad; and that I had a design to bring in the French at Carlingford, and went about to all the ports in Ireland, and pitched upon that as the most convenient; and yet it is so inconvenient for the bringing in a foreign force, that any one that knows any thing of the maps of the world, will easily conclude it otherwise. But, I say, my lord, why did not he tell some justice of peace that I was upon such a design but let me live in Ireland ten years after, and never speak of it till now?

L. C. J. What say you to the question?

Plunket. When he saw me all the time, and to the time of my taking prisoner, and never said one word; for I was a prisoner six months only for my religion, not one word of treason spoken of against me for so many years; why did not he acquaint some justice of the peace with it before?

L. C. J. What religion were you of then?

Wyer. I was a Roman catholic.

Plunket. And are you not so now?

Wyer. Yes, I am so.

Just. *Dolben.* Therefore it will be no wonder that you did not discover it.

Serj. *Jefferies.* But I ask you, why did not you discover it all this time?

Wyer. Because I was a papist myself: The first that did discover it, he and I did consult about it, I had charged him so to do, and I set him on work; but he was ill paid for having discovered: You got him to be trepanned, that he hath gone in danger of his life for it.

Plunket. Who is the man?

Wyer. Moyer.

Sir *Fra. Withins.* Call Henry O'Neal, (who was sworn.) What know you of any design in Ireland to introduce the popish religion?

O'Neal. In August 1678, bishop Tyrrel came with 40 odd horsemen to vicar general Brady's house, and alighted at the door; and he gave them there an oath, which they took willingly and freely from hand to hand, to forward the popish plot against the Protestant religion, to make an end of them all in one hour from end to end in Ireland; and, said he, I will come within two days with an order from the lord Oliver Plunket; and you need not be afraid, for the lord Oliver Plunket and I have sent some gold and money into France to get men, and bring them from France over sea; And do not fear, this will go on in one hour through all Ireland from end to end. In September 1678, a little while after, the same meeting was in a place which they call Virginia, in the county of Connaught, where they took a priest, he is here, and he was with me, and desired me to come up to Dublin and discover this; and there I did discover it to sir John Davis; which is all that I can say. For this Plunket I never saw him in my life.

Mr. *Jones.* You were a papist then?

O'Neal. Yes, I was.

Mr *Jones.* Are you a Roman catholic still?

O'Neal. Yes, I am.

Mr. *Jones.* And were you acquainted with all these orders?

O'Neal. Yes.

L. C. J. How came you to know of this oath?

O'Neal. I was in the house with them; I was one concerned to take my oath with them, and I durst not but take the oath.

L. C. J. Had you the oath of secrecy given you?

O'Neal. Yes, and so this priest commanded me to go along to Dublin and discover it.

Serj. *Jefferies.* What is his name?

O'Neal. John Mac Legh.

Sir *Fra. Withins.* Do you know any other transactions about the plot?

O'Neal. No, I will not swear for all the world more than I know.

Sir *F. Withins.* Then call Neile O'Neal, (who was sworn). What do you know of any design carrying on in Ireland against the government and the Protestant religion?

N. O'Neal. I will tell you all I know: I was at vicar Brady's house the 21st of August

L. C. J. What year?

N. O'Neal. 1678. And bishop Tyrrel came with 40 horse-men to the house, and went into the house, and discoursed a little while; and they took their oaths, every one round, to keep secret the plot to destroy the Protestant religion and the Protestants, that they might have their estates again. And he said they did not need to fear: for, said he, you have a very good man to assist you, and that is the lord Oliver Plunket, and you need not fear but it will go through all Ireland.

Att. Gen. Will you ask him any questions?

Plunket. Why did you not discover it before?

Serj. *Jefferies.* Were you a Roman Catholic at that time?

N. O'Neal. Yes, and am so still.

Mr. *Paget*, (Jury-man). I desire he may be asked how he came to be there.

L. C. J. You say, I think, this was at vicar general Brady's; how came you to be there?

N. O'Neal. I was there several times before that; for my nurse or my foster-mother (I do not know which you may understand best) was house-keeper to him.

L. C. J. Were you required to take the oath?

N. O'Neal. No, my lord, I was acquainted in

the house, I had been there two or three weeks before.

Plunket. Why did not you tell it to some justice of the peace?

L. C. J. He was a Papist, and so he is now.

N. O'Neal. There were many there that were wiser than I, that did not discover it.

L. C. J. How old are you?

N. O'Neal. I believe about 22 years old.

L. C. J. And this was but in 1678.

Att. Gen. Swear Owen Murfey, (which was done) Come, what say you?

O. Murfey. Mr. Edmund Murfey discovered the Plot; he went to one lieutenant Baker and did discover the plot to him, that there was a design to bring in the French.

L. C. J. Speak out aloud, I cannot hear you.

O. Murfey. All I know is from Mr. Edm. Murfey——

L. C. J. What do you know of any, of your own knowledge?

O. Murfey. Mr. Lieutenant Baker told me, that he did hear of the French——

L. C. J. Speak what you know yourself.

O. Murfey. If it please your lordship, this is more I saw that evidence that Edmund Murfey did produce in Ireland, when he was sent to the gaol there; but without trial or any thing.

Att. Gen. Then swear Hugh Duffy; (which was done). Speak loud, and tell my lord what you know of this plot and the prisoner: you know the prisoner, do not you?

Duffy. I know him! yes, I know him well enough.

L. C. J. What say you more of him?

Duffy. My lord, I say I have seen this Dr Oliver Plunket raising several sums of money to carry on this plot; sometimes 10*s.* per ann. sometimes 20*s.*

Sol. Gen. Of whom?

Duffy. Of all the priests in Ireland; of every priest according to his pension and parish.

L. C. J. In all Ireland?

Duffy. Yes.

L. C. J. And towards the proceedings of the plot?

Duffy. It was to give to his agent which was at Rome, and for the carrying on the business.

Att. Gen. How came you to know this?

Duffy. I was servant to Dr. Duffy, who was infinitely beloved by this man. He was Father Confessor to the queen of Spain. There was nothing that happened between them, but I was by all the time.

L. C. J. Were you chaplain to him?

Duffy. Yes.

L. C. J. You are a Papist then?

Duffy. Yes.

Att. Gen. This man is a Friar, my lord.

L. C. J. Were you in the company with them?

Duffy. Yes, I was.

L. C. J. What did pass there?

Duffy. About the plot; how they could confirm the plot. and this man Plunket said, he could prevail with the king of France, and the other with the king of Spain.

Att. Gen. Pray acquaint my lord [illegible] larly when this was, and in what place, [illegible] what they said?

Duffy. It was in 1673, 74, and 75, at [illegible] own house; and at he k[illegible] three or four Jesuits there, and a matter [illegible] hundred priests.

Att. Gen. What passed in the company?

L. C. J. Who else was there?

Duffy. The discourse, my lord, was always about the plot, how they could contrive the matter between them; and so they did conclude afterwards to raise so much money upon several priests, all the priests in Ireland, sometimes 20*s.* sometimes 40*s.*

L. C. J. A-piece, do you mean?

Duffy. Yes.

Att. Gen. What discourse had they about the French at any time?

Duffy. Yes, a hundred times; he talked several times, that he did not question but he should prevail with the king of France not to invade Spain: and I have seen his letter to cardinal Bouillon, to expostulate with him about the king of France, why he should wage war with the king of Spain, who was a Catholic, but rather should come and redeem Ireland out of its heretical jurisdiction.

Att. Gen. Did you see the letter?

Duffy. Yes.

Att. Gen. Why, do you know his hand?

Duffy. Yes, I know it as well as I know my own; I know it if there were a thousand papers together.

Att. Gen. And what was the import of it, pray?

Duffy. That cardinal Bouillon should prevail with the king of France not to invade Spain; and the contents of the rest of the letter were, That he did admire he should not rather wage war with the king of England, who hath been an apostate, and help their poor country that was daily tormented with heretical jurisdiction.

Att. Gen. How came you to be in France? Were you employed?

Duffy. I went to France to live there in a convent.

Plunket. Did Cardinal Bouillon shew you my letter?

Duffy. Yes.

Plunket. What year?

Duffy. 1677.

Att. Gen. Pray, sir, you were speaking of raising of money——

Duffy. Yes.

Att. Gen. Did you see any precept about it?

Duffy. Yes, I have seen several precepts: I was Curate to one Father Murfey; and while that man was with Dr. Oliver Plunket, and other Jesuits, I did officiate in his place, and he sent his letters to me to raise 40*s.* and 20*s.* a time, several times.

L. C. J. You yourself?

Duffy. Yes.

Att. Gen. What for?

Duffy. It was to send to Dr. who was at Rome.

Att. Gen. Did you send any money that you know of?—*Duffy.* Yes.

Att. Gen. Tell what time you gave the money yourself?

Duffy. In 1673, 74, 75.

Att. Gen. Where?

Duffy. At his own dwelling place at

Just. Jones. Of what quality was the prisoner amongst you?

Duffy. He was primate of all Ireland.

Just. Jones. Under whom?

Duffy. Under whom? under the Pope.

Just. Jones. How do you know he was so?

Duffy. We had it in his writings.

L. C. J. Did he stile himself so in his letters?

Duffy. Yes, if he writ but to the least man in the country, he would write, "Oliverus Armicanus, Primas totius Hiberniæ."

L. C. J. And so you always understood him?

Duffy. Yes.

Att. Gen. Were you present at any of the general consultations or meetings?

Duffy. Yes, I was.

Att. Gen. What number might meet at that time?

Duffy. Five hundred men and women

Att. Gen. Where was this?

Duffy. At Clouds

Att. Gen. What was the occasion and design of that meeting?

Duffy. Confirmation from the bishop.

Att. Gen. And what was done there besides?

Duffy. The second thing was, that the gentlemen of the three counties should conclude together about this matter.

L. C. J. About what?

Duffy. About joining the French and Spanish together.

Justice *Dolben.* Where was that meeting?

Duffy. In the county of Monaghan.

Just. Dolben. Was the prisoner there?

Duffy. Yes, he was the chief man.

L. C. J. When was this?

Duffy. In 1671, to the best of my knowledge.

Just. Dolben. Were you there yourself?

Duffy. Yes.

Att. Gen. What was the transaction of that day, besides the Sacrament of confirmation?

Duffy. It was agreed that the gentry of Armagh, Monaghan, and Connaught, should join together; and then they went into a private council to get a list of all the officers that were in the last rebellion, and those that lost their estates.

Att. Gen. How do you know that? Did you go into the consult?

Duffy. Yes, I was in the same consult myself, and was as willing to proceed in the matter as any one in the world.

L. C. J. Where was this?

Duffy. Within two miles of Clouds, at one Father house

L. C. J. Was that at the time when there were so many persons met? Pray speak again what was done there besides confirmation?

Duffy. Why they were withdrawn aside into a garden, some stood up, and some sat down: and Oliver Plunket stood in the middle of them all as a prelate, and every one kneeled down before him and kissed his hand.

Att. Gen. What was then said?

Duffy. Then they did consult and gave special order to some of them to get a list of all the officers in the late rebellion, and that lost their estates, and that they should be more forward than others to proceed in that wicked design.

L. C. J. What was that design?

Duffy To destroy all the Protestants together.

Att. Gen. Was it to mingle the Irish, and Spanish, and French army together?

Duffy. Yes, it was.

Att. Gen. Did you hear the prisoner speak about it?

Duffy. Yes, and he made a speech before them concerning our own faith and religion.

Att. Gen. Was there any mention of money at that time.

Duffy. It was, that every man of them that could dispose of money should provide some for those gentlemen that would soon come into Ireland.

Serj. *Maynard.* Who were those gentlemen?

Duffy. The French army and the Spanish army together.

Att. Gen. Were you at any other meeting?

Duffy. No.

Att. Gen. After he was taken, do you know of any order he sent out to gather money?

Duffy. Yes, at the assizes of Dalkeith, I think it is June two years ago he was apprehended——

Att. Gen. Indeed he was first apprehended as a very busy papist.

Duffy. I have seen two or three several orders to raise money, for the same purpose; and that it was the only time to bring the matter to an end when he lay in gaol himself.

Att. Gen. Was that the effect of the letter?

Duffy. Yes; and that the French and Spanish kings should take the advantage that now was offered whilst he was in prison.

Just. *Jones.* You say some money was sent to Dr. Cray?

Duffy Yes.

Just *Jones.* To what end?

Duffy. To comply with this design.

Just *Jones.* Where was that Dr. Cray?

Duffy. He was at Rome, he was made a bishop there.

Att. Gen. Who employed him there?

Duffy. This man employed him always.

L. C. J. What was his name?

Duffy. Cray.

Justice *Jones.* You say some of the priests paid 20, some 40?

Duffy. Yes.

Justice *Jones.* Did the lay-gentry agree to pay nothing?

Duffy. I don't know for the gentry.

L. C. J. But I think you paid something yourself?

Duffy. Yes, I paid for two or three years myself?

L. C. J. And that was for the design?

Duffy. Yes, for the French and Spanish army, and all the purposes together.

Att. Gen. What do you know of any precept to be given in of all sorts of persons of such an age?

Duffy. I gave a list of the age of every person from 16 to 60.

Att. Gen. By whose order?

Duffy. By his order.

Serj. *Jeff.* To whom did you give it?

Duffy. To Dr. Plunket.

Serj. *Jeff.* That is, to the prisoner?

Duffy. Yes, out of my own precinct.

Att. Gen. Had you had any order from him?

Duffy. Yes, it was directed to the parish priest; and I, being curate in his place, received the order.

Sir *F. Withens.* To what purpose was it?

Duffy. To know what men in Ireland were able to bear arms.

Justice *Jones.* What was the number contained in your list?—*Duffy.* 250.

Justice *Jones.* What, in one parish?

Duffy. Yes.

Serj. *Jeff.* What was the parish's name?

Duffy. Coghan.

Att. Gen. Do you know any thing of his going to view the ports?

Duffy. I accompanied him to Carlingford.

Att. Gen. Did you?

Duffy. Yes, in person I did.

Serj. *Jeff.* What did he say?

Duffy. He went round about the place where some of the custom-ships come in; there was a great castle there near the sea, and he went to view the place, but could not get a boat: And there was a great talk of Carlingford to be one of the best havens in Ireland; there was no great garrison at the place, and any ship might come to the gates of the town, and surprize it, being a little town.

Att. Gen. What did he conclude upon that?

Duffy. That he might get the French army to land safely there.

Att. Gen. What do you know of delivering any ammunition and arms?

Duffy. He did send some of this money to get ammunition into Ireland.

Plunket. You say you were Murfey's curate: Can you shew me such Institution as you say came to you to raise money?

Duffy. I could have brought them, but thought it needless.

Plunket. Can you name any other person I received money from?

Duffy. I have seen your paper of the county of Monaghan.

Plunket. Have you seen any of them pay any money?

Duffy. Yes, I have seen 20 of [illegible] money.

Justice *Dolben.* Why, you are acquainted with this man, are you not, Mr. Plunket?

Plunket. My lord, I believe I have seen him.

Justice *Dolben.* Don't you know he was chaplain to bishop Duffy?

Plunket. No, I never was in his company.

Serj. *Jeff.* Pray tell him what time of the year it was that you were at Carlingford?

Duffy. It was at the end of 1677, and the beginning of 1678.

Att. Gen. Pray, if you can recollect, was you once, or twice, or twenty times in his company?

Duffy. As I am a christian, I have been an hundred times in his company. And when you were creating priests, you would always send for me to be present; and I wonder how the man should forget himself.

Plunket. I do not say I have not seen him, or that I am a stranger to the man; but in the company of bishop Duffy I never saw him, nor I never sent him orders to pay any money; and if he did pay any money, he might shew the order.

Serj. *Jeff.* If he did pay any money, you did ill to take it.

Att. Gen. Pray let him have fair play to ask any questions.

Sol. Gen. Tell how you came to remember that you saw him at Sir Nich. Plunket's.

Duffy. Dr. Duffy did send me to sir Nicholas Plunket's, and I met Dr. Plunket as I was coming out of the city. I had been half a year at the Spanish ambassador's, and he sent me for Ireland again, and then I lived at the convent in Dublin; and then, when I knew that he would come to town, I went to Ring's-end, where the ships came in, to meet him.

Plunket. You say you were with him at my house?

Duffy. Yes.

Plunket. If you were, you were invisible: But I ask you, Why did not you tell this to some justice of the peace?

Just. *Dolben.* Good Mr. Plunket, he tells you, he was as willing to forward it then as you.

L. C. J. How came you now to change your mind?

Duffy. I went into France in 1677, and I was not there a year altogether; but when I have seen how the poor people were brought into such slavery by the French king, I thought of it, and had rather the devil should reign over us, than the Frenchman.

Just. *Dolben.* He gives you a very good rational account why.

Duffy. I have been at sir Nicholas Plunket's and Dr. Patrick Plunket's, where there fell some variance about something this man had done to Father Duffy. Says bishop Duffy, I might have had you drawn and quartered, if I were as ill a man as you; and I might have been primate of Ireland, if I would have undertaken

these things that you undertook. Upon that, says sir Nicholas Plunket, What is that? Why it was said, it was to raise 60,000 men in Ireland at any time whenever the French or the Spanish king should wage war with England, Scotland, or Ireland. And this man did confess before my face to Father Duffy, that it was not only to exalt himself, but all the Romish clergy, and all the gentry that had lost their estates.

Plunket. Mr. Duffy, one word with you: Is not this out of malice to me, for correcting some of the clergy?

Duffy. You had nothing to do with me, for I was a friar.

Att. Gen. Swear Edmund Murfey (which was done.) Tell your whole knowledge of Dr. Plunket and the Irish Plot.

Murfey. May it please you, my lord, I was one of the first discoverers of this plot; but of nine witnesses, I have but one in town.

L. C. J. Well, tell your own knowledge.

Murfey. Now I beg your lordship, as to Dr. Plunket, that you will respite it till next term; I could bring ten witnesses.

Att. Gen. Do you speak your own evidence?

Murfey. I refer it to the king and council, what evidence I have given.

L. C. J. Do not trouble yourself, be directed a little: You are here now to speak what you know concerning any treasons, or any other matters against the king, done by Dr. Plunket; speak your own knowledge, for as to other witnesses we do not call you.

Murfey. If I be called in question for this evidence——

Att. Gen. Come, sir, you have been at the Spanish ambassador's lately, answer my question; have you ever been with Plunket in Ireland?—*Murfey.* Yes, Sir.

Att. Gen. Have you ever heard him own himself Primate of Ireland?

Murfey. Yes, Titular Primate.

Att. Gen. Under whom did he claim that authority? under the king, or under the pope?

Murfey. I think he could not be under the king at all.

Att. Gen. Under whom then?

Murfey. It must be either the king or the pope.

L. C. J. Answer me directly, did he claim to be titular primate under the pope?

Murfey. I suppose he did.

L. C. J. Was he reputed generally so to be?

Murfey. Yes, my lord.

Att. Gen. Mr. Murfey, remember what you swore before the grand jury: pray recollect yourself whether that be true, and tell all.

L. C. J. You are upon your oath, you must speak the truth, and the whole truth; you must not mince or conceal any thing.

Serj. Jeff. Were you sworn before the grand jury?

Murfey. I was sworn before the king and parliament.

Serj. Jeff. Did you give in any evidence to the grand jury?

Murfey. Yes, I did.

Serj. Jeff. Was that you swore before the grand jury true, upon your oath?

Murfey. I can't say but it was.

Serj. Jeff. Repeat it; tell my lord and the jury what it was, and tell the truth.

Murfey. I have forgot it.

Att. Gen. Why then, I would ask you a little; you remember I was by, and it is no laughing matter, Mr. Murfey, you will find it so. What do you know of any orders issued out by Mr. Plunket to raise money from the priests?

Murfey. I know there were orders, and I took the orders myself in my hand.

Att. Gen. From whom had you those orders?

Murfey. From another, and not from him.

Att. Gen. Under whose hand were those orders?

Murfey. They were from the Primate.

Att. Gen. Did you see any order under Plunket's hand for raising of money?

Murfey. No, but under the Vicar General's, by his authority, as I suppose.

Att. Gen. Upon your oath, did you not swear before the Grand Jury, that you saw the orders under his hand?

Murfey. No, I did not, or I was mistaken, for it was only by his direction.

Att. Gen. Pray had you any converse with Oliver Plunket about the raising of money?

Murfey. Oliver Plunket about the raising of money?

Att. Gen. Yes, that is a plain question.

Murfey. It was about other matters I conversed with him.

Att. Gen. But did you converse with him about money?

Murfey. No, not about the money.

Att. Gen. Upon your oath, did you converse with him about bringing in the French?

Serj. Jeff. Declare the truth, come.

L. C. J. Come, don't trifle; what discourse have you had with the prisoner about raising of money, or bringing in the French? Either of them, Sir?

Murfey. I know this, if the duke of York and duke of Ormond had proceeded according to their intentions, it was a general expectation at the same time, that all the French and Irish would come and fall upon the English nation, as I understood.

L. C. J. Pray answer the question directly: You must not come and think to trifle with the court, you must speak the truth, you are sworn to it; you must not come to quibble and run about to this, and that, and t'other, but answer directly, have you had any discourse with the prisoner about orders for raising of money in Ireland?

Murfey. Yes, I have seen orders from his Vicar General for the raising of money.

L. C. J. Hath he owned them to be by his direction?

Murfey. Not before me, but others he has.

Att. Gen. Have you seen any money paid to him?

Murfey. To whom?

Att. Gen. To Plunket.

Murfey. To the Vicar General I have.

L. C. J. But to Plunket?

Murfey. None to Plunket.

L. C. J. Have you had any discourse with him at any time about the raising of money which the Vicar General gave order for?

Murfey. I have had discourse with the Vicar General.

L. C. J. Sir, don't trifle; have you had any with him?

Murfey. With him?

L. C. J. Yes, with him.

Murfey. Yes, I have had some discourse with him.

L. C. J. Tell me what discourse this was?

Murfey. I think it was about this: If the duke of York and the duke of Monmouth fell out together, that he had some men to raise about the matter, and if the duke of Monmouth would raise the Protestant religion———

Att. Gen. You see he hath been in Spanish hands.

L. C. J. Were you a Protestant, Sir?

Murfey. No, I am a priest.

Serj. *Jeff.* He is to seek yet.

Murfey. I am indifferent whether I be a Protestant or priest.

Att. Gen. My lord, he is a priest in orders, and so hath acknowledged himself.

Murfey. Yes, I am a priest, but it makes me forget myself to see so many evidences to come in, that never knew Plunket.

L. C. J. Sir, you refuse to answer those questions that we put to you here.

Murfey. What I said before the Parliament, I answer punctually.

L. C. J. You are asked questions here, and produced as a witness, will you answer directly, or not?

Murfey. Yes, I will.

L. C. J. Then let me hear what discourse you had with the Primate Plunket concerning any money raised by him or his Vicar General.

Murfey. May it please your lordship, first of all, I did not impeach Primate Plunket, but the officers and justices of the peace.

Just. *Jones.* Had you any discourse with him, yea or no?

Murfey. That he should find so many Catholics in Ireland, if the duke of York and the duke of Monmouth fell out.

Just. *Jones.* Why, it plainly appears what you drove at at first, to put off this trial if you could.

L. C. J. The papists in England have been at work with you.

Serj. *Jefferies.* I perceived this gentleman was very busy, looking upon his hat, I desire he may be searched, if he have no paper about him.

Att. Gen. Mr. Solicitor and myself heard the evidence he gave to the grand-jury.

Then he went out of the court, and would scarce be persuaded to come back again.

Att. Gen. We both heard him, and he gave the fullest evidence, much fuller to all instances and particulars of this High-Treason; much fuller than Duffy, to the grand-jury. Afterwards, about three weeks ago, the trial coming on, he ran away and lay hid; I took a great deal of pains to find him out, and sent messengers about; at last I heard he was got to the Spanish ambassador's, I sent, and they spied him in the chapel; but the Spanish ambassador's servant fell upon the messengers and beat them, the ambassador was first sent to about it, and his excellency promised that he should be brought, and when he was found he told me but the last night, that all he had sworn before the grand jury was true, and he was ready to make it out again.

L. C. J. And now he says, he knows not what he said then; pray take notice of that.

Murfey. I told the grand jury this, that my lord Plunket had a design to get 60 or 70,000 men in Ireland, if the duke of York and the duke of Monmouth should fall out.

Att. Gen. Did you tell a word of that to the grand-jury?

Murfey. Yes, sir, or I was mistaken.

Att. Gen. Not one word of that did he then say.

L. C. J. Do you own this man, Dr. Plunket, to be of your religion?

Serj. *Jefferies.* Do you know this Seeker?

Plunket. He says himself he is indifferent to be a protestant or a papist.

Serj. *Jefferies.* I will only try you by one question more, for you are sought out, and it may be you may be found: do you know how many men he was to raise in Ireland? remember what you said to the grand jury.

Murfey. 70,000 men.

L. C. J. What were they to do?

Murfey. For establishing if occasion should be——

Serj. *Jefferies.* Establishing, establishing what?

Murfey. Of the Romish religion.

Serj. *Jefferies.* Well, so far we have got 70,000 men to establish the Romish religion: What, was Plunket to do this?

Murfey. As far as I understood.

Just. *Jones.* And you understood it by himself?

Murfey. I received letters from the vicar-general to get so much money collected, and as soon as I got the letters to my hands, I sent them to a privy counsellor.

L. C. J. Do you not know that he was engaged to assist the French army?

Murfey. I do not know that by him, but by others.

Just. *Dolben.* Did you ever discourse with him about it?

Murfey. I did discourse with him about several matters.

Just. *Dolben.* About the French army?

Murfey. Yes.

L. C. J. Do you know that he did endeavour to bring them into Ireland?

Murfey. I had a correspondence in France at the same time—

L. C. J. With whom?

Murfey. With one Mac Carty.

L. C. J. And do you know that he had correspondence in France?

Murfey. Yes, I know that.

Just. *Dolben.* With whom had Plunket correspondence in France?

Murfey. He had correspondence with Dr Cray and others in France, as I understood by others.

Just. *Dolben.* Was the end of that correspondence to bring men from France into Ireland?

Murfey. Yes, so far as I understand.

Just. *Dolben.* You understood the letters when you read them, did you not?

Murfey. I know not how these people come to swear this business, whether they had not malice against him—

Att. Gen. Well, sir, pray give you your evidence, we will take care of the rest.

Just. *Dolben.* I reckon this man hath given the best evidence that can be.

L. C. J. Yes, it is evidence that the catholics have been tampering with him.

Serj. *Jefferies.* I desire he may be committed, my lord, because he hath fenced from the beginning (Which was done accordingly.)

Att. Gen. Swear John Mac Legh. (Which was done.)

Sir *F. Withens.* Tell my lord and the jury what you know of any plot in Ireland to bring in the French.

Mac Legh. I was a parish priest in Ireland, in the county of Monaghan, and Dr. Oliver Plunket received several sums of money in Ireland, and especially in the diocese where I am. I raised some of it, and paid him 40*s.* at one time, and 30*s.* another time, in 1674 I paid him 40*s.* in 1675, I paid him 50*s.* and it was about July, and it was for the better advancement of the French coming in.

Mr. *Jones.* Did he tell you that the money was to be employed that way?

Mac Legh. Yes, that the money was to be kept for arms, and ammunition for the Roman catholics in Ireland.

L. C. J. Before you paid it, did you receive any order from him?

Mac Legh. Yes, I received an order 'sub pœna suspensionis,' and there was a public order throughout Ireland, or we would not pay it; nay, several would not pay it, and they were to be suspended.

Plunket. Can you shew any of the orders under my hand?

Mac Legh. Yes, I can shew them, but only they are afar off, I did not expect to have them asked for.

Plunket. Have you no superiors of your own?

Mac Legh. Yes, but you being lord primate, you could suspend bishops and inferior clergy together.

Plunket. When was this?

Mac Legh. In 1674 and 1675.

Plunket. What is the reason you kept it so secret all this while?

Mac Legh. In the year 1677, I did discover it to one Mr. O'Neal, whom I sent to Dublin to discover this plot. I was in France myself, my lord

Plunket. How many years is it since you returned from France?

Mac Legh. In May in the year 1678.

Plunket. Why did you not speak all this while till now?

Mac Legh. I did send one Mr. Henry O'Neal to Dublin, for I durst not go, lest I should have been suspended and excommunicated.

Att. Gen. This is the priest that Henry O'Neal speaks of.

L. C. J. Is not this a very good reason? If he had come to Dublin to discover, you would have suspended him.

Plunket. But, my lord, then he might have shewn my suspension, and brought me into a præmunire,

Serj. *Jefferies.* If you please, Doctor, let us who are for the king have done with him first. I would ask you another question, sir, were you at one vicar Brady's house?

Mac Legh. Yes, I was.

Att. Gen. Tell what was done there.

Mac Legh. There was bishop Tyrrel came there with 10 horsemen well mounted and armed, he came into the house about 10 in the morning, and staid till about 11 at night, I was very much among them, and was as willing to be of the plot as themselves.

Att. Gen. Tell what was done there.

Mac Legh. There bishop Tyrrel said, that he had orders from doctor Oliver Plunket, and others to partake of the Plot to bring in the French and subvert the government in Ireland, and destroy the Protestant religion and the Protestants.

Att. Gen. Was there an oath given?

Mac Legh. Yes, they were all put to their oaths, which they did take willingly to keep it private during their lives time, and the reason was they were to have their estates during their lives time.

Serj. *Jefferies.* Now tell us when this was?

Att. Gen. My lord, Henry O'Neal, and Phelim O'Neal speak to the same purpose.

Serj. *Jefferies.* Do you remember whether Henry O'Neal was there? Did he take the oath of Secrecy?

Mac Legh. Yes.

Att. Gen. What do you know of any letters from Plunket?

Mac Legh. In France I landed at Brest, and going through Brittany, I met with bishop Tyrrell and Dr. Cray, who was my lord Oliver Plunket's agent, and duke John of Great Britanny came into them; for he heard of these two bishops being newly come out of Rome, sent for them, and I being a priest of Tyrrell's diocese, I went along with them, and they were well accepted, and he shewed Dr. Oliver Plun-

ket's conditions with the king of France, which was this; to get Dublin and Londonderry, and all the sea-ports into their own hands, to levy war and destroy the protestant religion, and that they should have him to protect them during his life-time.

L. C. J. Did you see those conditions?

Mac Legh. A copy of them I did, the governor of Brittany did shew them to the bishop.

Serj. *Jefferies.* What language were those conditions in?

Mac Legh. They were in Latin, sir.

Serj. *Jefferies.* Was Edmund Murfey put out of the diocese?

Mac Legh. Not as I know of.

L. C. J. What do you know of his being primate? Upon what conditions was he made primate?

Mac Legh. He was made primate by the election of the king of France. And upon his election, he made those conditions with the king of France, to raise men to join with the French, to destroy the Protestant religion.

Just. *Jones.* You know that man, Dr. Plunket?

Plunket. Yes, my lord.

Att. Gen. Will you ask him any questions?

Plunket. None, but what I asked the others.

Just. *Dolben.* Then if that is all, he hath given you a good answer to that already, he was as forward then as the rest.

Att. Gen. Then swear John Moyer. (Which was done.

Just. *Jones.* What do you know concerning any plot in Ireland, and Dr. Plunket's being in it?

Moyer. I knew him first, my lord, to be made primate of Ireland, engaging that he should propagate the Romish faith in Ireland, and to restore it to the catholic government; and I know the time by relation, that I came to Rome within two months after his being made primate of Ireland, upon the same conditions that have been related to you; and I was brought into the convent of St. Francis in Rome by one Father ——— and this Father was very intimate with Cardinal Spinola, and when he used to go abroad, he used to carry me along with him as a companion, and there I found several of the Romish cardinals say, that the kingdom of Ireland should come under the catholic government by the way and means of the lord primate Plunket.

Att. Gen. What do you know of yourself?

Moyer. As I was then from Rome, I happened to come into a Convent of the order of St. Francis, and there came out of Ireland a young gentleman of the family of the O'Neals who hath been my lord Primate's page.

Plunket. I never had a page.

Moyer. You termed him so, my lord, in Ireland, and as I came, this young man had a packet of letters with him, as though they were commendations to enter him into the college *de propaganda fide*, directed to the secretary of that college. And thinking them to be letters of recommendation, an old Father, called one Thomas Crawley, and I, thought it not prejudicial to open the seal; and the contents were these, I translated them five years ago, and here are the contents following, if you please, they may be read, I will do my best to read them in English, the original were in Latin, and some phrases in Italian. And when I was surprised by Mr. Murfey the last year, and taken suddenly, all my papers were taken away before I could return back again, by the soldiers and the tories. I only kept a copy of this letter I had in English as near as I could, and if I did not diminish any thing by the translation, upon the oath I have taken, I have not put any thing in it, but what the contents of the letter were.

L. C. J. Was that letter under his own hand?

Moyer. My lord cannot deny that.

Plunket. Do you know my own hand writing?

Moyer. Does your lordship deny that I know your hand?

Plunket. Pray sir, will you answer it?

Moyer. Yes, I do very well.

Plunket. When did you leave Ireland?

Moyer. I will tell you that, my lord, it is some 14 or 15 years ago.

Serj. *Jeff.* You were giving an account of the letter, read it.

Moyer. Here is the contents, *Illustrissime Domine*; it was directed to Seignior ——, who is now secretary of the college *de propaganda fide.* (So then he read his Paper.)

Sol. Gen. You say, you translated that out of a letter under the prisoner's own hand?

Moyer. Yes, I translated it immediately, and to pr it, I have statutes which his lordship m e in the general national council, which are under your own hand, my lord.

Sol. Gen. When did you make this translation?

Moyer. Five years ago.

Sol. Gen. Where did you make it?

Moyer. I made it out of the original in Ireland.

Sol. Gen. Where is the original?

Moyer. When I was taken by Mr. Murfey and Mr. Hetherington the last year, the soldiers and tories came and took them away, with other papers I had of the same business.

L. C. J. Was the paper you translated from, of his hand-writing?

Moyer. No, my lord, the paper I took this out of, was a copy of the original.

L. C. J. Was the original of his hand-writing?

Moyer. Yes, it was.

L. C. J. When did you take it?

Moyer. In Capeennica, when I met with my lord's page.

L. C. J. What made you take a copy of it?

Moyer. It was in Latin and Italian, and I translated it afterwards.

L. C. J. And the English father, you say, made bold to open it?

Moyer. Yes, because he thought it was a letter of recommendations; but the original of the statutes made at Clouds, I did take the original, and gave a copy to the page.

L. C. J. Have you the original here?

Moyer. Yes, my lord, under his own hand.

Plunket. That is another thing.

L. C. J. But we would know that other thing.

Serj. *Jefferies*. My lord, I desire that he would produce it, it is his own hand-writing; see whether his grace can deny it.

Moyer. The signing of it is his own hand-writing, I got the writing along with the letter, and thinking to have a copy of the one, as well as of the other; it was the Statutes I got, and I never knew I had them till I was in Madrid, in Spain.

Then the Paper was shewn to the Prisoner.

Plunket. My lord, it is my hand.

Moyer. Indeed, my lord, it is your own hand.

Serj. *Jefferies*. He owns it.

Moyer. And there is an order in those Statutes, wherein Ireland was bound to send so much money to Rome, upon such a design.

Then the Witness read the title in Latin.

Just. *Dolben*. Look out that clause for the raising of the money.

Moyer. My lord, it is that I look for. 'Cum 'tot. Clero in Hibernia necessarium sit.'

Just. *Dolben*. That is but *negotia* generally.

Serj. *Maynard*. That was to solicit their affairs.

Att. Gen. It is 500*l.* in the whole.

Plunket. Is it 500*l.*?

Moyer. It is in figures a 5 and two 00.

Plunket. My lord, this is counterfeit, it is put in by other ink.

Just. *Dolben*. Like enough so.

L. C. J. Nothing more ordinary, you leave a blank for the sum, and then, may be, you put it in with other ink.

Just. *Dolben*. How much do you say was the money, Dr. Plunket?

Plunket. My lord, every agent that is kept at Rome hath a maintenance, as all countries have their agents at Rome.

Just. *Dolben*. How much was it?

Plunket. It was 50*l.* a year.

L. C. J. Look you, Mr. Plunket, consider with yourself, 50 or 500 in this case is not five farthings difference, but the money was to be raised by your order.

Plunket. Ay, but whether it was not raised to this effect. There is never a nation where the Roman Catholic religion is professed, but hath an agent for their spiritual affairs at Rome, and this was for the spiritual affairs of the clergy of Ireland.

Serj. *Jefferies*. And the letter was for spiritual affairs too, was it not?

Plunket. I desire nothing, that is a truth, every nation hath an agent, and that agent must be maintained; and the reason is this, because we have many colleges beyond sea, and so there is no country of Roman Catholics but hath an agent in Rome.

L. C. J. You had better reserve yourself till by-and-by, to answer that and the letter together; for this is but a small part of the evidence.

Att. Gen. About this letter you were speaking of, pray, will you tell what fell out about it?

Moyer. I will tell you how it fell out afterwards. Then I came along into Marseilles in France, and there were two captains that had as much notice as I had in that letter, for they were discoursing, that they would advance themselves in the French king's service, and hoped, that by the king of France's help to have the Roman Catholic faith set up in their own country; why, that discourse passed off, for I was mightily afraid of any such thing, because I was of another opinion; for perhaps I might think the Roman Catholic faith would flourish as well as ever it did, and hoped so as well as any body else, but not by the sword. As I came to Madrid, there came one Hugh O'Donnell, son to —— O'Donnell, with letters of recommendation, and those letters were to intitle the young man earl of Tyrone; and likewise that his majesty, the king of Spain, should help him for Ireland, according to the form of the letters he had. And then as I came for Ireland, speedily after there came letters of recommendation to me, that I should present myself to my Lord Primate, to hear confessions, and be heard preach. I came to his lordship at his own house the 9th of December 1674, and there he kept me several hours, and approved me; and the copy of the approbation I have to shew. And after a long dispute we went aside, and went to look Father Patrick, and there he shewed me such and such things. And after a long discourse I told my Lord Primate, I saw your lordship's letter which you sent by young O'Neal in such a place, and he shewed me the contents of it, and said, Ay, my lord, it is a good intention and design, if it can be done without bloodshed: then my lord mused a little, and he said, well father Francis (which is my name in religion, my Christian name was John) pray will you keep it secret? Well, my lord, said I, you need not fear; for said he, whatever I have done herein was not for my own good, but for the public good of the Catholics. Well, said I, it is well. Then he does commend me into the parish of where this Mr. Murfey here was to put in a bull, that I had from my Lord Primate, which bull was brought here last year; and there he proffered me high promotions, if I would further such things, and solicit such gentlemen as I knew would be private in such a business, such as were old commanders among my friends and relations. Shortly after this I saw Plunket and bishop Tyrrel, and captain Con O'Neal, practising to bring soldiers ready for Ireland, as soon as they could get opportunity. This captain Con O'Neal coming to the place where we kept our priory,

and he and his brothers were sons to general O'Neal. And there captain Con comes in the night-time and lodges with us, and discoursed with his brother and I, because I was his companion beyond sea, about these matters, that he expected my Lord Primate and bishop Tyrrel's coming thither that night, to make some proposals about the Church and other affairs. After 10 o'clock, or thereabouts, my Lord Primate and bishop Tyrrel came, with others in their company, and there they and Father O'Neal did consult amongst themselves, that they should send captain Con to France and to Barcelona with such and such instruments; and sending those instruments away, captain Con departs the country, and goes for France soon after; and speedily my Lord Primate undertook, that he and bishop Tyrrel should view Munster and Ulster, and other parts of Ireland, to see how affairs stood. Soon after my Lord Primate calls a general provincial council, and sends out his orders to levy such and such taxes and subsidies, and warrants, to all the parish priests, that they should give them new lists, to know whether the numbers they had sent to Rome before, would comply with that list. And then O'Neal went to view the forts of Charlemont and Dun-Gannon, whilst those lords did collect the money: the orders I have seen with my own proper eyes, and his own man confessed before the council in Ireland, that my lord gave them under his hand.

Serj. *Jefferies.* What year was this?

Moyer. It was in 1676, to the best of my remembrance.

L. C. J. Look you, Sir, was this at a provincial meeting?

Moyer. Yes, my lord, a general national council, to send over instruments, to tell them, that they were ready to assist any foreign army that should help on the design.

L. C. J. And to raise money?

Moyer. Yes, my lord.

Just. *Dolben.* Have you paid him any money?

Moyer. I was exempted myself, but I have seen others.

Just. *Dolben.* How many?

Moyer. I believe 30.

Just. *Dolben.* It was not a secret thing then, but openly done by them.

Moyer. Yes, I saw them when they came with orders, there were four priests and they, had a great cloak bag going with orders up and down.

Serj. *Jeff.* Why were you exempted?

Moyer. Because I am a regular priest.

Sir *F. Withens.* You say you saw the orders for raising money, how do you know for what it was to be employed?

Moyer. It was there specified down.

Plunket. Can you shew any of the orders?

Moyer. I could not take them, they did not concern me

Sir *F. Withens.* How was it specified?

Moyer. To levy so much money per priest. I cannot remember the particular sum; but that every priest should give so much towards an agent in Rome to solicit their business, and forward it.

L. C. J. What year was it?—*Moyer*, 1676.

L. C. J. Was any of the money specified for raising an army, or bringing in the French?

Moyer. It was both for the agent and to summon a national council, to get things ready prepared to entertain and accept the French army when it should come. I am not so good in expressing myself in English.

L. C. J. Your sense is good, it is no matter for your expression.

Mr. *Jones.* What more do you know?

Moyer. I know that he had the same council, and that they did agree upon the business, and this I know by one Patrick Bourne, and I being willing that this wicked action should be hindered, sent to the next justice to discharge myself of it, which justice was as favourable to the business as my lord himself was.

L. C. J. Will you ask him any questions, Mr. Plunket?

Plunket. I desire to know when he left Ireland.

Moyer. I cannot tell how to number the years, but I think it was in 1662 or 63, to the best of my remembrance it was 16 or 17 years ago.—*Plunket.* When did you return?

Moyer. I came back in 1674, you know it, my lord.

Plunket. Very well, when did you see the letter with the young man in Capronnica?

Moyer. In 1672.

Plunket. How then did you know my hand, which you had never seen?

Moyer. I have seen it several times to several instruments to Seignior ———, and I have seen several other letters of your hand.

Plunket. How did you know my hand?

Moyer. I cannot positively say I then knew your hand, but according to relation, I heard it from those cardinals I conversed with at Rome.

L. C. J. But now you are acquainted with his hand, is it the same hand that you have seen up and down in writings with his name to?

Moyer. Yes, my lord, it is the very same hand.

Serj. *Jeff.* I ask you, Sir, when you came back again and told him you had seen such a letter under his hand with O'Neal, did he own it to you?

Moyer. Yes, he did own it, and that he did not do it for his own benefit, but for the public.

Serj. *Jeff.* Did he desire you to be secret?

Moyer. Yes, he did, and to be discreet, and he would see me highly promoted And, my lord, you sent proposals to me, to give me 100*l.* that I should not prosecute you, according as they told me, and they gave me one guinea in hand for it.

L. C. J. Some of it came to the hands of Murfey, I believe.

Plunket. My lord, I cannot say any thing

to this, my hands are tied because my witnesses are not here. My lord, if I had my witnesses and records, I did not care for all these witnesses.

L. C. J. But you know, you had time to bring them.

Plunket. My lord. I desire to know whether this be his hand (shewing the paper to Mr. Moyer.)

Moyer. Yes, I believe it is.

Plunket. I desire it may be read.

Moyer. Yes, I am very well satisfied it should

Cl. of Cr. reads. "For my reverend Father Anthony ——— Guardian of Armagh, your letter and citation"——It is dated in July 1678.

Plunket. He can best read it himself.

Cl. of Cr. Read it right (the paper being delivered him.)

Moyer. My lord, I pity him with all my heart, that a man of my own function should be brought into question for such things as these are, (he reads) 'Very reverend Father 'Guardian, it is dated 1 July 1678, your pater- 'nity's paternal letter and citation homeward, 'I did instantly peruse. As for my lord Oliver 'Plunket, I wrote a letter to him the day before 'I saw your reverence last, that he might cause 'my fame, which is as dear to me as my life 'to be recalled, or I should cause his name to 'be fixed at every public place, which by the 'Almighty I will do, nature and all reason 'compelling me to do it.'

Plunket. My lord, I say this, he says he came to my house when he came over, and I imparted this secret to him, yet you see I had denounced him through my whole diocess, and he here calls me by all those names of Elymas, Simon Magus, and Barjesus, and it is impossible, if I had communicated such a secret to him, that I would deal so with him.

Just. *Dolben.* He does not say, you imparted this secret to him; but he says, when he told you of the letter, you answered him, but you seemed surprised and amused first.

L. C. J. You seemed to flatter him then, and told him you hoped to see him the best of his order, highly promoted.

Just. *Dolben.* How came you to fall out, Moyer?

Moyer. When first they had this meeting at Brantry, seeing a cloud a-coming, and dreading a war, and the consequences of it, I went and applied myself to sir ——— Hamilton, one of his majesty's privy counsellors in Ireland, and I gave in all my informations the 7th December 1676.

Just. *Dolben.* And thereupon he denounced you excommunicate?

Moyer. Yes, and afterwards, when he saw I was in communication and familiar with these privy counsellors, then he was certain I had discovered the matter, and then he got a great many devices to get the letters out of my hand.

Plunket. You shall see under his own hand all the stratagem of this, if I had my witnesses here, you should then see under his own hand, upon what account he fell out with me. Pray, my lord, ask him if this other letter be his hand.

Moyer. I believe it is my own hand.

L. C. J. Read it.

Moyer. (Reads) "Very reverend father guardian," (then speaking) My lord, you know that I was loth to discover myself, being among people knowing of the Plot.

L. C. J. Well, read it over.

Moyer. (Reads) "The 23rd of April, 1678, I was somewhat comforted by your letter. But now I hope your reverence hath considered what wrong I have sustained, by my envious adversaries calumnies, only for standing, as I have a soul to save, for your rights and privileges, as also for endeavouring to hinder my native country's ruin and destruction."

Just. *Dolben.* Read that again (which he did.)

Plunket. Observe, that I was his adversary, for standing for the rights and privileges of the friars.

Just. *Dolben.* As also for endeavouring to hinder his country's ruin and destruction.

L. C. J. The one and the other were the reason of your falling out.

Moyer. (Reads on.)

Moyer. My lord, I was, I confess, a begging friar, and stood up for the privileges of the friars.

Plunket. Did you write any process to Rome against me?

Moyer. No, I never did.

Plunket. My lord, does not he say I was in disgrace at Rome?

Moyer. No, nothing of that.

L. C. J. I don't hear it, but what if he did? what is that to the purpose?

Plunket. To shew his contradictions; now he says, I was great in Rome, and but then in his letter he says, I was in disgrace at Rome. Now he says, all that he had against me, was for his friars, and to hinder the destruction of his country, because I hindered the friars to beg there, is the destruction of the country, as he was doing there. Upon that he fell out with me, and upon that his own superiors sent this order.

L. C. J. We can't meddle with your superiors' orders, they are nothing before us.

Serj. *Jeff.* My lord, I think, for the present we have done our evidence.

Plunket. My lord, to shew what was part of the falling out, I would ask him if he was indicted for any crime, and found guilty by a jury?

Moyer. That was for discovering, for I discovered it before.

Plunket. My lord, he confesses he was convict for giving powder and shot to the rebels.

Just. *Dolben.* No, he does not say so; produce the record, if you have any such thing.

Moyer. To satisfy the court.

Serj. *Jeff.* Look you, Dr. Plunket, if you will ask him any questions, that by law he is bound to answer, do it in God's name, we will

not interpose; but if you ask him any questions that may tend to accuse himself, we must tell you, he is not bound to answer them.

Plunket. He hath been convicted and found guilty, he will confess it himself.

L. C. J. He is not bound to answer such a question.

Moyer. It was a Tory swore against me, that you did absolve.

Just. *Dolben.* Don't tell us a story of your Tories.

L. C. J. Look you, Mr. Plunket, don't misspend your own time; for the more you trifle in these things, the less time you will have for your defence. I desire you now to consider, and well husband your time for your defence; what have you to say for yourself?

Plunket. My lord, I tell you, I have no way to defend myself, in that I was denied time to bring over my records and my witnesses which are 10 or 12. And if I had them here, I would stand in defiance of all the world to accuse me; but I have not sufficient time to bring over my records and my witnesses, and I am brought here out of my native country; were I in Ireland, there both I and they should be known: but when I was to be tried, they would not appear; and it is all false, and only malice. These men used to call me Oliverus Cromwellus out of spite.

Serj. *Maynard.* You are very like him, a destroyer of the government.

Serj. *Jeff.* Were not you acquainted with him?

Plunket. This is all I can say, if I had my witnesses here, I should make my defence.

L. C. J. Here are some things, that if you can give an answer to, you will do well to do it; for they stick close to you. They do testify against you here, that you did undertake to raise a body of men in Ireland, 70,000 men they speak of, out of your own nation, and all these were to join with the French, for the introducing the religion of the Romish church into Ireland, and settling that again there. And that you, in order to this, did take a survey of all those Roman Catholics that were able to bear arms, from 16 to 60; and there is plentiful evidence, that you did go a circuit there to peruse all towns, and see which might be most convenient for the taking in and entertaining the French, and landing their forces; and Charlemont, you did design that for one strong place to be taken, and Dun Gannon for another, and that you did design the French army to land at Carlingford, and all that was with you, tells the reason you gave, why that should be the place, that they might come up with a burdened ship to the very gates of the town; that you did, in order to the entertaining these foreign forces, raise money; that you did send out your orders *sub pœna suspensionis* to all that were of the Roman clergy, and that this money was received, several of them testified that they paid it to you, and this man hath seen great numbers of persons pay money to you upon these accounts. All these are treason: what say you to them? it does import you to consider what answer you can give.

Plunket. My lord, first as to the first point, I answer, that I never received a farthing of money out of my own district, and but for my own livelihood, and that I can prove by those that have received it for me, that I never received over threescore pound a year in my life, unless some gentleman would now and then give me 10*s.* for my relief. For, my lord, this is the way in Ireland, every priest hath so many families allotted to him, and every Roman Catholic family gives 2*s.* a year (as they that profess that way, know) and the priests give me who am superior over them, in my own district, some 20*s.* some 30*s.* and I never got so much in my life as to maintain a servant, and this was attested before the council in Ireland.

Just. *Dolben.* Ay, but the witnesses say, out of your own district you sent into another bishop's diocese to collect money.

Plunket. My lord, I say, I could never get so much as to keep a servant, and till now I never got a farthing out of my own diocese, unless I have been called to an arbitration or some such thing, it may be for my journey and expences 40 or 50 miles they would give me something for my maintainance. If you should find any thing else, I will be content to suffer; and if my evidence were brought from Ireland, there is nothing but what would be made clear, both under their own hands and by records, and that is all well known, and was attested in his presence before the council in Ireland; which threescore pounds was a very small thing to maintain me, and I never had above one servant, and the house I lived in was a little thatched house, wherein was only a little room for a library, which was not seven foot high, where once this fellow came to affront me, because I hindered him from begging, and that is for the money. For the men, I defy any one that ever see me make a list of men in my life, or can produce any list made by my order. I was never in my life at Kingsale, at Cork, at Dun Gannon, at Limerick, &c. or those parts of Munster which were the chief ports where the French should come in, and not in Carlingford, which is the narrow seas in Ulster, which any one that knows the world will judge to be a very improper place for the French to land in. It is all one as to say that the French should come in at a poor place, where they could get nothing, it being at the narrow seas, and they never saw me there in their lives.

L. C. J. Yes, one does say, he was with you.

Plunket. Well, one does say he saw me there, but if I had my witnesses here, I could prove he was a friar, and declared an apostate by his own provincial, as this gentleman is; and because I hindered them to beg in my districts, therefore they have this malice against me, that is all. Well, my lord, that is for that, I was never in my life in Connaught; and they cannot say, I took any list in Ulster,

ner was twelve miles in Munster in my life. But thus, my lord, sometimes there would be as our way is, so many families assigned to every priest, (and this is the plain truth,) this priest complains to me of the inequality, my companion near me hath 150, and I have but threescore, which I must rectify; though I never knew but one of these complaints. And if I had my witnesses from Ireland and the records, I would defy all these witnesses together. For my sending to Rome, I never had an agent in Rome for these seven years past, because I was not able to maintain him, and indeed it was a great shame to us; because there is never a community of friars, that hath a college beyond sea, but hath some agent at Rome.

L. C. J. It is a shame to have one there, not to want one.

Just. *Dolben*. Well, if you have witnesses, I cannot tell what to say.

Plunket. If I had gotten but to the latter end of the term, I had defied them all together. And your lordship should have seen under their own hands what they were.

L. C. J. You forget this all this while, your own letter wherein this matter is, that you had searched the towns and considered it.

Att. Gen. He does deny there was such a letter, he does not own there was such a letter.

Plunket. I, my lord, I never did write such a letter. And that young man that he speaks of, I could prove, if I had my witnesses, that he never was in my service or company in Ireland, nor writ any letters by him.

L. C. J. Did you never send any letter by one O'Neal?

Plunket. No, my lord, but he went over a begging.

Moyer. This young man's brother-in-law will testify, that he was your lordship's page.

Plunket. I have three witnesses that he came there begging, naked, and was sick three months, and went over a begging, and was at Rome as a straggler.

Moyer. Call Hanlet, (who came in.)

Sir *Fr. Withens*. Did you know Neil O'Neal?

Hanlet. Yes.

Sir *Fr. Withens*. Whose servant was he?

Hanlet. My lord Plunket sent him to Rome; he was sent there with his letters, and I saw the young man and his letters.

Mr. *Jones*. Did he come a begging there?

Hanlet. No.

Plunket. Where did you see him?

Hanlet. At Mantz.

Plunket. Where is that?

Hanlet. In France.

Plunket. And you saw him with my letters?—*Hanlet*. Yes,

Plunket. And this man says, the letters were opened at Caprennica, because he thought they were letters of recommendation.

Hanlet. Why he went that way afterwards, and they were not opened when I saw them.

Serj. *Jefferies*. Did you know he was the doctor's servant?

Hanlet. Yes, he was.

Plunket. Did you see him in my service?

Hanlet. I saw him in Mantz.

Justice *Dolben*. How do you know he was the bishop's servant?

Hanlet. Because he shewed me his letter.

L. C. J. Was he owned for his servant, and was he taken for his servant?

Hanlet. Yes.

Plunket. Did he go on foot, or on horseback?

Hanlet. He went on foot.

Plunket. He was in a poor condition in a place not above four miles from Rome, that I can prove.

L. C. J. Did he beg as he went?

Hanlet. No.

L. C. J. Mr. Plunket, if there is any question you will ask of the witnesses; or if there be any evidence you would give yourself, this is your time for the doing of it; if not, we must leave your case to the jury, who have heard the evidence all along.

Plunket. Only this, my lord, your lordship sees how I am dealt with. First and foremost I have not time to bring my witnesses, or my records, which if I had, I would not weigh one farthing to leave my cause with any jury in the world. Besides all this, I am brought out of my own native country, where these men lived and I lived, and where my witnesses and records are, which would shew what these people are. I sent by the post, and did all that I could, and what can I say when I have not my witnesses against these people, that may swear any thing in the world? You cannot but observe the improbability of the thing in itself, and unto what a condition I am brought. My lord, my life is in imminent danger, because I am brought out of my own country, where these people would not be believed against me.

Sol. Gen. My lord, I think this matter lies in a narrow compass, the evidence hath been long; I would only repeat the short heads of that which hath been given at large. He is indicted for a conspiracy to kill the king, the overt act is an endeavour to introduce a foreign power into Ireland, to raise an army, and levy war there; and the proof of it hath been very full. The proof in general, that there was a plot to introduce the French, is plain by all the witnesses; and the proof in particular upon this person at the bar, hath been as plain as any thing can be. They prove to your lordship in general, that there was an expectation that the French should come in, that there was an invitation of Florence Wyer the first witness, to go over into France and speedily he should have a command, upon his return in Ireland; that there were preparations; for this appears by the oath of secrecy given to several men. Forty men that came along with bishop Tyrrel to keep it private during their lives. And there was a farther proof of that general conspiracy by Duffy, that when there was a general meeting

of so many thousand people for confirmation, there was by the gentlemen of that meeting a secret consultation how to carry on the design, and how to look out the old officers in the late rebellion, and to see what posture they were in as to the management of this design; and this comes now particularly to the prisoner, who was by at this consultation, so the witnesses do tell you. But that that comes nearer to him, is, that he did issue out orders for the raising of money, and that he did raise money pursuant to those orders, and did receive money for that very purpose: This is proved by three witnesses, Duffy and Mac Legh, who paid the money, and by Moyer the last witness, who saw him receive it from several persons. This is positive upon him; nay, they say farther, that there was a list made of the several men, in the several parishes, that were able to bear arms upon occasion, from sixteen to sixty, and there was a list of a matter of threescore thousand men that were ready upon any occasion to rise for the purpose, and this list was delivered over into the hands of the prisoner at the bar. There is one witness Duffy, that says farther, that he saw a letter under his hand in France to the cardinal Bouillon, to invite the French king into Ireland; and he did wonder that he should spend his time and blood in wars against Spain which was a Roman Catholic, and not come into Ireland to extirpate the heretics. And this letter is confirmed by another letter, which was seen by Moyer, a copy of which is produced, which he translated from the original in Latin, and the letter was sent to Rome by Neil O'Neal, whom the prisoner says he had no concern for, but to give him some recommendations.

Plunket. I gave him no recommendations.

L. C. J. No, he says he did not give him any, nor sent any letter by him.

Sol. Gen. Then he urged, that he went along begging by the way; but it is proved he was sent by him, and sent with letters, and that by his brother in law, who met him at Mants. And it is proved by Moyer, who saw the letter opened, taking it to be but a common letter of recommendation, he read the letter and took a copy of it, and translated that copy, which translation is enough to verify all the matter which the witnesses have sworn; for it is agreeing to what he said of Cardinal Bouillon in his other letter, that it was more proper for the catholic princes to agree together and extirpate heresy, than to vary amongst themselves; that now was the time; for there were threescore thousand men ready to rise upon such an invasion. This is the substance of the letter, and this proves fully the conspiracy this man was engaged in, his receiving of money, his listing men, and his invitation of foreign princes. And this is fully proved.

Serj. *Maynard.* And so his viewing the ports too.

Sol. Gen. It was likewise agreed that Carlingford should be the port, and it is like enough to be the port, for it is a very large port, that ships of the greatest burden may come up to the town, and the town itself but a weak town. This is the substance of the evidence, and this is proof enough, we think, to convict any man of this fact.

Serj. *Jefferies.* My lord, I shall trouble you but with one word that hath been omitted. I think it is a cause of great example, and that thing which the prisoner seems to make his excuse, hath been answered by a favour and indulgence from the court in a very extraordinary manner. For, in as much as this gentleman would make it a very hard case, that he is brought out of his own country, and hath not his witnesses; it is very well known that by a particular favour of the court, which is not usual in these cases, he had between five and six weeks time for preparation for his trial: so that truly as to what does appear, I think all the witnesses that have been examined, are witnesses to be credited, except you gentlemen of yourselves can convict upon your own knowledge these persons of any misdemeanor, which I think you cannot, much less of perjury. But besides the witnesses we have produced, all which speak to the plot in general, and four of them fix it upon the person at the bar; they speak particularly, and every one agrees in circumstances, and that other that spoke mincingly, I put it upon; it is the greatest evidence that can be. For that person that could come before a grand-jury, and there be the main witness, but when he comes here, must be screwed and pumped to discover the 70,000 men. And I suppose you did observe how difficult it was to know of him, whether this person was primate of Ireland, or whether it were from the authority of the king or the pope; a very probable thing, that he should be such a one as the king designed to be primate and superintendent of Ireland. Further, my lord, I desire to take notice of too, that Wyer, the first witness, fixes four particular things upon the prisoner at the bar, which have not yet been taken notice of. First, he fixes a discourse with another person that was competitor with him for this very office, bishop Duffy, and he gives the reason why he was admitted into the office rather than the other, because he was a man of greater ability to carry on the design; and though he does not give you an account of the design, yet the rest of the evidence do, and make it to be the design then carrying on. Another thing is, he tells you of the sending one into France, that was to come back again in order to this design, I think his name was Mac Donnel, and then the great Tory Flemming and he were to come back again colonels in the army that was to be raised. The next person that fixes it upon him, is Mr. Han O'Neal, and he gives the plainest circumstances, That at a time in August when bishop Tyrrel came to the house of one Brady with so many men well equipped with such and such arms, and took the oath of secrecy; he himself, but not only he but the other priest Mac Legh, was present at the same time, and took the said oath, and he does tell you that that very priest was sent to

Dublin to discover it that very time, and so he hath fixed the person, and time, and the business they came about. Then Mac Legh comes and tells you the same thing in every circumstance; ay, but says the prisoner at the bar, and would make it to be a great objection, how chance that they have concealed this all the while, and not discovered it to some justice of the peace? Why, says one, I was under your jurisdictiction in that place, that is the very reason he gives wherefore he durst not; and, says another, I was concerned and as earnest as the prisoner or any body else, but going into France, I observed the slavery that all the subjects were under, under the tyranny of that king, and apprehending that the same king was to come into Ireland by the means of these gentlemen, I was concerned at it, and had rather the devil should reign over us than such an one, and therefore I will discover it. And he said very well, I think, that he had rather have the devil to reign; for it seems to be him, or one in his shape that reigns after that manner. And there are two persons that swear to the very year that they were obliged to raise the money, and swear positively, they saw his orders, *Sub pœna suspensionis*, I do not know whether they meant hanged or suspended from their office. But it seems it was so terrible, that it made them pay twenty shillings a-piece for three years successively. And there is another gentleman that tells you, that out of a small living, wherein he was concerned only as a curate to a third person, it had been paid two or three times, and another, though he was exempt himself from the payment, yet so great a confident was he of the prisoner's at the bar, that he was present when he saw thirty or forty pay this tax, and whereas the prisoner at the bar would make it thought a strange thing, that he should raise so much money, who had but an house seven foot high, it seems there is above that thatched house a chapel.

Plunket. There is no chapel.

Serj. *Jefferies.* But now, my lord, that which substantially proves what these witnesses say, is the letter that is sent to Rome to the secretary of the college *de propaganda fide*, which is the last letter that the last gentleman speaks of, wherein he does particularly take notice, that he had taken care to raise such monies, and view all the ports and places of strength. And my lord, that which is a very great circumstance to back the evidence of the first letter to the French cardinal Bouillon, which was taken notice of by the first witness, and there is such a passage in this too, that the catholic princes should not spill one another's blood, when they might better employ it here in Ireland for the propagation of the faith; this last letter takes particular notice of this very instance too, that instead of drawing their swords against one another, they had better come to promote the catholic faith in Ireland. These four witnesses are punctual and precise in every particular circumstance of the case, and against them there is nothing but the common objection; If I had such records, and witnesses here, I could make my defence, that is, if he had those things that he has not, he might appear to be another man than he is; but I am sure, as it appears upon the evidence that hath been given by all the witnesses, there is a plain proof, and a full proof of every treason laid to his charge.

Plunket. My lord, I desire these witnesses may be called [giving in a Paper.]

Cryer. David Fitzgerard, Eustace Commines and Paul Gormar.

L. C. J. Who gave him this paper? He had it not before.

Stranger. I was told that these were good evidences for Dr. Plunket, and I gave him the names.

L. C. J. Where are they?

Stranger. They are hard by.

Att. Gen. Where is Eustace Commines? For he was one that gave in evidence against the prisoner.

Then *Paul Gormar* appeared.

L. C. J. What would you ask him?

Plunket. I desire to know of him, whether Mr. Moyer did allure and entice him to swear against me.

Gormar. Indeed, my lord, he never did.

L. C. J. Will you ask him any more?

Gormar. But this, my lord, Mr. Moyer and I were in discourse, and he said if there was law to be had in Ireland, he would shew Mr. Plunket his share in it.

L. C. J. Well what of that?

Gormar. My lord, I did come out of Ireland to reveal what plots the Irish had against the king, and as for this Mr. Plunket, as I have a soul to save, I never heard of any misdemeanor of him.

Just. *Dolben.* How came you here to day?

Gormar. I was summoned.

Just. *Dolben.* By whom? Was it the Attorney General or Plunket that summoned you?

Gormar. Here is the summons.

Serj. *Jefferies.* It is a common Subpœna.

Plunket. I never sent for him.

Gormar. It was not against you, they knew I had nothing against you, I thought you did more good in Ireland than hurt; so I declare it.

L. C. J. Have you any more witnesses? If Fitzgerard or Commines will come, we will hear them.

Plunket. My lord, I have not any more witnesses.

L. C. J. Look you, gentlemen of the jury, this gentleman here, Mr. Plunket, is indicted of High-treason, and it is for conspiring the king's death, and endeavouring to bring the French army into Ireland for to invade that kingdom, and to plant the Romish religion in that kingdom. You have had evidence against him that hath been fully examined. And these things do seem to be very plain by the witnesses, that he himself hath taken a commission, or a grant, or, what you will please to call it, from

the pope to be primate of Ireland, that he hath taken upon him to make laws as the provincial, and that he hath undertaken and endeavoured to settle the popish religion in that kingdom, and in order to that, he hath invited the aid of the French army, and that he hath for the better landing of them, looked out what places were most convenient for them; That he hath set a tax upon the clergy within his province for the facilitating of all this, and for the making preparations for the entertainment of this army. This the witnesses testify against him, and that there were some towns, as Dungannon and another town, that were to be betrayed by the French. Now you must consider concerning these witnesses; If you believe the evidence that hath been given, and which hath been repeated by the king's council, and if you believe that he did design to bring in a French army, to establish the Romish religion there again, and that he took upon him to raise money for that purpose, surveyed the ports, and made such provisions, as the witnesses speak of and was in that conspiracy; you must find him guilty. I leave it to you, it is a pretty strong evidence, he does not say any thing to it, but that his witnesses are not come over.

Plunket. I can say nothing to it, but give my own protestation, that there is not one word of this said against me is true, but all plain romance. I never had any communication with any French minister, cardinal, nor other.

Then the jury withdrew for a quarter of an hour, and being returned, gave this verdict.

Cl. of Cr. Oliver Plunket, hold up thy hand. How say you, is he Guilty of the high-treason whereof he stands indicted, or Not Guilty?

Foreman. Guilty.

Plunket. Deo gratia, God be thanked.

Then the verdict was recorded, and the Court rose. And the Keeper went away with his prisoner.

On Wednesday, 15 June, 1681, Oliver Plunket was brought to the bar to receive his Judgment.

Att. Gen. My lord, I pray your judgment against the prisoner Oliver Plunket.

Cl. of Cr. Oliver Plunket, hold up thy hand; thou hast been indicted of high-treason, thou hast been thereupon arraigned, thou hast thereunto pleaded Not Guilty, and for thy trial hast put thyself upon God and the country, which country hath found thee Guilty; what hast thou to say for thyself, why judgment of death should not pass upon thee, and execution be thereupon awarded according to the law.

Plunket. My lord, may it please your lordship, I have something to say, which if your lordship will consider seriously, may occasion the Court's commiseration and mercy. I have, my lord, for this fact been arraigned in Ireland, and brought to my trial there. At the day of my trial all the witnesses voluntarily absented themselves, seeing I had records and witnesses to convince them evidently, and shew what men they were, and the prepensed malice that they did bear to me, and so finding that I could clear myself evidently, they absented themselves, on the day of my trial no Christian appeared, but hither over they came, and procured that I should be brought hither, where I could not have a jury that knew the qualities of my adversaries, or who knew me, or the circumstance of the places, times, and persons; the juries here, as I say, were altogether strangers to these affairs, and so, my lord, they could not know many things that conduce to a fair trial, and it was morally impossible they should know it. I have been accused principally and chiefly for surveying the ports, for fixing upon Carlingford for the landing of the French, for the having of 70,000 men ready to join with the French, for collecting money for the agents in this matter, for assisting of the French and this great Utopian army. A jury in Ireland consisting of men that lived in that country, or any man in the world that hath but seen Ireland in a map, would easily see there was no probability that that should be a place fit for the French to land in, though he never was in Ireland, yet by the map, he would see they must come between the narrow seas, all along to Ulster, and the rocks, and such places would make it very dangerous; and by their own confession it was a poor town, and of no strength, a very small garrison, which had not been so, if it had been a place of any consideration. And where I had influence only upon one province, as is well known, though I had the title of Primate of all Ireland, as the archbishop of Canterbury hath of all England; yet the archbishop of York did not permit him to meddle with his province; and it is well known by the gentry there, and those that are accustomed to the place, that in all the province of Ulster, take men, women, and children of the Roman Catholics, they could not make up 70,000. This, a jury there, my lord, had known very well, and therefore the laws of England, which are very favourable to the prisoner, have provided that there should be a jury of the place where the fact was committed, as sir Thomas Gascoigne, as I have heard, had a Yorkshire jury, though he was tried at London. And then after my coming here, I was kept close prisoner for six months, not any Christian was permitted to come to me, nor did I know any thing, how things stood in the world. I was brought here the third of May, to be arraigned, and I did petition your lordship to have some time for my trial, and I would have it put off till Michaelmas, but your lordships did not think fit to grant so long, but only till the eighth of this month, when my witnesses who were ready at the sea-side, would not come over without passes, and I could not get over the records without an order from hence; which records would have shewn that some of the witnesses were indicted and found Guilty of high crimes, some were imprisoned for robberies, and some of the wit-

nesses were infamous people; so I petitioned the 8th of this month, that I might have time but for 12 days more: but your lordship thought, when the motion was made, that it was only to put off my trial, and now my witnesses are come to Coventry yesterday morning, and they will be here in a few days, and so for want of time to defend myself in, I was exposed to my adversaries, who were some of my own clergy, whom for their debauched lives I have corrected, as is well known there. I will not deny myself, but that as long as there was any toleration and connivance, I did execute the function of a bishop, and that by the 2nd of Elizabeth is only a premunire, and no treason. So that, my lord, I was exposed defenceless to my enemies, whereas now my witnesses are come on, that could make all appear. I did beg for 12 days time, whereby you might have seen as plain as the sun, what those witnesses are, that began the story, and say these things against me. And, my lord, for those depositions of the 70,000 men, and the monies that are collected of the clergy in Ireland, they cannot be true; for they are a poor clergy that have no revenue nor land; they live as the Presbyterians do here, there is not a priest in all Ireland, that hath certainly or uncertainly above threescore pounds a year, and that I should collect of them 40*s.* a-piece, for the raising of an army, or for the landing of the French at Carlingford; if it had been brought before a jury in Ireland, it would have been thought a mere romance. If they had accused me of a Premunire for the exercise of my episcopal function, perhaps they had said something that might have been believed; but my lord, as I am a dying man, and hope for salvation by my Lord and Saviour, I am not guilty of one point of treason they have swore against me, no more than the child that was born but yesterday. I have an attestation under my lord of Essex's hand concerning my good behaviour in Ireland, and not only from him, but from my lord Berkley, who was also governor there, which the king's attorney saw; but here I was brought, here I was tried, and not having time to bring my witnesses, I could not prove my innocency, as otherwise I might. So that if there be any case in the world that deserves compassion, sure my case does: and it is such a rare case, as I believe you will not find two of them in print, that one arraigned in Ireland, should be tried here afterwards for the same fact. My lord, if there be any thing in the world that deserves pity, this does; for I can say, as I hope for mercy, I was never guilty of any one point they have swore against me, and if my petition for time had been granted, I could have shewn how all was prepense malice against me, and have produced all circumstances that could make out the innocency of a person. But not having had time enough, and being tried, I am at your mercy.

L. C. J. Well, you have nothing further to say in bar of judgment, you have said all you can?

Plunket. I have nothing further to say, but what I have said.

Then Proclamation was made for silence, while judgment was passing upon the prisoner.

L. C. J. Look you, Mr. Plunket, you have been here indicted of a very great and heinous crime, the greatest and most heinous of all crimes, and that is, high-treason; and truly your's is treason of the highest nature, it is a treason in truth against God and your king, and the country where you lived. You have done as much as you could to dishonour God in this case; for the bottom of your treason was, your setting up your false religion, than which there is not any thing more displeasing to God, or more pernicious to mankind in the world. A religion that is ten times worse than all the heathenish superstitions; the most dishonourable and derogatory to God and his glory, of all religions or pretended religions whatsoever, for it undertakes to dispense with God's laws, and to pardon the breach of them. So that certainly a greater crime there cannot be committed against God, than for a man to endeavour the propagation of that religion; but you to effect this, have designed the death of our lawful prince and king: and then your design of blood in the kingdom where you lived, to set all together by the ears, to destroy poor innocent people, to prostitute their lives and liberties, and all that is dear to them, to the tyranny of Rome and France; and that by introducing a French army. What greater evil can be designed by any man? I mention these things because they have all been fully proved against you; and that you may take notice, and repent of them, and make your peace with God, by a particular application for mercy for all these faults; for it seems to me, that against God, your prince, and fellow-subjects, you have behaved yourself very ill, designing very great evil to all these; and now it hath pleased God to bring you to judgment.

I must tell you, peradventure, what you urge for yourself might introduce pity, if it were to be believed; that is, that you are innocent, and had witnesses to prove it; but we cannot suppose any man innocent, that hath had a legal and fair trial, and a trial with as much candor to you, as your case could bear, or as perhaps any man in such a case ever had. You had time upon your request to send for you witnesses, to help you in your defence, and to have proved your innocence, if you could have done it; time long enough to your own content, you yourself thought it so, at the time it was given. To give a prisoner under your circumstances, five or six weeks time to send for witnesses, is not usual; we could have put you upon a present defence, and hurried you out of the world by a sudden trial, if we had had any design against you; but we go on in a fair way, and with legal proceedings, and with as much respect to you, as in

such a case could be used, for we gave you all the fair hearing and liberty that you desired to have.

Look you, as to what you urge, that your trial was in this kingdom, whereas your offence was in another, that is a thing that does not become you by any means to object; for you have had a trial here by honest persons, and that according to the laws which obtain in this kingdom, and that too of Ireland, which is by a Statute not made on purpose to bring you into a snare, but an ancient Statute, and not without precedents of its having been put in execution before your time: for your own country will afford you several precedents in this case, as O'Rurke, and several others that have been arraigned and condemned for treason done there. So that you have no reason to except against the legality of your trial. You say, now you have witnesses that could prove all this matter; why that lies in the mouth of any man that is condemned to say; but pray consider with yourself, what regard ought to be given to this. We cannot help it, if your witnesses do not come; you may remember they wanted not time nor opportunity to come over; but you told us they would not come unless they had a passport.

Plunket. My lord, they got a pass to come over afterwards, and so in eight days they came hither.

L. C. J. You might have provided yourself, if they wanted such a thing. In the first place, no body is bound to give it them, much less could you expect it for them without asking.

Plunket. I could not get the copies of the records neither by any means, unless I had an order from the council, and they would not give that order, unless your lordship appointed it.

L. C. J. We cannot tell that, you should have petitioned in time.

Plunket. How could any one foresee, unless he was God Almighty, that they would deny it, or that he could not get out a copy of a record, paying for it, without a petition. All the friends I had, told me, upon motion there it might be had; but here I have it under the lieutenant's and council's hands, that they would give no copy of records without order from hence, which before I could know it, it was impossible for me to have them ready against my trial.

L. C. J. Look you, Sir, I do speak this to you, to shew you that those objections, which you seem to make against your trial, have no weight at all; but in this case it is not the jury that are so material as the witnesses themselves. I appeal to all that heard your trial, if they could so much as doubt but that you were guilty of what you were charged with. For consider, here were persons that were of your own religion, the most of them priests, I think almost all of them in orders.

Plunket. There were two friers, and a priest whom I have endeavoured to correct this seven years, and they were renegadoes from our religion, and declared apostates.

L. C. J. Look you, Sir, they gave an evidence very home to your matter; you had liberty to examine them, and they gave you a rational account of any thing you asked. Let me but put you in mind of one thing. You made exceptions to one's evidence, (and indeed that was very much of your exceptions to all) why he did not reveal this in all that time: Truly he told you he was of your mind, till he went into France, and saw what slavery and mischief you endeavoured to introduce upon his and your own countrymen, and this his spirit rose against, to see what a condition Ireland was like to be brought into. And pray, did he not give you a full answer to that question?

Plunket. I had sufficient witnesses to prove he was an apostate, and was chastised by me, and therefore had prepensed malice against me.

L. C. J. Therefore I have spoken this to the satisfaction, I hope, of yourself, and all that hear it. I do now wish you to consider, you are near your end. It seems you have lived in a false religion hitherto; it is not too late at any time to repent, I wish you may have the grace to do so: In the mean time there is no room for us here to grant you any kind of mercy, though I'll tell you, we are inclined to pity all malefactors: Whoever have done evil, we are inclined to pity them, and wish heartily that they may repent, as we do that you may, of what you have done. But all we can do now, is to say what the law says, and that is to pass judgment upon you.

Plunket. May it please your lordship to give me leave to speak one word. If I were a man that had no care of my conscience in this matter, and did not think of God Almighty, or conscience, or heaven, or hell, I might have saved my life; for I was offered it by divers people here, so I would but confess my own guilt, and accuse others. But, my lord, I had rather die ten thousand deaths, than wrongfully accuse any body. And the time will come when your lordship will see what these witnesses are, that have come in against me. I do assure your lordship, if I were a man that had not good principles, I might easily have saved my life; but I had rather die ten thousand deaths, than wrongfully to take away one farthing of any man's goods, one day of his liberty, or one minute of his life.

L. C. J. I am sorry to see you persist in the principles of that religion.

Blunket. They are those principles, that even God Almighty cannot dispense withal.

L. C. J. Well, however, the judgment which we must give you is that which the law says, and speaks. 'And therefore you must go 'from hence to the place from whence you 'came, that is, to Newgate, and from thence 'you shall be drawn through the city of London to Tyburn; there you shall be hanged 'by the neck, but cut down before you are

'dead, your bowels shall be taken out and burnt 'before your face, your head shall be cut off, 'and your body be divided into four quarters, 'to be disposed of as his majesty pleases. And 'I pray God to have mercy upon your soul.'

Plunket. My lord, I hope I may have this favour, of leave for a servant, and some few friends that I have, to come at me.

L. C. J. I think you may have liberty for any servant to come to you, I know nothing to the contrary.

Plunket. And some few friends that I have in town.

L. C. J. But I would advise you to have some minister to come to you, some protestant minister.

Plunket. My lord, if you please, there are some in prison, that never were indicted or accused of any crime, and they will do my business very well; for they will do it according to the rites of our own church, which is the ancient usage, they cannot do better, and I would not alter it now.

L. C. J. Mr. Richardson, you may let his servant come to him, and any friend in your presence, to see there be no evil done, nor any contrivances that may hereafter have an influence upon affairs.

Justice *Jones.* Be you present, or somebody.

Plunket. My servant, I hope, may come, without his being present.

L. C. J. Yes, yes, his servant may be with him alone. Well, Sir, we wish better to you than you do to yourself.

Plunket. God Almighty bless your lordship. And now, my lord, as I am a dead man to this world, and as I hope for mercy in the other world, I was never guilty of any of the treasons laid to my charge, as you will hear in time; and my character you may receive from my lord chancellor of Ireland, my lord Berkeley, my lord Essex, and the duke of Ormond.

Then the keeper took away his prisoner, and upon Friday the 1st of July, he was executed according to the sentence.

At the place of execution Dr. Plunket spake as follows:

I have some few days past abided my trial at the King's-bench, and now very soon I must hold up my hand at the King of Kings'-bench, and appear before a judge that cannot be deceived by false witnesses, or corrupted allegations; for he knoweth the secrets of hearts; neither can he deceive any, or give an unjust sentence, or misled by respect of persons; He being all goodness, and a most just judge, will infallibly decree an eternal reward for all good works, and condign punishment for the smallest transgression against his commandments. Which being a most certain and undoubted truth, it would be a wicked act, and contrary to my perpetual welfare, that I should now, by declaring any thing contrary to truth, commit a detestable sin, for which, within a very short time, I must receive sentence of everlasting damnation; after which there is no reprieve or hope of pardon. I will therefore confess the truth, without any equivocation, and make use of the words according to their accustomed signification; assuring you moreover, that I am of that certain persuasion, that no power, not only upon earth, but also in heaven, can dispense with me, or give me leave to make a false protestation: And I protest upon the word of a dying man, and as I hope for salvation at the hands of the Supreme Judge, that I will declare the naked truth with all candour and sincerity: And that my affairs may be the better known to all the world.

It is to be observed, that I have been accused in Ireland of treason and Præmunire, and that there I was arraigned and brought to my trial; but the prosecutors (men of flagitious and infamous lives), perceiving that I had records and witnesses who would evidently convince them, and clearly shew my innocency and their wickedness, they voluntarily absented themselves, and came to this city, to procure that I should be brought hither to my trial (where the crimes objected were not committed) where the jury did not know me, or the qualities of my accusers, and were not informed of several other circumstances conducing to a fair trial. Here, after six months close imprisonment (or thereabouts) I was brought to the bar the 3rd of May, and arraigned for a crime, for which I was before arraigned in Ireland: A strange resolution, a rare fact, of which you will hardly find a precedent these five hundred years past: But whereas my witnesses and records were in Ireland, the Lord Chief Justice gave me five weeks time to get them brought hither: but by reason of the uncertainty of the seas, of wind and weather, and of the difficulty of getting copies of records, and bringing many witnesses from several counties in Ireland, and for many other impediments (of which affidavit was made) I could not at the end of the five weeks get the records and witnesses brought hither; I therefore begged for twelve days more, that I might be in a readiness for my trial, which my Lord Chief Justice denied; and so I was brought to my trial, and exposed, as it were, with my hands tied, to those merciless perjurors, who did aim at my life, by accusing me of these following points:

First, That I have sent letters by one Niel O'Neal (who was my page) to M. Baldeschi, the Pope's secretary; to the bishop of Aix, and to Principe Colonna, that they might solicit foreign powers to invade Ireland; and also to have sent letters to cardinal Bouillon to the same effect. Secondly, To have employed captain Con O'Neal to the French king for succour. Thirdly, To have levied and exacted monies from the clergy of Ireland, to bring in the French, and to maintain 70,000 men. Fourthly, To have had in readiness 70,000 men, and lists made of them, and to have given directions to one friar Duffy to make a list of 250 men in the parish of Foghart, in the county

of Lowth. Fifthly, To have surveyed all the forts and harbours in Ireland, and to have fixed upon Carlingford as a fit harbour for the French's landing. Sixthly, To have had several councils and meetings, where there was money allotted for introducing the French. Finally, That a meeting in the county of Monaghan, some 10 or 12 years past, where there were 300 gentlemen of three several counties, to wit, Monaghan, Cavan, and Armagh; whom I did exhort to take arms to recover their estates.

To the first I answer, That Niel O'Neal was never my servant or page, and that I never sent letter or letters by him to M. Baldeschi, or the bishop of Aix, or to Principe Colonna. And I say, that the English translation of that pretended letter produced by the friar Macmoyer, is a mere invention of his; and never penned by me, or its original, either in English, Latin, Italian, or any other language. I affirm, moreover, that I never wrote letter or letters to cardinal Bouillon, or any of the French king's ministers; neither did any who were in that court either speak to me, or write to me, directly or indirectly, of any plot or conspiracy against my king or country. Farther, I vow, that I never sent agent or agents to Rome, or to any other court, about my [illegible] temporal affairs; and [illegible] well kn[illegible] a precept publicly [illegible] that [illegible] (Rome) in countries where the go[illegible] not of Roman Catho[illegible] lics), are com[illegible] not to write to Rome, concerning any [illegible] temporal affairs. And I do aver, that I [illegible] ceived letter or letters from the Pope, [illegible] any other of his minist[illegible], making the [illegible] ntion of any such matter: so that th[illegible] Macmoyer and Duffy were most fal[illegible] letters, [illegible]

To [illegible] I say, That I [illegible] captain Con O'Neal to the French king, or any of his ministers; and that I never wrote to him, or received letters from him; and that I never saw him but once, n[illegible] spoke to him, to the best of my remembrance, ten words: and as for his being in Charlemont or Dungannon, I never saw him in those towns, or knew of his being in those places; so that as to Con O'Neal, friar Macmoyer's depositions are most false.

To the third I say, That I never levied any money for a plot or conspiracy, for bringing in Spaniards or French, neither did I ever receive any upon that account, from priests or friars, as priest Mac-Clave, and friar Duffy, most untruly asserted. I assure you, that I never received from any clergyman in Ireland, but what was due to me by ancient custom for my maintenance; and what my predecessors these hundred years were wont to receive; nay, I received less than many of them. And if all what the Catholic clergy of Ireland get in the year were put in one purse, it would signify little or nothing to introduce the French, or to raise an army of 70,000 men, which I had inlisted, and ready, as friar Macmoyer most falsely deposed; neither is it less untrue what friar Duffy attested, viz. That I directed him to make a list of 250 men in the parish of Feghart, in the county of Lowth.

To the fifth I answer, That I never surveyed all the forts and harbours of Ireland, and that I was never at Cork, Kingsale, Bantry, Youghal, Dungarvan, or Knockfergus; and these 36 years past I [illegible] not at Limerick, Dungannon, or Wexford. As for Carlingford, I never was in it but once, and staid not in it above half an hour; neither did I consider the fort or haven; neither had I it in my thoughts or imagination to fix upon it, or upon any other fort or haven, for landing of French or Spaniards; and whilst I was at Carlingford (by mere chance passing that way), Frier Duffy was not in my company, as he most falsely swore.

To the sixth I say, That I was never at any meeting or council, where there was mention made of allotting or collecting of monies for a plot or conspiracy; and it is well known, that the catholic clergy of Ireland, who have neither lands nor revenues, and hardly are able to keep decent cloaths upon their backs, and life and soul together, can raise no considerable sum; nay, cannot spare as much as would maintain half a regiment.

To the seventh, I answer, That I was never at any meeting of 300 gentlemen in the county of Monaghan, or any gentleman of the three counties of Monaghan, Armagh, and Cavan, nor of one county, nor of one barony; and that I never exhorted a gentleman, or gentlemen, [illegible] there, or in any other part of Ireland, to take arms for the recovering their estates; and it is well known, that there are not even in all the province of Ulster 200 Irish Roman catholics, who had estates, or lost estates by the late rebellion; and, as it is well known, all my thoughts and endeavours were for the quiet of my country, and especially of that province.

Now to be brief, as I hope for salvation, I never sent letter or letters, agent or agents, to pope, king, prince, or prelate, concerning any plot or conspiracy against my king or country: I never raised sum or sums of money, great or small, to maintain soldier or soldiers, all the days of my life: I never knew or heard (neither did it come to my thoughts or imagination) that the French were to land at Carlingford: and I believe there is none who saw Ireland even in a map, but will think it a mere romance; I never knew of any plotters or conspirators in Ireland, but such as were notorious and proclaimed (commonly called Tories) whom I did endeavour to suppress. And as I hope for salvation, I always have been, and am entirely innocent of the treasons laid to my charge, and of any other whatsoever.

And though I be not guilty of the crimes of which I am accused, yet I believe none came ever to this place who is in such a condition as I am; for if I should even acknowledge (which in conscience I cannot do, because I should belie myself) the chief crimes laid to my charge,

no wise man that knows Ireland would believe me. If I should confess, that I was able to raise 70,000 men in the districts of which I had care, to wit, in Ulster; nay, even in all Ireland, and to have levied and exacted monies from the Roman clergy for their maintenance, and to have prepared Carlingford for the French's landing, all would but laugh at me, it being well known, that all the revenues of Ireland, both spiritual and temporal, possessed by his majesty's subjects, are scarce able to raise and maintain an army of 70,000 men. If I will deny all those crimes (as I did, and do), yet it may be that some, who are not acquainted with the affairs of Ireland, will not believe that my denial is grounded upon truth, though I assert it with my last breath. I dare venture further, and affirm, That if these points of 70,000 men, &c. had been sworn before any protestant jury in Ireland, and had been even acknowledged by me at the bar, they would not believe me, no more than if it had been deposed and confessed by me, that I had flown in the air from Dublin to Holy-Head.

You see, therefore, what a condition I am in, and you have heard what protestation I have made of innocency, and I hope you will believe the words of a dying man; and that you may be the more induced to give me credit, I assure you, That a great peer sent me notice that he would save my life, if I would accuse others: but I answered, That I never knew of any conspirators in Ireland, but such (as I said before) as were publicly known outlaws; and that, to save my life, I would not falsly accuse any, nor prejudice my own soul. '*Quid prodest homini,*' &c. To take away any man's life or goods wrongfully, ill becometh any christian, especially a man of my calling, being a clergyman of the catholic church, and also an unworthy prelate, which I do openly confess. Neither will I deny to have exercised in Ireland the functions of a catholic prelate, as long as there was any connivance or toleration; and by preaching and teaching, and statutes, to have endeavoured to bring the clergy (of which I had a care) to a due comportment, according to their calling; and though thereby I did but my duty, yet some, who would not amend, had a prejudice for me, and especially my accusers, to whom I did endeavour to do good; I mean the clergymen; (as for the four lay-men, who appeared against me, viz. Florence, Macmoyer, the two Neals, and Hanlon, I was never acquainted with them), but you see how I am requited, and how by false oaths they brought me to this untimely death; which wicked act being a defect of persons, ought not to reflect upon the order of St. Francis, or upon the Roman Catholic clergy; it being well known, that there was a Judas among the twelve apostles, and a wicked man, called Nicholas, among the seven deacons; and even, as one of the said deacons, to wit, holy Stephen, did pray for those who stoned him to death; so do I, for those who with perjuries spill my innocent blood, saying as St. Stephen did, O Lord, lay not this sin to them. I do heartily forgive them, and also the judges, who (by denying me sufficient time to bring my records and witnesses from Ireland) did expose my life to evident danger. I do also forgive all those who had a hand in bringing me from Ireland to be tried here, where it was morally impossible for me to have a fair trial. I do finally forgive all who did concur, directly or indirectly, to take away my life, and I ask forgiveness of all those whom I ever offended by thought, word, or deed.

I beseech the all-powerful, that his divine majesty grant our king, queen, and the duke of York, and all the royal family, health, long life and all prosperity in this world, and in the next everlasting felicity.

Now that I have shewed sufficiently (as I think) how innocent I am of any plot or conspiracy, I would I were able, with the like truth, to clear myself of high crimes committed against the divine majesty's commandments (often transgressed by me), for which I am sorry with all my heart; and if I should, or could live a thousand years, I have a firm resolution, and a strong purpose, by your grace (O my God) never to offend you; and I beseech your divine majesty, by the merits of Christ and by the intercession of his blessed mother and all the holy Angels and Saints, to forgive me my sins, and to grant my soul eternal rest. 'Miserere mei Deus, &c. Parce animæ, &c. In manus tuas, &c.'

P. S.* To the final satisfaction of all persons, that have the charity to believe the words of a dying man, I again declare before God, as I hope for salvation, what is contained in this paper is the plain and naked truth without any equivocation, mental reservation, or secret evasion whatsoever; taking the words in their usual sense and meaning, as protestants do, when they discourse with all candour and sincerity. To all which I have here subscribed my hand.† OLIVER PLUNKET.

* According to Bulstrode, Memoirs 318, Plunket, at the place of execution, spoke what is here called Postscript, concluding at the words 'candour and sincerity.'

† Of this case Mr. Fox observes that the king "even after the dissolution of his last parliament, when he had so far subdued his enemies as to be no longer under any apprehensions from them, did not think it worth while to save the life of Plunket the popish archbishop of Armagh, of whose innocence no doubt could be entertained. But this is not to be wondered at, since in all transactions relative to the popish plot, minds of a very different cast from Charles's became as by some fatality divested of all their wonted sentiments of justice and humanity" Fox's Hist. James II.

279. The Trial of Sir MILES STAPLETON, bart. at York Assizes, for High Treason: 33 CHARLES II. A. D. 1681.

SIR Miles Stapleton, baronet, was indicted at the sessions of Oyer and Terminer at the West riding of the county of York, and the indictment was removed by a Writ of Certiorari to the King's-bench, where sir Miles Stapleton having been arraigned, and pleaded to the same Not Guilty, was sent down to be tried in the county of York. The Indictment was as followeth:

"Sir Miles Stapleton, late of Carleton in the county of York, baronet, stands indicted, for that he, as a false traitor against our illustrious and excellent prince, king Charles the second, his natural lord, not having God before his eyes, nor weighing the duty of his allegiance, but by the instigation of the devil being moved and seduced, the cordial love, and true, due, and natural obedience, which true and faithful subjects of our lord the king should bear to him, and of right are bound to bear, wholly withdrawing, devising, and with all his power intending to disturb the peace and common tranquillity of this realm, and to bring and put our said lord the king to death and final destruction, and the true worship of God in this kingdom by law established and used, to alter to the superstition of the church of Rome, and to move and stir up war against our said lord the king in this realm, and to subvert the government of this kingdom, the 30th day of May, in the 31st year of our said lord the king's reign, at the parish of Barwick in Elmett in the said county of York, in the West-riding of the same county, with divers other false traitors unknown did traiterously compass, imagine and intend, the death and final destruction of our said lord the king, and to change and alter, and wholly to subvert the ancient government of this realm, and to depose and wholly to deprive the king of the crown and government of the said kingdom and to root out the true Protestant religion: And to fulfil and accomplish the same most wicked treasons, and traiterous imaginations and purposes, the said sir Miles Stapleton, and other false traitors unknown, on the said 30th of May in the 31st year aforesaid, with force and arms at the parish of Barwick aforesaid, advisedly, devilishly, maliciously and traiterously, did assemble, unite and gather themselves together, and then did devilishly, advisedly, maliciously, craftily and traiterously, consult and agree, to bring our said lord the king to death and final destruction, and to depose and deprive him of the crown and government, and introduce and establish the religion of the Romish church in this realm: and the sooner to fulfil and accomplish the said most wicked treasons and traiterous imaginations and purposes, the said sir Miles Stapleton and other unknown traitors, then and there advisedly, maliciously and traiterously, did further consult and agree to contribute, pay and expend divers large sums of money to divers of the king's subjects, and other persons unknown, to procure those persons traiterously to kill our said lord the king, and to introduce the Romish religion into this realm, against the duty of his allegiance, against the peace of our said lord the king, his crown and dignity, and against the form of the statute in such case made and provided."

Clerk of Assize. Hold up thy hand, sir Miles, thou hast heard the treasons and other misdemeanors whereof thou standest indicted: Art thou Guilty thereof, or Not Guilty?

Sir *Miles.* Not Guilty.

Cl. of Assize. How wilt thou be tried?

Sir *Miles.* By God and my country.

Cl. of Assize. Culprit. God send thee a good deliverance.

Clerk of Assize. Sir Miles, this understand you, that these gentlemen that are now to be sworn, are returned by the sheriff of this county to pass between our sovereign lord the king and you for your life; therefore if you will challenge any of them, you are to challenge them as they come to be sworn, and before they be sworn.

The Jury being called, Mr. Justice Dolben took notice to sir Miles, that there were but few appeared, and therefore told him, he would do well not to challenge too many of them. Sir Miles thereupon said, he should not challenge many; and enquired whether those that served on the lady Tempest's,* Mr. Thwing's, and Mr. Ingleby's juries did now appear; and the judge answered him, that if they did, care should be taken that they should not be sworn.

Then the Jury being called to the book, sir Miles challenged these, viz. Sir David Fowles, bart. John Estoft, William Bethel, William Caley, Towers Driffeild, Marm. Trueman, John Wright, John Green, esquires; Rob. Bell, John Dixon, Thomas Wood, Robert Turner, John Beckwith, Simon Warrener, Gervase Hatfield, John Coats, gentlemen. And only two of the jury returned, viz. Tho. Fletcher, Rob. Gudgeon, were sworn.

Just. Dolben. Sir Miles, I see you must stay till the next assizes, for you challenge so many, here will not be a jury gotten.

Sir *Miles.* If your lordship please, I shall be content, and do desire the jury may be called that served the first day; nay, all the three juries, if you please.

Just. Dolben. That is, you would chuse all of one way, and leave the others; where is the indifferency of the trial then; but come, call them, I cannot deny it.

The three Juries called, and five challeng. d,

* See the Note to Thwing's case, vol. 7, p. 1162, of this Collection.

viz. Tho. Worseley, esq. Samuel Tennant, Robert Bushel, Roger Stretwel, gents. Roger Lee, esq. And these sworn, viz. Sir Tho. Pennyman, bart. Thomas Rokely, esq. William Stone, Thomas Conyers, Christopher Tankard, esq. who was excepted against by sir Thomas Stringer, as one that disparaged the evidence of the Plot, and called his dogs by the names of Oates and Bedloe; which the judges allowed to be a good exception; but there being no witness in the court to prove it, he was sworn.

Just. *Dolben.* Sir Miles, you must stay till the next assizes, we have not a full jury.

Sir *Miles.* Here are gentlemen in the court, your lordship may take whom you please.

Just. *Dolben.* I cannot do it without the king's counsel move for a Tales, which as this case stands they will not do.

And so he was remanded to prison, and 'Remanet pro defectu Juratorum' until the 18th day of July, 1681. And at the assizes then holden for the county of York, before Mr. Just. Dolben, and Mr. Baron Gregory, was proceeded against as followeth:

Clerk of Assize. Sir Miles Stapleton, hold up thy hand; thou standest indicted by the name of Miles Stapleton, late of Carleton in the county of York, bart. &c. *prout* in the Indictment.

After Not Guilty pleaded to the Indictment and other formalities of the Court, as before, these gentlemen following were called. Sir Thomas Maleverer, kt. challenged by the king's counsel. Sir Roger Beckwith, kt. challenged by the king's counsel.

Sir *Miles.* Are any challenged?

Just. *Dolben.* Yes, there are two challenged for the king.

Sir *Miles.* I hope they must shew cause why they challenge them.

Just. *Dolben.* Yes, they shall, but they are not bound to shew cause before the pannel be gone through, and then, if you desire it, they will shew cause; but I suppose sir Thomas Maleverer married a kinswoman of your's, and if so, it is a good exception.

Sir *Miles.* I desire it may be proved.

Richard Audbrough, esq. challenged by the king. John Dodsworth, esq. challenged by the king. Isaac Fairfax, esq. Christopher Bradshaw, esq. challenged by sir Miles.

These following were called and sworn, viz. Sir Barrington Boucher, kt. Sir John Jennings, kt. Richard Hutton, Wellbrough Norton, Tobias Hodson, John Beverley, Anthony Frankland, John Addams, Francis Battery, Francis Fuldgam, Humphrey Brook, Thomas Lee, esquires.

Cryer. Twelve good men and true, stand together and hear your evidence.

Clerk of Assize. Sir Miles Stapleton, hold up your hand (which he did). Gentlemen, you of the jury that are sworn, look upon the prisoner, and hearken to his charge; you shall understand that he stands indicted by the name of sir Miles, &c. *prout* in the Indictment; upon this Indictment he hath been arraigned, and thereupon pleaded Not Guilty, and for his trial hath put himself upon his country, which country you are, &c.

Then proclamation was made for evidence, and sir Thomas Stringer, one of the king's counsel, aggravated the Indictment, as followeth:

Sir *Miles Stapleton.* I desire, my lord, the king's evidence may be put apart, not to hear what each other swears.

Just. *Dolben.* No, no, sir Miles, that must not be, would you have the same for your witnesses?

Sir *Thomas Stringer.* May it please your lordship, and you gentlemen of the jury: Sir Miles the prisoner at the bar, stands here indicted of the greatest and blackest treasons that can be invented by the worst of men; he stands here indicted for endeavouring to depose the king from his crown and dignity; and imagining and compassing the death of the king, to alter the established government, and root out the true Protestant religion, and to establish the Romish religion among us. Gentlemen, to compass these wicked designs we shall prove there hath been several consults where the prisoner at the bar hath been, and where he hath contributed money to carry on these wicked designs: and gentlemen, I must acquaint you, there hath been a horrid Plot against the king and government, and I need not do it, for it hath been made notoriously known; not only parliaments have declared it so, but there have been noblemen, gentlemen, and priests, nay, some men have been found guilty for carrying on the horrid design, and have received their deserts. This Plot, gentlemen, is no new Plot, not a Plot of a day, nor of an age; but a Plot that hath been carried on for an hundred years. My lord, since we were delivered by God's mercy from the Popish religion by the Reformation; ever since that time, the Pope, the Jesuits, the priests, and those of the Popish persuasion, have, my lord, been from time to time, and ever since, endeavouring to carry on this wicked design, and had destroyed us long since, if we had not been by God Almighty, from time to time, delivered from their power. And you, gentlemen of the jury, I must tell you, this Plot was carried on in queen Elizabeth's time; and as they did in this Plot carry on their designs, with the king of Spain at Valladolid in Spain. The king of Spain, he joined with the Popish party here; but it pleased the Lord to take the queen to his mercy, before the Plot was effected. And I must tell you, the same men of the same quality that carried it on then, have now endeavoured to carry it on in these days. My lords, the king of Spain, though he was a Papist, yet it was so horrid a thing, that he left them to carry on their wicked design, and God Almighty did preserve the queen. My lords, they rested not here; but in king James's time they designed to have destroyed both king and parliament at one blow, and thereby the whole nation in its representatives, and this they managed by Guy Vaux and others. And all king Charles's time the same Plot was on foot, and pray how far did they bring it? they brought it to the death

of that gracious king, and the sad effects of a civil war; and they have brought it in these days to raise officers, generals, major generals, and other officers, and proceeded so far that actual commission was delivered for destroying our king, and if this had not been by God's mercy prevented, what would have been the evil effects thereof, ere this day? And, gentlemen, I must tell you, that which is now before you is the greatest, and most wicked design that ever was before men; and though you be of the relations and kindred, yet I know if you have but conscience and right in you, you will give a verdict according to the justness of the thing, and the evidence you shall have.

Sir *John Ottwith.* We call Mr. Smith first, who will give you an account of the plot in general.

Mr. *John Smith* called and sworn.

Just. *Dolben.* Mr. Smith, pray tell the court what you know of the plot.

Smith. I must speak of it then what I have done beyond sea, my lord. My lords, I remember when I had been first beyond sea, I became acquainted with one abbot Montagu and Mr. Thomas Car, at Paris, and they told me then, if I came to the Romish religion what preferment I should have here in England; they told me what friends they made in England, they named several persons about the court, and several gentry in England which I did not then know to be papists. I staid some time among them in Paris, and all this while I did not pervert to the Romish religion; though they told me how many Jesuits they had sent over into England. After I left France I was going for Rome, where I met with Father Anderton, rector of the English college, and Father Southwel, and father Campion, who introduced me into the acquaintance of cardinal Grimaldi, which is an Italian name, but he is archbishop of that place; I happening there, they carried me to speak to the cardinal, and he told me what likelihood there was for introducing the Romish religion into England, and he told me, he would prefer me very well there, if I would turn to their religion; and gave me letters to several friends in Italy: At last I was perverted to the Romish religion, by virtue of this cardinal; and this gentleman at last asked me if I had a mind to study, I told him yes, so I came into an Italian college, and became acquainted with all the secular priests, both English, Scotch, and French; who told me what interest they had made in England, during the coming in of cardinal Norfolk, and said, there was but one man in the way, meaning the king, and said they should soon remove him.

Just. *Dolben.* Did they mean the king?

Smith. Yes, my lord, they said there was but one man in the way, and that they would soon make an end of him, and that they had men ready in England for it. After this, my lord, I left this Italian college, and came to the English college (for I had a mind to come there) and I made friends with the jesuits: After I came to the English college, my lord, I was informed of one Father Anderton, rector of that college, and Father Moudford, who told me, that by means of this cardinal Norfolk they did not doubt but to take the king out of the way; and that they would give me all privileges that could be for a young man in that time. When I was coming away, my lord, from Rome, and had my letters emissaries, by cardinal Perorin (he sent for me when I was coming away, and as is usually done to all scholars, and they kiss the pope's toe, and he gives them his blessing and particular indulgence; which I had when I came into England) said he to me, there is one man in the way who hath made us fair promises, but will perform nothing, therefore we must take him out of the way, and that I might be instrumental in the design; with this, my lord, I took leave of the college, and we came five into England as priests, and I made my application to the arch-priest, which was in London, one Purrat, and I was employed a long time by him in England; but proclamations coming forth for the apprehending popish priests, I was constantly after at the Portugal embassador's chapel, where this Purrat had a chamber, wherein I discoursed with several of the clergy in England, who said they doubted not but popery would soon be settled in England. I came after that to live at one Mr. Jennison's house, where the clergy had several meetings, and we were all of opinion that course would be taken with the king, unless he brought in popery. And this, my lords, is all I can say in general.

Just. *Dolben.* Do you know of any conspiracy in Yorkshire?

Smith. My lord, I am coming to that. When I came to Mr. Jennison's house, there was one Mr. Thwing, a priest, who has suffered as a conspirator, he was well acquainted in the house before I came there, and did very much to persuade me that I would intreat Mr. Jennison to send his daughters to a place called Dolebank, where a nunnery was to be erected, and I knew several that were there. This Mr. Thwing came to me oftentimes, and several priests in this city, and they all pressed me to it, but I was against it, knowing what their design was.

Just. *Dolben.* But do you know any thing against the prisoner?

Smith. All that I can say to the gentleman at the bar, is this: I never saw him before to my knowledge; but Mr. Thwing, when we were at Mr. Jennison's, and discoursing of the Plot, asked me how they gave money in the Bishoprick, I told him some gave more, some less.

Just. *Dolben.* What were those Collections for?

Smith. My lord, it went among ourselves under the notion of killing the king, and rooting out the Protestant religion; but we gave it out that it was repairing a college at Doway, which, if granted, had been penal by law. Then I asked him, how doth the collections go

among you in Yorkshire, Some, saith he, give freely; but, saith he, my uncle and his friends are engaged another way; for, saith he, they are going to make a founder for Dolebank; several persons he named, among which he named this gentleman.

Just. *Dolben.* What said he of sir Miles?

Smith. He said sir Miles was very zealous for promoting the Roman Catholic religion, and had contributed largely for the introducing of it into England.

Baron *Gregory.* You say that amongst yourselves you gave it out, that the money that was raised was for the killing of the king, and rooting out the Protestant religion; pray, by what way and means was it to be done, was that ever discoursed among any of you; was it for raising of an army? or what was it for?

Smith. Wherever I was, my lord, it was resolved, that that was the most effectual means for the introducing of popery.

Mr. *Robert Bolron* called and sworn.

Sir *Thomas Stringer.* Mr. Bolron, acquaint my lords and the jury, what you know of sir Miles Stapleton.

Bolron. May it please your lordship, I came to live with sir Thomas Gascoigne in 1674, as steward of his coal-works; and was then a Protestant, but was persuaded by Mr. Rushton, sir Thomas, and others, to turn Roman Catholic; when I had turned Roman Catholic, about 1676, they came and asked me, what I would do for the Romish religion, if it should come to it; I told them, I would venture my life in that cause, and then I went to Barnbow-Hall, where I took the oath of secrecy; after that I went to Barnbow-Hall, where sir Miles Stapleton was at a consult in 1677.

Just. *Dolben.* At what time in 1677?

Bolron. It was about Whitsuntide, my lord.

Just. *Dolben.* That was the Whitsuntide after you had taken the oath of secrecy?

Bolron. Yes, my lord.

Just. *Dolben.* Who was there?

Bolron. Sir Miles Stapleton, sir Tho. Gascoigne, Mr. Gascoigne his son, my lady Tempest, lawyer Ingleby, Mr. Thwing, father Rushton, and several others.

Baron *Gregory.* What was there done at that consult?

Bolron. My lord, the consult was about killing the king, and establishing a nunnery at Dolebank, near Ripley; sir Tho. Gascoigne gave 90*l.* per ann. and 300*l.* for killing the king; and I remember very well, Pickering was mentioned about killing the king; and they asked sir Miles Stapleton what he would give? and he said, 200*l.* for killing the king.

Just. *Dolben.* Are you sure that in the presence of sir Miles Stapleton it was resolved the king should be killed?

Bolron. Yes, my lord, it was resolved both by him and all others, that the king should be killed; and, my lord, I heard them further say, if the duke of York did not please, that they would serve him as they would serve his brother.

Baron *Gregory.* Who said these latter words?

Bolron. Sherby of Stone-house said these latter words, and Mr. Shereburn said——

Justice *Dolben.* No matter what Mr. Shereburn said. What said sir Miles?

Bolron. The gentlemen said, that sir Miles should be a privy counsellor, and that they would procure the duke's consent to it.

Just. *Dolben.* Is that all?

Bolron. My lord, I was further at a consult in 1678, about the 13 or 14th of June.

Baron *Gregory.* What time was that?

Bolron. The 13th day of June 1678, and there it was agreed upon the taking of Hull, the letting in of the French there, as the fittest place for the French to land at.

Just. *Dolben.* Where was this?

Bolron. At Barnbow; and likewise they did discourse, that my lord Bellasis had caused the block-houses to be almost ruined, that the French might more easily come in; and we had all pardons for our sins.

Mr. *Lawrence Mowbray* called and sworn.

Sir *Tho. Stringer.* Mr. Mowbray, tell my lords and the jury what you know against sir Miles Stapleton, the prisoner at the bar.

Mowbray. My lords, you have heard what Mr. Smith and Mr. Bolron say to the Plot in general; what I say shall be very brief, in relation to sir Miles Stapleton, and no further. Sir Miles Stapleton being present with sir Tho. Gascoigne, my lady Tempest, esquire Gascoigne, and several others, they held several discourses concerning a design of killing the king, subverting the government, and bringing in popery, and accordingly they would fire London.

Baron *Gregory.* When was this?

Mowbray. This was in 1676, where father Rushton gave him an oath of secrecy, and he promised to be true to the design, and would venture his life and estate for the promoting so good a cause.

Just. *Dolben.* Did you hear sir Miles Stapleton say he would adventure his life and estate for killing of the king?

Mowbray. Yes, my lord.

Just. *Dolben.* And was it resolved at that consult?—*Mowbray.* Yes, my lord.

Just. *Dolben.* And he consented to it?

Mowbray. Yes, my lord, and took the oath of secrecy from father Rushton.

Just. *Dolben.* This is not the time that Mr. Bolron speaks of.

Mowbray. No, my lord, he speaks of 1676 and 1678, this was in 1678.

Bolron. I have seen in 1675 a collusive conveyance of sir Miles Stapleton's estate to sir John Dancy.

Just. *Dolben.* Where did you see it?

Bolron. I did see it at sir Thomas Yarbrough's, and he asking me when sir Miles Stapleton was at sir Tho. Gascoigne's; may it

please you, said I, I can tell you something where you are concerned with sir Miles Stapleton; as soon as he heard that he blushed, and away he went, and would hear no further.

Sir *Tho. Stringer.* What say you, Mr. Mowbray, of an indulgence you had?

Mowbray. Yes, my lord, I had an indulgence.

Just. *Dolben.* Was it for the time to come, or the time past?

Mowbray. It was for the time past for I was to enter into the rosary.

Sir *Tho. Stringer.* Did you ever attend Rushton at the altar?

Mowbray. Yes, I did.

Just. *Dolben.* Mr. Bolron, you say, you saw a collusive conveyance made by sir Miles Stapleton to sir John Daney; pray, what was the forfeiture of it?

Bolron. It was——

Just. *Dolben.* Was it sir Tho. Yarbrough, or sir John Daney, you told of it?

Bolron. I told it to sir John Daney.

Mowbray. I drew a copy of that very conveyance.

Sir *Tho. Stringer.* Truly, my lord, we want Mrs. Bolron, one of the most material evidences against sir Miles, being sick at London.

Mr. *Baynes* called and sworn.

Sir *Tho. Stringer.* Come, Mr. Baynes, declare to the Court what you know against sir Miles.

Baynes. I know nothing against Mr. Miles, only I have seen him at Barnbow-Hall in 1677.

Sir *T. String.* Pray tell us this, whether you observed, in the year 1676, sir Miles Stapleton come to several meetings with sir Tho. Gascoigne, and my lady Tempest, and others?

Baynes. Yes, my lord, I have.

Just. *Dolben.* But do you know what discourse they had?

Baynes. No, my lord; but I remember we were once discoursing about some nuns beyond sea, and they were called galloping nuns.

Justice *Dolben.* They were gallopers, indeed.

Just. *Dolben.* Sir Miles, you have heard what hath been proved against you—

Sir *Miles.* My lord, there is nothing of truth in it at all; I hope to make it appear to your lordship. I call God to witness I am as innocent of what they say, as any child unborn.

Just. *Dolben.* That is an easy thing to say.

Sir *Miles.* I hope to make it appear to your lordship. Will your lordship please to give me leave to ask the witnesses some questions?

Just. *Dolben.* That you may have allowance in.

Sir *Miles.* Then I desire to ask Bolron this question; did you accuse me in your information to justice Lowder?

Bolron. No, my lord, I did not.

Sir *Miles.* Did I, or any other, desire you to keep any secret for me?

Bolron. Yes, my lord, I have been desired.

Just. *Dolben.* But did sir Miles ever desire you?

Bolron. No, my lord, he did not, but Rushton did, when I was introduced by the priests to the consult.

Sir *Miles.* Did you and Mowbray know that each other was concerned in the plot?

Bolron. Yes, we did.

Sir *Miles.* Name the persons that were present at the consult.

Bolron. There was sir Tho. Gascoigne, my lady Tempest, esquire Gascoigne, Mr. Ingleby, Mr. Thwing, Mr. Rushton, Mr. Addison, Mr. Metcalf, and several others.

Sir *Miles.* How long did the consult last?

Bolron. Some six or seven hours.

Sir *Miles.* What servants were there?

Bolron. I took no notice of the servants.

Sir *Miles.* What room was it in?

Bolron. In the old dining room.

Sir *Miles.* How long did it last?

Just. *Dolben.* Six or seven hours he tells you.

Sir *Miles.* Was there any other at sir Tho. Gascoigne's?

Bolron. None else that I can remember.

Sir *Miles.* Upon what occasion did he mention Mowbray in his information to the council?

Just. *Dolben.* There hath no information to the council been mentioned here.

Sir *Miles.* Pray what was the occasion you were turned out of sir T. Gascoigne's service?

Bolron. My lord, I know not; they say it was about a trunk: sir T. Gascoigne sent him to York, and he was to come again. I know there was a design to take away Mowbray's life; but I never told him so much; and my lady accused him for a ring; I never durst tell him this, but this was the thing contrived against him to take away his life; I can make it appear where he bought the ring.

Just. *Dolben.* What tellest thou us of a ring? Can'st thou not as well tell us it was for that he left sir T. Gascoigne's service.

Sir *Miles.* When did you first become a Protestant?

Mowbray. When I made my first information.

Bar. *Gregory.* When was that?

Mowbray. That was in 1679, and a little before that I kept correspondence with Father Addison.

Sir *Miles.* I desire to know whether he saw a list of names?

Mowbray. Yes, I did.

Sir *Miles.* Whose names were there?

Mowbray. There was your name for one, and sir T. Gascoigne's.

Sir *Miles.* What was it for?

Mowbray. It was a list of those that were actors and contributors for killing the king.

Just. *Dolben.* You are sure sir Miles Stapleton's name was in the list?

Mowbray. Yes, my lord, I am.

Just. *Dolben.* Was it parchment or paper?

Mowbray. No, my lord, it was paper.

Just. *Dolben.* Were you to assist in killing the king?

Mowbray. My lord, I was to be an actor in killing the king.

Sir *Miles.* Whether did I, or any other desire you to keep any secret for me?

Mowbray. Yes, Father Rushton did.

Sir *Miles.* Did I ever do it?

Mowbray. No, sir Miles, you never did.

Sir *Miles.* Did any body else desire you?

Just. *Dolb.* Father Rushton, he tells you, did.

Sir *Miles.* Was the discourse so loud that sir Thomas Gascoigne could hear it?

Mowb. Sir Thomas could hear well enough when he would.

Sir *Miles.* Was it in 1679 that you discovered the plot?

Bolron. Yes; I went to London, and there discovered the plot in 1679, I think it was.

Sir *Miles.* You said, I was not concerned, you only accused sir Thomas Gascoigne and some others in your information; but did not name me.

Justice *Dolben.* Did he so? you may prove that upon him.

Sir *Miles.* It was so in his information, my lord.

Justice *Dolben.* Well, then let it be so. Call your witnesses.

Mr. *Lowder* called and examined.

Sir *Miles.* I desire Mr. Lowder to acquaint your lordships and the jury, what was in the information Mr. Bolron gave in, whether he accused me or no.

Mr. *Lowder.* All I know of it is, that in January 1679, on Sunday evening, as I think, about the 24th day of the month, Robert Bolron came to me, and told me he had something of secrecy to impart to me, and I asked him if he would go into the house with me; he told me it was a matter of high-treason; I asked who was concerned, he answered, sir Thomas Gascoigne, and several others: Then I ordered my clerk to bring a table, and pen and ink to take his information. I desired him to be very cautious, telling him, that several lives were at stake: At that he began to be fearful and changed colour: I asked him for what cause that fear was; he said, if it were upon my conscience, that was upon his, for concealing it so long, I should be as fearful as he. I bid him seriously consider what he had to say; he then said, he had delivered his information to Mr. Tindal. Well, then, said I, why is it you come to me? Said I, Mr. Tindal is to be at my house the 25th day, and I shall discourse it with him, and we shall take it together. Mr. Tindal did come, and Bolron came and delivered in his information.

Justice *Dolben.* You did not give him his oath at that time?

Lowder. No, my lord; for it seems he had not then delivered in his information, but only a writing of his to Mr. Tindal.

Baron *Gregory.* You took no examination then?

Lowder. No, my lord, not at that time; but afterwards he came and he gave in his information to us, and I think we were about two hours about it; and then he did not charge any person but Rushton and sir T. Gascoigne; but said, he had more to recollect: Well, said I, if you recollect any more, you may come again.

Baron *Gregory.* Pray who did he name?

Lowder. He named father Rushton and sir T. Gascoigne; he named my lady Tempest, but spoke that as from another. And when he came again, he said he would trouble us with no more, but would go to the king and council to deliver in the rest.

Justice *Dolben.* He said then he should recollect more.

Lowder. Yes, my lord, he did, and when he came again, he said, he would not trouble us with it, but would inform the council of it: When we saw him so positive, he had a letter of recommendation from Mr. Tindal to the council; and he lost that letter at Ware; but he went on, and delivered his information to the council.

Justice *Dolben.* Do you know it?

Lowder. Yes, my lord.

Justice *Dolben.* You cannot know it, were you there then?

Lowder. No, my lord, but I do know it.

Justice *Dolben.* How do you know it?

Lowder. I have a copy of the order under several of the council's hands.

Justice *Dolben.* That is not evidence, you are not to speak what another man knows. But that is not the matter; it seems he went to give in his information to the council, for indeed he could not otherwise have been safe.

Lowder. After this, he goes up to London again, and comes down and brings me another order of council to examine Mr. Mowbray and one Hickeringil; and I asked him if he knew any thing about sir Miles Stapleton's being concerned in the plot, and he said no, he believed he was very clear.

Just. *Lowder.* You say that Bolron brought you another order of council to examine Mowbray.—*Lowder.* Yes, my lord.

Justice *Dolben.* Did Bolron bring you in writing what Mowbray could say?

Lowder. My lord, I know not whether it was by writing or by word of mouth.

Justice *Dolben.* What was it he told you Mowbray could say?

Bolron. He told me, he could say he saw sir Miles Stapleton at Barnbow when the consult was; but, said he, there will others come against sir Miles.

Justice *Dolben.* Pray let us ask Bolron that: Did you say to Mr. Lowder, you knew nothing against sir Miles Stapleton, but there were others would do it?

Bolron. No, my lord, not that I remember.

Lowder. Bolron himself had never said any thing against sir Miles.

Baron *Gregory.* Did you ask Bolron if he

knew whether sir Miles was concerned in the plot, or no?

Lowder. Yes, my lord, I did, and he answered, he knew nothing against him.

Justice *Dolben.* He was not then upon his oath?

Lowder. No, not then; but after this he delivered his information, and did swear, to the effect that Mowbray did swear, that sir Miles was at Barnbow, and that they all did conspire the killing of the king, and introducing the Romish religion; and he said, my lady Tempest came to him, when he was in the passage, and said to him, Mr. Mowbray, it is fitter for you to be treating of sir Miles Stapleton's servants in the larder: And he asked me whether he had best go and apprehend sir Miles or Mr. Ingleby first.

Justice *Dolben.* This was your discourse with Bolron.—*Lowder.* Yes, my lord.

Bolron. May it please your lordship, I did not know then that Mr. Mowbray was at all concerned in the plot.

Justice *Dolben.* He tells you, how you told him what Mowbray would say before he came to him, and what he would say against sir Miles Stapleton.

Bolron. No, my lord, I never said any such thing.

Justice *Dolben.* You say, you did not know what Mowbray would say, Mr. Lowder saith otherwise.

Bol. My lord, I did not know what it was before he brought it himself, and he brought it in writing.

Bar. *Greg.* Mr. Lowder, did he tell you the particulars, or only said he was to depose things against sir Miles Stapleton?

Lowder. My lord, he told me he could swear sir Miles was at the consult at Barmbow, and did there conspire the death of the king, and introducing the Romish religion.

Just. *Dolb.* How long was this, Mr. Lowder, you had that discourse with Bolron before Mowbray came to give in his information?

Lowder. It was, my lord, two or three days before, and I ordered him to come again, when Mr. Tindal was to be at my house.

Just. *Dolb.* Were you ever with Mr. Lowder, and knew when he and Mr. Tindal ordered him to come to him?

Bol. I went to Mr. Mowbray, and we came to esquire Lowder's, and there Mr. Tindal was; but I knew nothing of what he had to say; my lord, Mr. Mowbray was there at that time he doth affirm.

Just. *Dolb.* Mowbray, before you came to Mr. Lowder's, had you acquainted Bolron with what you had to say?

Mowb. I might acquaint him I had something to say, but did not tell him the particulars.

Just. *Dolb.* Did you tell him you had any thing against sir Miles Stapleton?

Mowb. It is possible, my lord, I might; but I am not positive in that.

Bar. *Greg.* Did he tell you, Mr. Lowder, what Mr. Mowbray could swear against sir Miles, and was it not the day which he tells hereof?

Lowder. No, my lord, it was not.

Bar. *Greg.* It was not the same day?

Lowder. No, my lord, I shall be positive in it, if I be brought to my oath.

Just. *Dolben.* Come, another witness, sir Mile

Sir *Thomas Yarbrough* called and examined.

Sir *Miles.* I desire sir Thomas to speak what he heard Bolron declare what he knew of the plot after sir T. Gascoigne was taken.

Sir *T. Yarbrough* The 10th of Aug. 1679, Mr. Bolron came to my house about 10 or 11 o'clock at night, and knocked at my door; I thought him very unseasonable; but my servants looking out at the window, asked who was there; he said a friend that would speak with sir Thomas: My servant came and told me, and I ordered my servant to go down and bring him into my chamber; in the interim I put on a morning-gown: As soon as he came in, he told me he had an order of council to search all suspicious places for popish priests, and I have great cause to believe that there is one Rushton, a priest, now at sir Miles Stapleton's. What would you have me to do, said I, would you have me go with you myself? He said no, but a servant. Said I, Mr. Bolron, will you shew me the order; and finding his name in the warrant, I ask him, Was that the person that informed against sir Tho. Gascoigne? His answer was this, that if I pleased he would shew me the article against sir T. Gascoigne; when I observed the article, I asked him, if he knew any thing of sir Miles Stapleton's being concerned in the plot: No, I protest, saith he, I know nothing of sir Miles Stapleton's being concerned in it, for he is a very honest gentleman: only this I must say, that I know he hath made a collusive conveyance of his estate, and I believe most of the Roman Catholics in England have done it for the securing of their estates.

Just. *Dolben.* What do you say to this, Bolron?

Bolron. My lord, when I delivered in my information to the council I did accuse sir Miles Stapleton.

Just. *Dolben.* Did you say this to sir Thomas?

Bolron. No, I did not, if it was not in the information I gave to the council, believe not one word that I have said.

Just. *Dolben.* It is possible it might be in the second information to the council that you accused sir Miles: Was sir Miles Stapleton's name in the paper you gave to him?

Bolron. Yes, my lord.

Just. *Dolben.* This was the 10th day of August 1679. Had you then informed the council of any thing before that time against sir Miles Stapleton's being at Barmbow-Hall at the consult?

Bolron. May it please your lordship, I was called out when I was before the king and

council, and there was something I did not deliver in.

Just. *Dolben*. Then you did not do it at that time?

Bolron. No, my lord, I did not.

Just. *Dolben*. I ask you again, before the 10th of August, 1679, had you informed the council of any thing against sir Miles?

Bolron. No, my lord, I had not.

Just. *Dolben*. Then it could not be in the information that you shewed him.

Bolron. No, my lord, it was at the second time.

Baron *Greg*. Was it before you had this discourse with sir Thomas Yarbrough?

Bolron. No, my lord, it was not before that: I shall not speak one word of a lie.

Sir *Miles*. Every word you speak is a lie.

Bolron. It is no lie, before this honourable court.

Just. *Dolben*. Were these informations inclosed in the letter from the council?

Lowd. Yes, my lord, your lordship may see the letter mentions it, (holding the letter forth in his hand with the informations) which Mr. Justice Dolben took and silently read them over, after which he made his report thereof to the court.

Just. *Dolb*. Mr. Lowder, I have read all these things over, and there is nothing of any consult in them: How should then the accusation of sir Miles be mentioned in them?

Bar. *Greg*. I do believe, sir Thomas, you mistake times.

Sir *Tho. Yarb*. No, my lord, I do not.

Just. *Dolb*. In the bringing of this order of council to you, did you ask Mr. Bolron if he knew any thing against sir Miles Stapleton?

Sir *Tho. Yarb*. Yes, my lord, I did, and he said he believed he was innocent.

Sir *Tho. String*. Pray sir Thomas, why did you ask him that about sir Miles?

Sir *Tho. Yarb*. Because I knew sir Miles was related to sir Thomas Gascoigne, and was often there.

Sir *Tho. String*. It seemed, sir Thomas, you feared it.

The Lady *Yarbrough* called and examined.

Sir *Miles*. Madam, pray acquaint the court what you heard Bolron say when he discoursed your husband.

Lady *Yarb*. All I can say is that I was in bed then, and heard him say all these things, and I heard the order read, and there was mention of several at the consult, among whom there was no mention of sir Miles Stapleton.

Just. *Dolb*. Does your ladyship very well remember that sir Thomas Yarbrough asked him if sir Miles was concerned, and he said, not that he knew of?

Lady *Yarb*. Yes, my lord, and he said more than that; for when he returned from taking priests in the afternoon, there was a great deal of company in the house, and when he came, he brought one of the sons along with him, and they came into the hall, there Mr. Bolron was with him, and amongst the rest there was one Mr. Anby, who being a little merry, he takes him by the arm, and comes and brings him to us as we were sitting in the porch, and said, Heark you, Mr. Bolron, I hear you are a discoverer of the Plot? Yes, I am, said he: Then I pray you, who are they that are concerned? But he would not tell him. So said he, is sir Miles Stapleton in it? He answered, he had nothing to say against sir Miles, but he was an honest gentleman for aught he knew, excepting that he had made a collusive conveyance of his estate

Mr. *Normanton* called and examined.

Normanton. In June 1679, came Robert Bolron to me, and said, that sir Thomas Gascoigne would give 1,000*l*. for killing the king, and the lady Tempest would have hanged him for breaking a trunk, but now he would be even with her; and that sir Miles Stapleton kept priests in his house, but he would apprehend them presently, for he might have had 20*l*. a piece for taking of them.

Bar. *Greg*. You say Bolron told you this?

Norm. Yes, my lord, he told me this in my own house; and I told him he might go to esquire Tindal, and I lent him eighteen pence, and borrowed him a horse in the town.

Rich. Pears, sir Miles's man, called and examined.

Pears. My lord, Bolron came to Carleton

Just. *Dolben*. Carleton, what is that?

Pears. To my master's house.

Just. *Dolben*. Who is thy master?

Pears. Sir Miles Stapleton.

Just. *Dolb*. What then?

Pears. I go in to an alehouse where Bolron was, he asked me how I did, I thanked him.

Just. *Dolben*. Did you know him?

Pears. Yes, my lord, and he called for a pot of ale, and he wished me to drink with him, and he asked me if they did not blame him for accusing my master sir Miles? And I said I did not hear him named; he said it was not him, but he might not tell who it was

Just. *Dolben*. When was this?

Pears. Three or four days after my master was taken into custody; and he said he would have gone to have seen sir Miles; but I think (says he) he does not know me: And he asked me, if Mr. Legget would be at our house, and he desired me to give him a letter; and I said I should not see him; then he said I might burn it, and I did burn it, my lord.

Sir *Tho. String*. How came you acquainted with Bolron?

Pears. At the coal pits, my lord.

Sir *Tho. String*. Did you never see him at sir Thomas Gascoigne's?

Pears. No, my lord

Stephen Thomson called and examined.

Just. *Dolb*. Have a care you speak nothing but truth, though you are not sworn, yet we

can punish you, and God Almighty will punish you if you speak false.

Thompson. An't like your honour, Robert Bolron was servant to sir Thomas Gascoigne, as steward of his coal pits; sir Thomas put him out of his coal-pits, and there was a great deal of money due, and he knew not how to get it, and therefore he would take threescore pounds for it, because he knew not how to get it, and he would take 32*l.* at one time, and 28*l.* at another, and came to me to be bound with him, which I was unwilling to; saith he, here is 38*l.* good debt, and I shall take care to get the other, and if sir Thomas be not kind, I shall do him an ill turn.

Just. *Dolb.* What is this to sir Miles Stapleton?

Thomp. He did swear, this plot being discovered, they thought he knew something of sir Thomas Gascoigne, and he said before the plot broke out, there was never a catholic in Yorkshire was concerned in it? if there were any, it was above.

Bar. *Greg.* This was before his information, I will lay a wager.

Just. *Dolben.* How could he do him an ill turn?

Thomp. My lord, this is the ill turn, Mr. Legget said he did it not for need: O Rob. Bolron, said I, do you thus requite sir Thomas Gascoigne's kindnesses?

Bar. *Greg.* Did he speak any thing to you concerning sir Miles?

Sir *Miles.* I conceive when they reflect upon sir Thomas, they reflect upon me.

Just. *Dolben.* No, not so, you might be guilty and sir Thomas innocent, or you might be innocent and sir Thomas guilty.

Sir *Miles.* My lord, I think that as there was a consult at sir Tho. Gascoigne's, certainly if any one was guilty, we were all guilty.

Bar. *Gregory.* There are some that conceive and I think not without grounds, that there are no considerable catholics in England, but they are concerned in the plot.

Just. *Dolben.* There was one Dixon came at sir Tho. Gascoigne's trial, and said he heard Bolron and Mowbray down a pair of stairs, speaking of revenge against sir Tho. Gascoigne and my lady Tempest, and thinking these witnesses might now be produced, we called at Leeds to view the stairs, and I am sure neither my brother nor I could see any probability in it.

Bar. *Gregory.* For satisfaction we made two go up into the chamber and stand where the witnesses were, and they spoke as loud as people do usually when they discourse, and I am sure I could neither perceive what they said, nor see them, unless I went three or four steps up.

Just. *Dolben.* This is but occasioned by your jesting upon the matter.

Nathanael Wilson called.

Just. *Dolben.* Sir Miles, I would put you in mind of one thing; produce those two witnesses that were produced at sir T. Gascoigne's trial.

Sir *Miles.* I have none of those witnesses.

Just. *Dolb.* Certainly these witnesses would be as material as any you can have to do it.

Sir *Miles.* I have them not here, my lord.

Just. *Dolben.* Nay, that is because you dare not; the king's counsel will prove that what they spoke they were hired to, and had money from sir Tho. Gascoigne, which they confessed.

Sir *Miles.* My lord, they made affidavit of it.

Just. *Dolben.* Though they did, yet they confessed they were hired to it.

The lady *Vavasour* called and examined.

Sir *Miles.* My lord, I call my lady Vavasour to tell, whether sir Walter was there at the consult they tell us of at Barnbow.

Just. *Dolben.* That will be hard for her to do; but call her in. (Who was called:) but speaking so low she could not be heard by the court, and standing beside Mr. Justice Dolben, he repeated her words to the court. My lady saith this gentleman, she believes her husband was not there in any part of the year, because he was infirm at York. Now, gentlemen, I would only know, whether that be conclusive evidence when it is only possible.

Mr. *Legget* called and examined,

Sir *Miles.* Mr. Legget, pray, what money would Mr. Bolron have given you when I was taken.

Legget. Mr. Bolron desired me to lend his wife some money to go to market with, and I did: the same day between Tadcaster and York, Mr. Bolron asked me what allowance Dr. Oates had; I told him, I heard he had 500*l.* a year: and he answered, I deserve as much; for I have done as much good as he: as I was going for York, I met with Mr. Mowbray, and it raining, I put in at Tadcaster; when the rain was over, we set forward for York: said Mr. Mowbray, Mr. Bolron hath sent for me; so I went to Mr. Bolron to the George, and he sent for Mr. Mowbray, and he pulls out his information, and after he had read it, he asked him if he knew any thing of that, and he said, he did not know of it.

Just. *Dolben.* Well, what is this to the purpose? Did you hear him say any thing against sir Miles?

Legget. I have heard Mr. Bolron say, that he had nothing to say against sir Miles Stapleton, but only he had made over his estate to sir John Daney.

Just. *Dolben.* How came he to name sir Miles to you?

Legget. He voluntarily told me of it, when we went to Allerton to apprehend some priests; and when I returned I told him, I took but one of these persons, old Mr. Metcalf; and he said, he cared not if I had but taken but one Addy.

Just. *Dolben.* You must not talk of this fashion.

Sir *Miles.* It shews but what a kind of a man he is.

Just. *Dolben.* So may we examine to the end of the chapter. Do you say Bolron read over his information to Mowbray, and he said he knew nothing of it as to sir Miles Stapleton?

Legget. No, my lord, but of sir Tho. Gascoigne; he asked him nothing, my lord, but against sir Tho. Gascoigne; after they went out and had been together, Mr. Bolron told me, sir Miles Stapleton was to be taken into custody; and he said, you may as well have it as another, but I'll go half snips with you: at last he told me, if I have 100*l.* of sir Miles, you shall have twenty of it.

Just. *Dolben.* Had you any warrant at that time to take sir Miles?

Legget. No, my lord.

Bolron. I know nothing of any such thing.

Mrs. *Eliz. Holmes* called and examined.

Mrs. *Holmes.* An't please you, my lord, at sir Tho. Gascoigne's trial, Mr. Bolron and his wife they were at our house at dinner; after dinner, they asked me, if I would go to sir Thomas's trial. I answered, yes; so Mrs. Mowbray came and called her husband out of door, and I asked her about sir Tho. Gascoigne, and she said——

Just. *Dolben.* Tell us what she said.

Holmes. She said, they were hard people; but she thought they were innocent to the plot, and she had nothing to say against them, as God shall judge her soul. Then another time, my lord, after Bolron came from York he met me. How, now, sister, I understand you are to be a witness against me at York, but if you will be kind to me, I'll be kind to you, and speak as favourably as I can; and he said, if he had known he should have been no better rewarded, he would never have been a witness; the devil should have been a witness as soon as he.

Just. *Dolben.* Against whom?

Holmes. Against sir Tho. Gascoigne and sir Miles, my lord, and he bid me be careful what I swore: for if we did swear false, he would have us at the pillory, and unless I would unsay what I had said in my lady's trial, he would punish me sufficiently.

Just. *Dolben.* Who said this, know you?

Holmes. Mr. Bolron, my lord.

Bar. *Gregory.* Where do you live?

Holmes. I live, my lord, in Baldwin's Garden.

Sir *Tho. Stringer.* Did you ever tell any that if they would come and swear against the evidence against sir Miles Stapleton, they should be sufficiently rewarded?

Holmes. No, never in my life.

Sir *Miles.* When did you see me last, Bolron?

Bolron. I have seen you in 1678 several times.

Just. *Dolben.* He hath seen you in prison.

Bolron. My lord, I have seen him at Barmbow-hall in 1678.

Sir *Tho. Stringer.* You know sir Miles Stapleton?

Bolron. Yes, very well; and I have several times talked with him.

Sir *Miles.* I desire to know whether he hath seen sir Tho. Gascoigne and me discourse about any thing?

Bolron. No, not since the plot broke out.

Sir *Miles.* He swore in sir Tho. Gascoigne's trial, he heard me and sir Thomas discourse about Oates and Bedloe.

Just. *Bolron.* Well, how material will that be?

Sir *Miles.* I shall prove that he swore false; for sir Thomas and I were never together since the plot broke forth.

Just. *Dolben.* That is hard to do.

Bar. *Gregory.* You have an excellent witness that can swear that.

Sir *Miles.* In all probability I can do it.

Just. *Dolben.* But that must not go before a positive. Well, have you done?

Sir *Miles.* There is another witness or two, if it be not too tedious.

Just. *Dolben.* No, we will stay here all day, if you please.

Edward Cooper called and examined.

Cooper. My lord, all that I can say is, we having been at Autherton fair, we met with Mr. Mowbray; knowing him, and being acquainted with him, pray said I, whether is there any thing of a truth in this that Bolron swears against sir Tho. Gascoigne, or no? No, saith he, he might as well have sworn it against you, or another person; for I have been in the house as long as he, and I never knew any such thing.

Justice *Dolben.* This was before Mowbray had discovered any thing; for Mowbray was then a papist, and had taken the oath of secrecy: Besides, it is not much what Mowbray said, he was going on a high-way: If it had been before a justice of peace, or if he had been upon his oath, then it had been more material.

Madam *Shereburn* called and examined.

Sir *Miles* Madam Shereburn, pray declare what Bolron said at your house.

Madam *Shereburn.* Mr. Bolron and Mowbray came to our house under the pretence of searching for priests, and Bolron took several parcels of silver away with him.

Just. *Dolben.* Away, away, if you have any thing against him on the behalf of this gentleman, Madam, speak it; but you would prove him a thief, and say, he went to seek for priests, and he stole money from them.

Mowbray. We went to seek for priests, and we took some chalices and other popish trinkets away.

Justice *Dolben.* Do not spend your's and our time in saying that Bolron and Mowbray were knavish boys; we, it may be, are guilty of extravagances in that particular.

Baron *Gregory.* They themselves confess they have been very bad; they took the oath

of secresy, and it is as as ever was spoke or writ in so few words.

Justice *Dolben.* I know they have been very bad men. Well, have you any more witnesses.

Sir *Miles.* I can produce my neighbours and those of the church of England, that can say no otherwise than that I have been of good behaviour.

Sir *Tho. Stringer.* It is generally concluded by all, that sir Miles hath been a very good man until he fell into this great action.

Justice *Dolben.* Brother, have you any more to say? If not, I'll proceed.

Sir *Tho. Stringer.* Only I desire that Dixon and Wilson may be called in to swear that they were hired at sir T. Gascoigne's Trial.

Justice *Dolben.* Call them, then.

Dixon called and sworn.

Sir *Tho. Stringer.* Pray tell my lord and the jury what witnesses were hired, and whether you were hired to testify for sir T. Gascoigne or no?

Dixon. My lord, in November 1679, John Baily sent John Wilkinson for me, and when I came there, Batley was there; and they desired me to go; and there called me into the garden, and asked me, if I would be a witness for sir T. Gascoigne, and would give me 40*s.*

Wilson called and sworn.

Sir *Tho. Stringer.* Were you offered any thing by Mr. Babbington, to be a witness for sir Miles?

Wilson. I was, my lord.

Sir *Tho. Stringer.* Pray, tell my lord what you were offered, and what he would have you say.

Dixon. Batley would have him to be a witness.

Justice *Dolben.* Well, but what was he to say?

Dixon. He was to say, he never saw Bolron nor Mowbray at his house. Saith Batley, I saw them at the door. Thou never didst see them in my house. Yes, saith he, I see them once, and my lord, the third time before they departed he might say, that in 1679 he came in and found them there. This he pressed on me, telling me, it was but telling a lie, for no oath was required in this case.

Baron *Gregory.* Did Mr. Babbington offer you money? What would he have you to testify for it?

Justice *Dolben.* What money would he have given you?

Wilson. He would have given me 10*l.* and Hickering proffered me 10*l.*

Justice *Dolben.* Is Babbington a solicitor for sir Miles?

Bolron. Yes, my lord, here he is.

Dixon. Batley did press me to say again, that he never did see Mr. Bolron and Mowbray in his house, and he made a contrivance of that.

Christ. Langley and *Richard Cocker* called and sworn.

Sir *Tho. Stringer.* Pray tell my lords and the jury what you have been proffered, and by whom, to give evidence for sir Miles.

Chr. Langley. My lord, an't please you, I kept a public-house; so William Batley and John Ross came and called for a quart of ale, and this Richard Cocker was with us, and he said, if you'll go and be a witness for sir Miles in those things we shall direct you, you shall have a couple of oxen and half a score of sheep.

Sir *Tho. Stringer.* Who proffered you this?

Langley. Will. Batley and John Gross.

Cocker. Well, it is the same, my lord, I went with him into his house, and he proffered him a couple of oxen, and half a score of sheep, if he would be a witness for sir Miles.

Mr. *Bayns* called and sworn.

Sir *Tho. Stringer.* Speak whether Mrs. Holmes would have had you to have recanted any thing against sir Miles.

Bayns. She proffered me since I came into the kingdom of England threescore pound a year to have holden my tongue, if I had any thing to say against sir Miles: I told her not whether I had any thing or no, and she proffered me 60*l.* per ann. Mrs. Hewit said, she would give me more if I would say nothing against sir Miles.

Just. *Dolben.* Did they make an assurance?

Bayns. I asked them, do you know another gentleman's purse? They said, they knew it very well, that he would give it.

Sir *Miles.* Pray let Mrs. Holmes be called again.

Just. *Dolben.* Well, she denies it. What is that Hewit?

Bayns. He married another of my daughters, my lord.

Just. *Dolben.* She only appeared zealous for sir Tho. Gascoigne, and she would be the same for sir Miles Stapleton. Have you any thing more, sir Miles?

Sir *Miles.* No, my lord; only Mrs. Holmes denies.

Just. *Dolben.* She does so.

Sir *Miles.* I have not so much to say against Mr. Bayns.

Just. *Dolben.* I do not hear he saith much against you.

Baron *Gregory.* He had got his money pretty easily if he said nothing more against you; he had scarce earned his money.

Sir *Miles.* I desire the jury may consider what credit was given to their evidence formerly in the former trials; for I speak seriously, I never spoke any such thing, nor was ever at any consult about any such thing; I believe there is none that knows me will believe it.

Just. *Dolben.* Is that all?

Sir *Miles.* The evidence is very improper;

I never thought ill against the king in my life; what reason was there for it?

Just. *Dolben.* No reason at all that either you or any papist should do it, but only through the mad fiery zeal of the jesuits; for ever since the reformation you have enjoyed your estates and religion without any molestation; but you could not endure we should quietly enjoy our's. But if you have any matter on record against them, we will hear it. It may be you will say he is an idle fellow and the like; there will be no end of such reflections.

Baron *Gregory.* You see what is produced on your behalf, sir Miles, though not by your direction, yet on your behalf, and they said it was but telling a lie.

Sir *Miles.* No, my lord, not I; I never gave any such directions.

Just. *Dolben.* Gentlemen of the jury, sir Miles Stapleton stands indicted for a very foul treason, for endeavouring to subvert the government, change the religion, and to bring in superstition and idolatry; which he could never do, without compassing the death of the king, he being the only obstacle in the way. This is his charge. The proof of this depends upon Bolron and Mowbray: Mr. Smith, the first witness, he only relates he hath been in Rome and France, and among all the priests he conversed with there was such a design on foot; but against sir Miles he knows nothing, but things told him by Mr. Thwing, which I must tell you is no evidence against sir Miles Stapleton. Bolron and Mowbray do positively swear the thing as plain as any thing can be; they both swear they were present at several consults, where it was resolved the king should be killed, and that sir Miles did agree to it, and did agree to contribute 200*l.* to carry on this design. Captain Bayns, being examined, he saith, he did really see sir Miles at Barnbow-hall at that time, but he doth not know whether it was about that or no.

Against this, sir Miles saith it cannot be; but this is an invention of Bolron and Mowbray; and to prove this, he produceth several witnesses, that Bolron should deny, and that he should sometimes say that sir Tho. Gascoigne knew nothing of it; sometimes that sir Miles knew nothing of it: I must tell you at this time, that they were then discoursed withal, they at that time were papists themselves, and lay under the oath of secrecy. But now here are three witnesses, sir Tho. Yarbrough, my lady Yarbrough, and Mr. Lowder; and they do speak as much as any of the other doth concerning Bolron and Mowbray, and they speak it when it was a time pertinent; for what they spoke to a justice of peace at that time seems somewhat probable: you heard what Mr. Lowder saith, they came to him to accuse them the 25th of January 1679, and he put them off for that time, and he gives you reasons why he did it; and then he brings an order of council to examine Mowbray, and he tells him what Mowbray would swear, and he tells him he would swear against sir Miles Stapleton, that he was at the consult at Barnbow-hall; you have heard him often deliver this, and because it was somewhat material we desired him to speak it again and again: Bolron denies it, he never told what Mowbray could swear; so that depends upon the credit of the witnesses.

Sir Thomas Yarbrough tells us that Bolron came to him, and knocked him up out of bed, for his warrant to search for Rushton a priest, who he said was at sir Miles's, and thereupon he asked him if he could tell any thing of sir Miles Stapleton, and he said no, with many asseverations; now if that information were the same that was sent to Mr. Lowder, then it is of no such weight, and it hath been presupposed by the king's counsel, that sir Thomas might forget himself, neither was there any thing in these papers relating to sir Miles.

And my lady Yarbrough being in bed in the same chamber, she saith she heard the papers read, and her husband asked him of sir Miles Stapleton, but he denied that he was concerned in the Plot: and she saith further, in the afternoon, a gentleman brought him into the porch where they were sitting, and the gentleman asked him who were plotters, but he would not tell him: then he asked him if sir Miles Stapleton was concerned, and he positively denied it. These things hang not well together, I know not how to make any observations upon it; he denies that he said so, they say he did. The rest of the witnesses are not very much material; only, as I told you before, what talk they would have talked before they changed their religion: there is nothing proved against them, but they are good witnesses in the law; there is no records, nor perjuries, nor any thing else that takes off their evidence, they have sworn it several times, and stand to it. Now you have heard and taken notice what objections have been made against it.

Baron *Gregory.* My brother has opened it so fully, I shall trouble you with very little, only to let you see that my observations were the same, and that I concur in the evidence with my brother; for there is full evidence against the prisoner at the bar. The matter they swear is treason of the highest nature imaginable: there are but two that swear positively, but they swear of several consults, and of the particulars that were agreed on by sir Miles Stapleton for the carrying it on; and there is no material witnesses against them. For the latter witnesses of their denying of it, it must be before they were of the Protestant religion; when they were concerned as much to conceal it, as any persons that were guilty of it: besides, in a discourse a man is not bound to tell a neighbour all things that he doth know, he cannot be safe to tell it to a private person at that time. It is very true, as my brother hath told you, they were resolved when they discovered it they would have security for themselves: I suppose they needed not have feared sir Miles flying from being apprehended;

but if sir Miles was at large they might have feared it. But when they came to be examined upon their oaths before Mr. Lowder and Mr. Tindal, there could not be any thing to excuse them; it is true, to my apprehension, there was no probable reasons why these two gentlemen should ask them if sir Miles were concerned in the Plot; for in the information they saw his name was not mentioned; thus they were as much afraid as sir Miles was, it may be; it was their care of him, knowing what religion he was of, and knowing him to be related to sir T. Gascoigne. Now it doth depend upon the credit of what they have sworn; they deny what is charged upon them by these gentlemen; by sir Thomas Yarbrough and by my lady; and it is true, Mr. Lowder was as a magistrate too, and sir Thomas was as a magistrate too; it is true, he was not upon the examination of them upon oath at that time, therefore that was not as before a magistrate; but Mr. Lowder, they came to him as a magistrate; therefore it must be for you to consider whether or no there might be a forgetfulness of them in their speaking, or a misunderstanding of them; there is nothing else that I know can tend to the reconciling of it: for if there were a mistake by the one, or a forgetfulness in the other, then it might alter the understanding; but if they heard well and remembered true, then it will be, as I have said before, more difficult to be reconciled. But, gentlemen, upon the whole matter, it will depend upon the construction and reputation of what they swear, and these gentlemen speak, which you are to consider.

Having sworn a bailiff, the Jury withdrew for about half an hour's consultation together, and then returned into Court, and gave in their verdict Not Guilty.

280. The Trial of GEORGE BUSBY, at Derby Assizes, for High Treason, being a Romish Priest: 33 CHARLES II.* A. D. 1681.

THE court being sat, and the usual formalities preceding business over, the pannel of the Grand Jury was called over, and nineteen of them sworn. The names of which gentlemen of the Grand Jury, which found the bill of Indictment, &c. against George Busby, were as follows:- Sir Henry Every of Egginton, bart., sir Robert Coke of Langford, bart., sir William Boothby of Ashborn, kt. and bart., sir Robert Clark of Chilcote, kt., William Fitzherbert of Tissington, Henry Cavendish of Dovebridge, William Mundy of Darley, John Lowe of Denby, William Berrisford of Bentley, John Allen of Gresely, William Hopkinson of Bonsall, esquires; William Lee, Lionel Parshaw of Dionfield, Joseph Harpur of Yeavely, John Stuffin of Hopton, Matthew Smith of Denby, John Whigly of Cromford, Paul Jenkinson, George Birds of Stanton, gentlemen.

The Indictment being brought into Court, *Billa vera.*

Clerk of the Assizes. Gaoler, set George Busby to the bar. (Which was done.)

Clerk of the Arraignments. George Busby, hold up thy hand, (Which he delayed to do.

Clerk again. George Busby, hold up thy hand.

Which he did not do, but instead thereof, presented a petition to the court to this effect, That he was committed to the gaol in March last, for being a popish priest, and that great astry had been used to procure witnesses to ar against him, and that having obtained his Habeas Corpus to be removed to London, the under sheriff falling sick, and being since dead, the Habeas Corpus was not executed; he prays he may be removed, to the King's Bench, that he may have time to make his defence, he depending upon his Habeas Corpus, his most material evidence to clear him, and to prove his being an alien, being then in London, &c.

Baron *Street.* Mr. Busby, notwithstanding I must proceed to try you, the Grand Jury having found the bill *Billa vera*: you say, you are an alien; if that be so, then you are without this law of the 27th of Eliz.

Busby. I had not my Habeas Corpus, and so am deprived of my witnesses to prove that I am an alien born.

Baron *Street.* If they prove you not a native, then the Indictment falls.

Then the Clerk of Arraignments proceeded to arraign the prisoner.

Clerk. George Busby, hold up thy hand, (which he did.) "Thou standest indicted by the name of George Busby, late of West-Hallam in the county of Derby, clerk, for that thou, being a subject of our sovereign lord the king that now is, and being likewise born within this kingdom of England, was made and ordained a priest by the authority derived and pretended from the See of Rome, after the feast of the Nativity of St. John Baptist, in the first year of the reign of our lady Elizabeth, late queen of England, &c. and before the 16th day of March, in the 33rd year of the reign of our sovereign lord Charles the second, of England, Scotland, France and Ireland king, defender of the faith, &c. the laws and statutes of this kingdom of England little weighing, nor the punishments in the same contained not at all regarding; with force and arms, &c. at the

* See the Cases of Campion and others, v. 1, p. 1049; of David Lewis, v. 7, p. 249; of Thomas White, alias Whitehead and others, v. 7, p. 311; of sir George Wakeman and others, v. 7, p. 591; of Charles Kerne, v. 7, p. 707; of Andrew Bromwich, v. 7, p. 715; and of William Atkins, v. 7, p. 726 of this Collection.

parish of West Hallam aforesaid, in the county of Derby aforesaid, being within this kingdom of England, voluntarily, freely and treasonably, the 16th day of March, in the 33d year of the reign aforesaid, hath been and remained, contrary to the form of the statute in that case made and provided; and against the peace of our sovereign lord the king, his crown and dignity, &c."

Baron *Street.* How sayest thou, George Busby, art thou Guilty of this felony and treason whereof thou standest indicted, or Not Guilty?

Busby. This Indictment, my lord, is not full; it recites not the particular case in the statute of queen Elizabeth, viz. that I took orders beyond sea, and another point, that I am a native of the king's dominions.

Baron *Street.* You may be made a priest in England by the authority of the bishop of Rome, as well as at Rome.

Busby. How can I be made a priest in England by the authority of the bishop of Rome, where there is no such authority?

Baron *Street.* You must plead to your Indictment as it stands.

Busby. Then, my lord, I humbly beg I may be allowed counsel.

Baron *Street.* If any point in law arise, you shall be allowed counsel.

Busby. The time and place is not specified in the Indictment.

Baron *Street.* If that be so, it is material.—But upon view of the Indictment, it was found right.

Clerk of Arraign. George Busby, hold up thy hand; art thou Guilty of this Indictment, or Not Guilty?

Busby. (then holding up his hand) said, Not Guilty.

Clerk of Arraign. Culprit, how wilt thou be tried?—*Busby.* By God and my country.

Clerk. God send thee a good deliverance.

Baron *Street.* Now we will see if your objections be of any weight; you hear the Indictment read, which was *ut antè*, being a subject of the king's, born within this realm; you may be made a priest by the authority of Rome, in England, Ireland, or Germany, or any where else, and that will make you a priest within this law.

Busby. I am no native, I was born beyond the sea.

Baron *Street.* Your being a native, is matter of fact, and must be proved.

Busby. My lord, I move I may have right of challenging the jury.

Baron *Street.* Sure we must have the jury before us first, before you can challenge any of them.

So the jury being called, Busby challenged peremptorily near the number allowed by the law.—The king's counsel did except against two persons only.

Baron *Street.* Have a care, Mr. Busby, at your peril, if you challenge peremptorily above the number of 35.

The names of the petty jury sworn were. Samuel Ward, gent. Tho. Wilson, gent. John Steer, John Ratcliff, Ed. Wolmesly, gent. William Horn, gent. George Tricket, gent. Jeremiah Ward, John Roper, John Cressel, gent. Edmund Woodhead, Anthony Bowne.

Then Mr. Bridges, counsel for the king, opened the Indictment.

Mr. *Bridges.* May it please your lordship, and the gentlemen of the jury, the prisoner at the bar, George Busby, stands indicted for high treason, as it is alledged in the Indictment, that he being born within the king's dominions, and made a priest, and having received orders by pretended authority from the see of Rome, did the 16th day of March last come into the realm of England, as it is laid in the Indictment, to Westhalllam, in the county of Derby, and there he did abide, contrary to the form of the statute; and this is laid to be traiterously done. To this he hath pleaded Not Guilty; and we are to prove it upon him, by the king's evidence, whom we are now to call.

Mr. *Coombes.* Gentlemen of the jury, you have heard the Indictment read and opened, you will presently have it fully proved, and highly aggravated by our evidence; for, gentlemen, we shall prove that the prisoner at the bar is not only a Popish priest, but a Jesuit, and this by his own confession; and that his name was inserted in sir William Walier's warrant, when he came down into this country to search for Jesuits: That he has held a secret and dangerous correspondence with Harcourt, Ireland, and other Popish traitors: That he has been their procurator, and disbursed and received great sums of money for them.

Gentleman, the prisoner hath been a person highly suspected, as well as dangerous to the government, for some years; for treasonable matters of another nature than he stands indicted of, have been deposed against him upon oath at the council board, and thereupon a strict warrant to apprehend him was directed to Mr. Gilbert (a worthy gentleman and justice of peace of this county.) Mr. Gilbert, gentlemen, will presently tell you the manner of his taking him in an obscure place in the roof of one Mr. Powtrel's house at Westhallam, in this county. But here I must beg leave to digress; for I cannot but take notice of the malicious temper and base practices of this sort of men; for though Mr. Gilbert acted by virtue of a warrant from the Lords of the council, and has since received an approbation from his majesty of what he did, under the hand of a secretary of state, yet could not those people forbear to raise false and scandalous reports of, and make false accusations against him, upon this very account: but what is it they will not do to discourage Protestant magistrates from doing their duty against them? I confess, nothing is to be wondered at since the barbarous murder of sir Edmundbury Godfrey. But to proceed, gentlemen, we shall also prove to you, that the prisoner is so little a friend even to the civil government of this nation, that he

would not suffer his nephew, Mr. Powtrel, to take so much as the oath of allegiance, which is scrupled only by the Jesuits; for I think their secular priests will generally take it. Gentlemen, the things I have already opened, are matters of high aggravation, and come in by way of indictment. But that which in this case we rely upon is this, that the prisoner has baptized, married, confessed, and absolved, in the Popish way, that he has given the sacrament, and said mass very frequently in his Popish vestments; and for proof of this we have a cloud of witnesses.

Gentlemen you hear the prisoner is indicted upon a statute made in the 27th Eliz. * which makes it treason for any subject born to take orders from the see of Rome, and afterwards to remain in England; which law I conceive was not only made for the security of the government, but also in favour of the lay papists themselves; for though several statutes were made to keep them within the bounds of their allegiance, and to secure the government from their villainous designs; yet it was experimentally found true, that no dangers or penalties whatsoever could deter or hinder them from plotting against the state, in order to bring us back again to the slavery of Rome; whilst those juggling managers of their consciences were suffered to come amongst us; and therefore I may well call this statute, upon which the prisoner stands indicted, an act of charity to the common papists; for it was made to prevent the dangers they would otherwise run themselves into, as well as the nation. It is true, indeed, gentlemen, that the lively execution of this law has (by the clemency of our princes, and good nature of the government) been many times suspended, and might yet have continued in the shade, had not the popish priests and Jesuits roused up this sleeping lion against themselves by a damnable and hellish plot against his majesty's life, the true religion and well established government of this nation; the reality of which has been confirmed to us, not only by the unanswerable evidence of Coleman's papers, and other loyal proofs, but also by frequent proclamations, and the uniform votes and resolutions of several parliaments. I may therefore very well borrow the words of a great man upon the like occasion, and say, that at this time of the day it is much better to be rid of one priest than many felons: and therefore, gentlemen, if our evidence shall make good the indictment, I hope you will do your king, your country, and yourselves the right to find the prisoner guilty. We shall call our evidence. Call Mr. Gilbert (who was sworn.) Pray tell my lord and the jury, what you can say concerning the prisoner at the bar.

Gilbert. My lord, I dwell within two miles of Mr. Powtrel's house at West-Hallam, the place where the prisoner was taken, and have heard that he hath been a priest in that family six or seven years, though I did never know him personally, nor, to the best of my knowledge ever saw him till I apprehended him, which which was the 16th of March last, the very day on which the judges went out of Derby the last Lent assizes; the first enquiry I made after him, was occasioned by a letter and a messenger from sir Simon Degg, about November 1678, at which time I sent a warrant to the constable at West-Hallam, to search for the said George Busby, but he could not then be found; at that time it was reported, that he was a Jesuit, and concerned in the plot; which I had reason to believe, because when Mr. Gray came to search Mr. Powtrel's house for some Jesuits the January following, by order from the lords of the council (in which service he commanded me to attend him), we perceived Mrs. Powtrel (who is Busby's niece) to be much troubled, and in a great passion, the cause whereof Mr. Powtrel declared to be for fear the said search was made for her uncle Busby, who, as I heard afterwards, was then in the house, though at that time he was reported to be fled.

However, the government had a jealous eye on this Busby about two years ago, as may appear by a warrant from the Lords of the Council, which warrant I have ready, and humbly pray your lordship it may be read openly in court.

Baron *Street.* Let it be read.

Clerk. "Whereas information hath been given to his majesty in council upon oath, That George Busby late of West-Hallam, in the county of Derby, is a reputed priest and Jesuit, and has had a considerable part in the late conspiracy against the life of his sacred majesty, and the peace of the government; these are therefore to will and require you to repair to the place aforesaid, or where ever else the said George Busby shall be found, and him to seize and apprehend, and convey to the next county-gaol, there to remain in close custody, until he shall be delivered by the due course of law. And all mayors, sheriffs, justices of the peace, constables, and other his majesty's officers and loving subjects are to be assisting unto you in the execution hereof, as they will answer the contrary; for which this shall be your warrant. Dated at the council-chamber in Whitehall, the 19th day of March, 1678. Worcester, Clarendon, Aylsbury, H. London, Sunderland, Essex, Falconbridge.

"JOHN NICHOLAS."

"Indorsed to Henry Gilbert, esq. at Locko, in the county of Derby."

Then Mr. *Gilbert* proceeded.

Mr. *Gilbert.* My lord, I received this order on Saturday the 22d day of March, 1678. And on Sunday afternoon I sent to Mr. John Bagnall of Derby, who was then under-sheriff, requiring him to meet me early on Monday the 24th, at Mr. Powtrel's house at West-Hallam, about some earnest business lately sent down from the lords of the council, wherewith

* The Statute is inserted in the Case of Bromwich, vol. 7, p. 724, of this Collection.

I would acquaint him at our meeting: As soon as he came, I shewed him the warrant; after which we searched very diligently in every place we could see, but could not find him; though afterwards I was informed he was in the House at that time also.

About August, 1679, Mr. Powtrel obtained a licence from his majesty to travel beyond sea, and it was confidently reported by the papists, that this Mr. Busby was gone over too, insomuch, that when sir W. Waller came into these parts in January 1679, with warrants to search for Jesuits (in one whereof I saw Busby's name) and would have searched at Hallam, I dissuaded him, and did assure him I believed he was gone beyond sea, and told him how often I had searched for him in vain; whereupon sir W. Waller diverted to another place, though I have been informed since, that Busby was never out of England since the discovery of the Plot.

But about Christmas last, and since, I having had notice that Busby was in England, and particularly at West-Hallam, and had been seen last corn-harvest to walk in Mr. Powtrel's garden with one Anne Smalley, a widow, I thought it my duty to make it my further enquiry after him, which I did on the first day of March last, and came to the house to buy some wood for my coal-pits, and then brought five or six persons with me, and sent for the constable to help me to search for him, which we did most part of the afternoon, but could not find him, though he was seen to be walking in the garden with the said Anne Smalley when I came first into the house, as I was afterwards informed; but when I asked the said Anne Smalley for him, she affirmed with many protestations, that he was in Flanders, and not in England, and that if I had any business with him, I must go beyond sea to him, for she had not seen him for above two years; though she had helped to convey him out of the garden into his hiding-hole, but a few minutes before: however, I proceeded in my search, and found in the chamber where Busby lodged, a crimson damask vestment, wherein was packed up a stole, a maniple of the same (as the Papists call them) an altar, stone, surplice, and a box of wafers, mass-books, and divers other popish things: Then I told Mrs. Braylsford (a kinswoman of Mr. Powtrel's) and the said Anne Smalley, those things did signify that a priest belonged to the house; for the book had been lately used, as was apparent by the string which was put betwixt two leaves, whereof Festa Februarii was on the one side, and Festa Martii was on the other side; but they stiffly affirmed that no priest had been there of above two years before, and jeered me when I could not find him, and said, if there was a priest in the house why did I not take him?

When I had done searching, and could not find him, I took away the vestment, and other things, which I brought to the assizes, a fortnight after, and did ask Mr. Justice Charlton (who came that circuit) his opinion, what I should do with them; he told me they must be burnt, according to law; I entreated his favour, that I might send them again to the same place, for two or three days, to make the priest more confident, that I might better apprehend him; he told me, he could give no such permission; but insisted, that they ought to be destroyed.

When all the business was done at the assizes on the crown-side (where I was obliged to attend) on March the 15th day at night, I went to the judge again, and craved his lordship's pardon for presuming to send back the popish things, contrary to his opinion; but acquainted him that I intended to go after them to West-Hallam that night, and if I could not catch the priest, I resolved to bring the same things again; and after I had asked his lordship some questions, and received his directions, I came to my own house, and went about eleven of the clock at night (with some company to assist me) to Hallam and set two men to watch in the garden, and one in the church yard (joining to another side of the house) to see if they could spy any light, or hear any walking in the lofts or false floors, when I made a noise on the other side of the house. I sent a man before to call up the constable, and when he and two or three more came, I knocked at Mrs. Anne Smalley's window, about twelve of the clock in the night, and said aloud, Mrs. Smalley open the doors, I am come to search for a popish priest. She started up, and said, Who was there? I told her, it was I, she knew me well enough, I dwelt at Locko. Then I staid a pretty space of time, and called aloud to her again, and spoke the like words: but by that time, I suppose she and her bedfellow, Mrs. Braylsford, were gone to give the priest notice and to help him to his hiding-hole, for no body answered me; then after a pretty space, I called to her a third time, and required her, in the king's name, to open the doors, for I was come to search for Busby, the Jesuit, who was a traitor by law, and if she would not open the doors, I would cause the constable to force them open; and when I could have no answer from her, I went to Joseph's Dudley's chamber window, and called there, charging him in the king's name to open the doors, but no answer at all was returned; for he also was gone into the priets's chamber, and found Anne Smalley busy in helping Busby to secure himself, as the said Joseph Dudley did afterwards inform me.

After I had staid about a quarter of an hour I commanded the constable, in the king's name to break the doors open, which was done; and when we came into the priest's chamber, I found the fire had been lately extinguished, the counterpain and the blankets laid in confused heaps on the bed, and some part of them warm, and some part cold; the upper part of the feather bed was cold; which I wondered at, then I put my hand underneath, and the bed was warm; for they had turned it. I looked for the pillow, sheets, cap, &c. but Anne Smalley (as I was afterwards informed) had taken them

into the chamber where she lay. I asked her divers questions about the person that had lain in that bed that night, and particularly, whether or no it was not Busby? She told me, no body had lain in that bed that night; I told her, I was sure some person had lain there; for the feather bed was warm on the under side: she took many protestations, that nobody had lain there of divers nights before: I replied, if she would discover the person who had lain there, it would save her and me much trouble: but when all I could say would not prevail, I told her, I must search, for I was confident, that Busby was in the house, because she would not declare who it was that lay there.

I began to search about one o'clock, and continued till after ten next morning before I could find him: and though the watchers in the garden told me, they heard his paces and steps very plainly amongst the lofts and false floors, and described on the out-side of the house the place where they last heard him, within the space of nine or ten foot where he was hid; yet were we almost so many hours before we could find him

At last when the searchers were almost all tired, Anne Smalley, and others of the family, scoffed at us, and asked, What, have you not found him yet? You said there was a priest in the house, why do you not find him then? Why do you not take him? I said, All in good time? I was resolved to find him, or starve him out: Nay, the foot-boy of the house, seeing my servant look within the kitchen-chimney, where there hung a port-mantle, said, jeering to my man, Look if he be not in the port-mantle.

After those persons had pleased themselves a good while with mocking us for our disappointment, I persuaded two or three of the searchers once again to climb upon the lofts (which I could not do myself, by reason of a lameness in my shoulder), and look well near the place where Busby's last steps were heard. Which when they had done some while, and found nothing, I took my sword and scabbard, being in the room underneath) and knocked on the plaister-floors over my head, and caused them to answer me with the like knocking as near the same place as they could, and when we had examined the floors in this manner, I knocked near unto a stack of three chimneys, but they could not answer within a yard; I knocked again in two or three places near the chimneys; yet still they could not answer near those places, but told me there was nothing but tiles and roofing; I bid them break open those tiles, which they did, and espied under them a wooden door, and a little iron hinge; I bid them break the door; then one of the searchers put in his hand into a little hole that was broken in the door, and felt a hat; then he told me some body was in that place, for a man had thrown his hand off the hat; then I caused them to break open the entrance, which when they had done, Busby spoke to them, and desired them to be civil; when they told me what he said to them, I charged them to be civil to him, and bring him to me, which they did. Then I arrested him in his majesty's name for high treason, and after he had refreshed himself a little, I told him he must get on his boots, and prepare himself to go to Derby.

Soon after his apprehension, (I perceiving him to be a little dismayed) I encouraged him and said, he should have all the favour a person in his circumstances could expect; for I told him, I understood he was a gentleman of a good family in Buckinghamshire or Oxfordshire, and that his brother lived at Coddington, in Oxfordshire, which he acknowledged, and thanked me for my civility.

I was so well satisfied that we had apprehended him, after much tedious watching and searching, that I never thought of sending any man to look what was in the hiding hole with him; but after an hour's stay, or thereabouts, I took him away from Hallam between eleven and twelve o'clock on the 16th of March last, and brought him to Derby between one and two o'clock; where, after I had taken his examination, I made a Mittimus, and committed him to Derby gaol.

On Saturday following, I writ a letter to Oxford to the right honourable the earl of Conway, one of his majesty's principal secretaries of state, informing his lordship of the apprehending and commitment of Busby, and inclosed a copy of his examination, to which his lordship writ me a letter in answer, that he had acquainted his majesty with my proceedings, who did very well approve of what I had done.

Busby. My lord, I am an alien, born at Brussels.

Baron *Street*. Was your father of that place? It is a very good family.

Busby. My father lived at Coddington, my mother was an heiress, and here is an affidavit ready to be produced of what children my father had before he went beyond sea, born at Coddington, out of the register of that place; I have had no time to bring a particular certificate where I was born, and what other children my father had beyond sea; my father went over about the beginning of the troubles, and I am about 40 years of age.

After the Judge had told Busby of the Act for Naturalization,

Mr. *Busby*. I suppose, my lord, that act may stand good as to privileges of the subject, but not as to penalties.

Baron *Street* Yes, as to all intents and purposes: Read the Act 29 Car. 2, cap. 6.

"An Act for the Naturalizing of Children of his Majesty's English Subjects, born in foreign Countries during the late Troubles.

"Whereas during the late unhappy troubles in England, which began in the year of our Lord, 1641, and continued until the time of his majesty's most happy restoration, divers of his majesty's English subjects, as well of the no-

bility as others, did either by reason of their attendance upon his majesty, or for fear of the then usurped powers, reside in parts beyond the seas out of his majesty's dominions, and it may hereafter become difficult to make proof of the occasion of such their residence: Now for preventing of all disputes and questions that may arise, whether the children of such his majesty's subjects of this realm are natural-born subjects of our sovereign lord the king, and to express a due sense of the merit of all such loyal persons as out of their duty and fidelity to his majesty and his father of blessed memory, did forego, or were driven from their native country:

"Be it declared and enacted by the King's most excellent majesty, by and with the consent of the Lords spiritual and temporal, and the Commons in this present parliament assembled, and by the authority of the same, That Charles Gerard, and Elizabeth Gerard, children of the right honourable Charles lord Gerard of Brandon, Trever Wheler, and Dorothy-Elizabeth Wheler children of sir Charles Wheler, baronet, Ann Ravenscroft the wife of Edward Ravenscroft of Bretton in the county of Flint, esq.; one of the daughters of sir Richard Lloyd, knight, deceased, born at Calais in France, and all other persons who at any time between the 14th day of June in the said year of our Lord 1641, and the 24th day of March in the year of our Lord 1660, were born out of his majesty's dominions, and whose fathers and mothers were natural born subjects of this realm, are hereby declared and shall for ever be esteemed and taken to all intents and purposes, to be and to have been the natural born subjects of this kingdom; and that the said children, and all other persons born as aforesaid, and every of them, are and shall be adjudged, reputed, and taken to be and to have been, in every respect and degree, natural born subjects, and free to all intents, purposes, and constructions, as if they and every of them had been born in England.

"And be it further enacted and declared by the authority aforesaid, That the children, and other persons as aforesaid, and every of them, shall be, and are hereby enabled and adjudged able, to all intents, constructions, and purposes whatsoever, as well to demand, as to have and enjoy any titles of honour, manors, lands, tenements, and hereditaments, and all other privileges and immunities belonging to the liege people and natural subjects of this kingdom, and to make his or their resort or pedigree, as heir to his, their, or any of their ancestors, lineal or collateral, by reason of any descent, remainder, reverter, right, or other title, conveyance legacy, or bequest whatsoever, which hath, may, or shall descend, remain, revert, accrue come or grow unto the said children, or persons born as aforesaid, or any of them; as also to have and enjoy all manors lands and tenements, or other hereditaments, by way of purchase or gift of any person or persons whatsoever; as also to prosecute, pursue, maintain, avow and justify all and all manner of actions, suits and causes, and all other things to do as lawfully, liberally, freely and fully, as if the said children, and the persons born as aforesaid, and every of them had been born of English parents within this kingdom, or as any other person or persons born within this kingdom may lawfully in any wise do; any law, act, statute, provision, custom, or other thing whatsoever, had, made, done, promulged, proclaimed, or provided, to the contrary thereof in any wise notwithstanding; provided always, that no person, other than the persons expressly named in this act, shall have any benefit thereby, except such person shall within seven years next ensuing, receive the Sacrament of the Lord's Supper, and within one month next after such receiving the Sacrament, take the oaths of Allegiance and Supremacy in some of his majesty's courts at Westminster, and deliver into the court, at the same time, a certificate of such his receiving the said Sacrament, and then make proof thereof by witnesses to be examined *viva voce* upon oath.

"And be it further enacted, That no person or persons, other than the persons expressly named in this act, shall have any benefit thereby, until he or they shall have received the Sacrament, and made proof thereof by certificate and witnesses, and taken the said oath in manner aforesaid.

"And for the better manifestation and proof of such qualifications as may entitle any person to the benefit of this act, which in process of time may be very hard to be proved: Be it further enacted, That any person having received the sacrament, and made proof thereof by certificate and witnesses, and taken the said oaths within the time aforesaid, in any of his majesty's courts, in manner aforesaid, shall and may be admitted to make proof of such his qualification in the said court by witnesses *viva voce* to be examined upon oath; and if he shall make proof thereof to the satisfaction of the said court, he shall thereupon have a certificate thereof under the seal of the said court, to be likewise enrolled in the said court, and for ever after upon shewing such certificate or enrollment thereof, every such person shall have full benefit of this law, as if he had been therein expressly named."

Baron *Street*. Then you are a natural born subject by the late act of parliament; whereby it appears that all persons born abroad in the late troubles, who went out of this kingdom by reason of their sufferings for the king, are made natural born subjects, as if born here.

Then *Joseph Dudley* was called and sworn.

Baron *Street*. Joseph Dudley, do you know the prisoner at the bar? Look upon him.

Dudley. I have known him these six years and more, to belong to Mr. Powtrel's at West Hallam to whom I was at that time a servant, where he officiated as a priest, and was kept to do that office; where I have heard him say

mass, preach, pray, and have seen ten, twenty, or thirty or more at a time before him in the chapel there, when he hath officiated with his priestly robes upon him; and likewise seen children brought to be christened by him, others to be catechised; which he frequently did, as if he had been a parish priest, but with what privacy he could: And I myself have taken care of the doors at such times, which care they left to me, though I was not of their opinion; yet upon my promising to be so, they did repose that trust and confidence in me.

Baron *Street*. Tell us what you know concerning Mr. Busby's being an alien, as he pretends, which I cannot believe.

Dudley. He tells you, that when the civil wars were here in England, his father and mother, with their family, went beyond sea, where he was born; but my lord, in discoursing with my master and others of the late wars, I have heard Mr. Busby relate what happened to their family in those times, and that their house was often plundered, and his father and mother living at Coddington in Oxfordshire (as he tells you) the first time the soldiers came to plunder the house, he was about two years old or more, and being frighted at the soldiers, he hid himself behind the bed in the curtains, so that while they were there, none of the house knew where to find him, which made them believe that the soldiers had taken him, or made him away; but when the soldiers were gone, his mother and some of the family lamenting for him in her chamber, he hearing them, appeared; so that with great joy they received him. My lord, I think the place was Coddington, where he tells you his mother lived, and that it was her's, she being an heiress. At least I am very certain I have heard him speak of the place where he was born, to be in or about Oxfordshire, I think it was Coddington; for it is the place where Mr. Charles Busby his eldest brother now liveth, and he saith, that from thence his father and mother went beyond sea.

Busby. When did you hear me discourse any such thing as you have related, and with whom; you speak this by hearsay, do you not?

Dudley. Several times with my master and others, as I said before, when they have been talking how some families have been ruined by the great oppressions of those times, some being plundered, others sequestered, and forced to leave their estates and friends, which you have said was your mother's case; for their great sufferings forced them to go from their own house: And, my lord, when he was about five years old, he did also say, that he could remember soldiers coming again to plunder, and he being at that time in the garden or orchard, he did hide himself in the hedge, where he did continue till they were gone, and then he came forth when it was late in the evening; but his mother nor any of the family knowing where he was, did very much fear they had lost him; but when he came to them, they were not a little joyed; but after this they went immediately beyond sea, and took him with them, where his mother continued several years and had several children there, the which I have heard him say of himself, and of her being at Brussels.

Baron *Street*. Mr. Busby, the evidence says, that you told a story of your mother's house being plundered, and how you hid yourself in the curtains when you was two years old, and in the garden-hedge, when five years old, for fear of the soldiers, and that soon after your mother went beyond sea, where she had several children, which yourself told from your own mouth, and he had it not from other people.

Baron *Street*. But, Mr. Dudley, What can you say as to his being a priest or jesuit?

Dudley. My lord, my master and his family, and all papists that were acquainted with him, ever owned him to be a jesuit; and several of them have many times told me so: Besides he himself has owned that he was of the society of Jesus, particularly one time, when I should have been his convert; telling me, While I was out of the true faith, I could not be saved; and there was no way to be saved, but by believing the catholic church, which was the Roman catholic, as tradition makes appear; for God help me, I was a poor heretic, and led by weak and blind pastors; for they had their religion only from Calvin and Luther, and every silly fellow was made now a preacher of the gospel, before he understood it; but that he and all jesuits were fifteen years labouring in their studies and degrees, before they came to be ordained.

Busby. I pray you, where and when was it I said all this to you?

Dudley. In the gardens at West-Hallam, where my master Mr. William Powtrel and Mrs. Anne Smalley, after great persuasions, sent me to you; and told me they had sent you before; and that I should find you there, where I did. And your first discourse was of the gardens, withal giving me a description of the jesuit's college in Liege, where you did (as I remember) own your receiving orders. Besides, I have heard my master, Mrs. Smalley, Mrs. Winifrid Attwood, and George Harrison (who lived in the colleges beyond sea) own it. And yourself said, That Mr. Evers, my lord Aston's priest (who had been with you at West-Hallam) was your master and tutor, when, as I think, you were a scholar at St. Omer's.

Busby. How long do you say you have lived at West-Hallam?

Dudley. Betwixt six and seven years.

Busby. When was that I talked of the gardens at the college of Liege? And whether I told you I was a jesuit when I spoke of Liege gardens? What time was it, what year?

Dudley. I cannot say the time, but it was since I lived at Hallam, and it was when you persuaded me to be a Catholic.

Busby. You take a compass of six years,

this is a mere story. Pray, what were my arguments?

Baron *Street.* You were about to convert him, and then you told him this; it is enough you have endeavoured to make him change his religion; but it seems your arguments were not of so much weight as to be remembered.

Busby. I pray you, was I ever with you alone to tell you I was a jesuit? Let me know the year and time, and what induced me to say so?

Dudley. I cannot satisfy you when the discourse was; but I have been alone with you in the garden a hundred times and more; when you did satisfy me that you was a jesuit, was the time when you did move me to be of your persuasion; the which I did so far condescend to, that ever since there was none of the family more trusted than I; for, my lord, I did give them all the assurance that might be of being of your religion; but the times being troublesome, and the fear of disobliging my friends, particularly one or two, who had the care and management of a house of mine (which was then in trouble) then I durst not consent, yet my seeming inclination did ever much please them, and they did so far credit me that my master did intend (as he told me) to take me beyond sea with him; nor did I know the contrary, till I was upon the road for Dover, and then he told me that his uncle Busby was inserted in the pass (by the name of Thomas Jackson) which he shewed me; but he having no mind to go, stayed in England, (and for the most part at Hallam) so that my master commanded me back, to look after his affairs there: and for some time before he was to return, he said he would send for me over. Ever since he left Hallam Mr. Busby hath continued privately there, for none besides Mr. George Brent and myself, and the women of the house, were suffered to know of him; nay, some of his relations who have lain in the house, have not known but that he was beyond sea, though they were papists, yet he would not suffer them, but concealed himself.

Busby. I pray, will you tell me what day, month, or year it was, you and I had this discourse you speak of; and tell me how it came that I was so familiar with you?

Baron *Street.* What need you impose it upon him, when he saith he hath lived with you six years and more? He cannot remember it; but he tells you, that it was in the garden, where he has been with you a hundred times and more, not thinking further of it; it is impossible to satisfy you the particular time: therefore why do you ask him such a foolish question?

Busby. I desire you will let me know how you (as you pretend) come to know I was a jesuit.

Dudley. Sir, it is what you know to be truth, and I am sure you cannot but remember, it was in the walk at the head of the orchard, where you was before me expecting my coming to you, and did then use all the persuading means that might be to confirm me in your opinion; in which I seemed so well satisfied, that you told me you would leave me to consider of it; but that I ought to forsake my friends, and whatever else, to come to God Almighty, of which you did not doubt; but bid me be careful, for delays are dangerous: and, my lord, as to his being a jesuit, he did own it when my master was committed to prison for refusing the oaths of supremacy and allegiance; (for he was then private at West-Hallam), withal saying, in his conscience he ought not to take them, for their church would not allow it, but on the contrary did expressly forbid it: nevertheless Mrs. Powtrel, Mr. William Powtrel, and divers of the family did argue for his so doing, especially after Mr. Thomas Cannynge came from St. Thomas, in Staffordshire, and said, that his uncle Fowler, he, and all belonging to him, had taken the oath of allegiance: and that it was the opinion, and with the consent of Mr. Fitter, their priest, that they might do it; and for that reason Mr. Cannynge came to advise my master the like: but Mr. Busby did reject the motion, and said, no secular priest could give leave so to do, and for his part he was absolutely against it, and so was all the society: but if seculars gave too much liberty, he would not be guilty of their fault; so when all would not prevail with him, then Mrs. Powtrel and I went to Mr. William Brent, at Fox-Coat in Warwickshire, her grandfather, and Mr. Busby's father-in-law, a counsellor, to have his advice; and upon his writing several letters to my master, and Mr. Busby, that it was proper for my master so to do, nor could he avoid it; then in compliance to Mr. Brent, he did not much oppose the taking of the oath of allegiance: and those letters, the next night after Mr. Gilbert had taken Mr. Busby, Mrs. Smalley (for fear he should find them) did burn, but shewed them to me as she was looking over many papers more, the most of which she did likewise burn.

Mr. *Gilbert.* For your lordships and the jury's further confirmation that the prisoner is a jesuit as well as a priest, and that he held a dangerous correspondence with some of his order, which have been executed for their treasons in relation to the Plot, I must acquaint your lordship, that this Busby was procurator for the jesuits, and that he received the rents of their lands, from 1673 till 1677, and that he disbursed and returned several great sums of money to divers jesuits, as may appear by letters, and his account-book, which I took, where may be seen what dealings and transactions he had with Gawen, Harcourt, Turner, Ireland, Pool, Bennet, Heaton, Tomson, and others of his tribe: he could not deny it to be his own hand-writing. My lord, here is the book. (Which was presented to the judge, and perused by him.) Then Mr. Gilbert proceeded. My lord, I did also search at West-Hallam house for popish priestly garments (being well informed that there were such in

the house), and found divers suits of vestments, and other popish trinkets, which I brought away, together with those I formerly sent back from the last assizes; all which I have ready in Court to be produced, and have also a minister here (who has formerly been a popish priest himself, to inform your lordship the names and use of all the particulars; here are also, my lord, a box of wafers, which I suppose they use for the sacrament at the mass; the larger sort, I am told, are for the priests use, the lesser for the people; and here are the wafer-irons which made them. Mr. Sheppey, pray tell my lord and the jury the names of all those things, and how the priest used them at mass.

Mr. *Sheppey* taking up the things, said, My lord, this is a vestment, used when the mass is said; this is a stole, and this is a maniple, and this an Antipendiana: And so gave an account of the rest of the trinkets.

Then *Thomas Houis* was called and sworn.

Baron *Street*. What can you say, friend, of the prisoner? See if you know him, look upon him.

Houis. I know him well enough, he persuaded me to be a Roman catholic, when I was about to marry a man's daughter that was a papist: whom I could not have, until I turned to their religion. Mr. Busby persuaded me, and when he had converted me, bound me to believe that matrimony was a sacrament: he gave me absolution, and made me do penance; the words of the absolution I cannot pronounce, but I have been several times at mass when he said it, when I had absolution from him; after confession I was to say these words.

'For all which, and whatever else I cannot 'at this present call to mind, I am heartily 'sorry for, the love of God; and purpose by 'God's grace to amend, beseeching you, my 'ghostly father, to pray to God for me, and to 'give me absolution and penance.' Afterward you know you married me, and I was cited to Lichfield-court for being married privately by you. My lord, I have been present when Mr. Busby said mass at West-Hallam, and have heard and seen him say mass several days in his priestly robes: I never knew any other priest but him at West-Hallam; most Sundays and holydays he said mass, where were present most of the Roman catholics in those parts; I have heard him preach three times, and no more.

Busby. Did I come to you or you to me?

Houis. I came to you.

Busby. Then I did not persuade you to turn catholic, you was satisfied upon the first persuasion before you came to me, you declared you would turn catholic.

Houis. I was persuaded by Mr. Shirborn of Stanly-Grange, yet not fully convinced but by you.

Mr. *Gilbert*. My lord, this Shirborn he speaks of, was one captain Shirborn a great papist, who lived near me, a letter-carrier (as was reported) and one that sold them books and trinkets.

Houis. For I was fully satisfied then in all things by your instructions, and hearing your sermons; as for mass, I did not understand it; but you said it was mass; besides, others called it so.

Busby. How can you swear to a thing you do not understand?

Houis. If I did not, you told me so, and I believed you, because you did the office of a priest.

Baron *Street*. It seems this is the matter, you courted a papist for your wife, and Busby told you the way to have her was to be a papist, and you did hearken to Busby to persuade you; he told you matrimony was a sacrament, and before you were married, you must be confessed, and have absolution; and Mr. Busby, you put words into his mouth to desire absolution; but gave it in such language as he understood not: He says, he has heard you say mass frequently; but preach only three times.

Busby. It is an easy matter for him to say such things, but how does he prove it to be absolution or mass, when he says he understands not the language?

Houis. My lord, I have not only been present at that which they call their mass, but I have also received the sacrament from Mr. Busby then, and have seen him give the sacrament to divers other persons too; and besides, my lord, I did send my eldest child to the chapel at Standly Grange, to have it christened by Mr. Busby; this woman (pointing to Sarah Clark, who stood by) carried it: When we came there, Dr. Richard Needham (who lived there) said to me, are you the father of this child? I answered, yes: Then, says Dr. Needham, you ought not to be present when your child is christened: Whereupon, my lord, I went into a corner of the room, but could perceive well enough what was done, and Mr. Busby did christen my child, and gave her the name of Anne, Mr. Peter Waldron was godfather, and Mrs. Anne Smalley godmother.

King's Counsel. We shall now call Elizabeth Evans for further proof of Mr. Busby's exercising his priestly office: (Who was also sworn.)

Bar. *Street*. Come, good woman, what can you say of the prisoner at the bar, do you know him?

Eliz. Evans. Yes, I know the prisoner at the bar, it is Mr. Busby, my lord, and have seen him in his priestly habit say mass in the chapel at Mr. Powtrel's house at West-Hallam; I saw him christen Henry Avery's child of Stanton, I was godmother to the child: He has confessed me several times; and I have received absolution from him: I have received the sacrament from him?

Bar. *Street*. What was it he gave you, when you received the sacrament from him.

Eliz. Evans. I know not what it was Mr. Busby gave me.

(Then the wafers were called for, they were of several sizes in the box. And being shewed to her, she said, yes, my lord, these are what he gave us at mass for the sa-

crament: I remember them, they were just such.

Busby. Wafers are things usually put under biskets and macaroons; therefore how can she say those are the sacrament, for they are what I have seen given to children to eat and play withal.

Bar. *Street.* They are things indeed to give to children.

King's Counsel. Pray call *Dorothy Saunders* (who appeared, and was sworn.)

Bar. *Street.* Well, Dorothy Saunders, what say you?

Dor. Saunders. He has several times absolved me, and given me the sacrament, and has said mass, where the company were sometimes more, and sometimes less; (and having a wafer given her into her hand) and he held up the wafer thus, (and shewed the court and the jury the manner of his elevation of the host.) And being asked by the judge, whether she knew priestly vestments? (answered)

Dor. Saunders. Yes; I know priestly vestments when I see them; (which being shewed to her) she said, she had seen Busby in some of them; but for his christening of children, I know nothing of that.

Busby. Is that the sacrament? Those wafers in the box, is that the sacrament?

Dor. Saunders. We took it at your hands for the sacrament.

Baron *Street.* Mr. Busby, you are so impertinent in your questions, you think you have weak persons to deal with; I hope the jury will take notice of it.

King's Counsel. Call Sarah Clark. (Who appeared, and was sworn.)

Baron *Street.* Sarah Clark, have you heard Mr. Busby say mass?

Sa. Clark. Yes, my lord, that which he told us was mass, but I did not understand it, for it was in another tongue, which they said was Latin.

Baron *Street.* But had he his vestments on or how was it, tell us, good woman?

Sa. Clark. Yes, my lord, he had vestments on, and he did then give us the sacrament, as he called it, which was a wafer, and that he put into our mouths after that he had elevated the host: and he himself told me it was the sacrament.

Baron *Street.* Well, and have you made confession to him, and has he absolved you after you have done so?

Sa. Clark. I have been at confession, before him, upon my knees, and when I had done, he spoke something to me in Latin (as I think) which he said was absolution, and I did take to be so; and I have sometimes, my lord, heard him preach, and that I understood, because it was in English. He told me what absolution was, and the mass, and the same was to be read in English, and those that could read, at those times, said the same.

Baron *Street.* Several witnesses have spoken closely, that he has exercised his office in all things as a priest: have you known him marry any body, and christen children; if you have, speak:

Sa. Clark. My Lord, he did not marry me, one Mr. Gavan married me; but I have heard that he did marry Thomas Houis, and I am sure he did christen Thomas Houis his first child, for I carried it to him, and Mr. Waldron, and Mrs. Anne Smalley were godfather and godmother, and he did name it Anne; it was christened at Standly Grange, at Dr. Needham's house, and several others were there at the same time, and afterwards I brought it home.

Busby. How do you know it to be mass and absolution, when you say you do not understand the language I spoke in?

Sa. Clark. Though I did not understand what you said, you told me what every thing meaned, and I did believe you, because others told me so too; besides, all papists thought it their duty (as you told us) to be be there holydays and Sundays, to prevent a venal sin, which if we omitted we were liable to penance.

Mr. *Gilbert.* My lord, we have three or four more witnesses but we are loth to trouble your lordship and the court with any further testimony of this nature; hoping the matter of the indictment has been fully proved against the prisoner; and if your lordship please we will rest here.

Baron *Street.* I suppose the jury will believe there has been sufficient evidence given to convict him; but Mr. Busby, what can you say for yourself?

Busby. Joseph Dudley tells your lordship how I should tell a childish story of hiding myself in the curtains, when I was two years old; pray, my lord, consider how I could remember what I did at two years old; I know not how I could. I have told your lordship I was born beyond sea, I am sure I was bred there; I hope your lordship will not take notice of an hear-say: my mother went beyond sea at the begining of the troubles, not after, it was before Edge-hill fight. As to what Houis says, he himself does acknowledge, that he does not understand what language I absolved him in, nor the language of the mass, and therefore he cannot swear to it; and for ought I know, as to his being married, it was in a privileged place and could not be cited to Litchfield court; and for what the other witnesses say, their evidence is only that they heard something read in an unknown language, usually women pray in an unknown language, and those public prayers were only family-duties; they swear not what it was, because they understand it not.

Baron *Street.* I believe not one in a hundred understands your prayers that hear them; else they would not be so juggled by you.

Busby. There are vespers and mattins, and evensong; he does not distinguish what it was that was said, by reason it was an unknown language to him; it was only family-duty. I can produce a witness to prove it, that women do family-duty in an unknown language.

Baron *Street.* I know women do not officiate in your church.

Busby. He swears, my lord, to what he does not understand. As for Elizabeth Evans, she swears concerning saying mass, and understands not one service from another, and this proves not particularly my priestly office.

Baron *Street.* Mr. Busby, you forget christening Avery's child, and Houis's child, confessing and absolving divers persons, the material evidence: you only offer some little diversions.

Busby. Dorothy Saunders knows not what she swears, nor Sarah Clark; none of the witnesses can distinguish one service from another, they cannot therefore swear what was, and what was not: giving of bread is not the priestly office, they do not swear positively to my exercising the priestly office, other persons wear those garments as well as priests: those things are monuments and heyre-loomes to the family, they were taken out of churches in former times at the Reformation: there are now to be seen in the cathedral at York, church-stuff and vestments, which are kept for antiquity, and so were these.

Baron *Street.* Mr. Sheppy has been a priest, and he knows the use of those things as well as you.

Busby. My lord, those things laymen do wear as well as priests, I desire to cal witness to prove it.

Baron *Street.* You may if you will, but to what purpose?

Busby. Pray call Robert Ne[illegible] (Who was called and appeared.)

Baron *Street.* Well, Needham, do you know these things? (the vestments being shewn unto him.)

Needham. I have had these things on myself, my lord, and have said my prayers in them, and have thought my prayers more acceptable when I had them on; and I have seen them used by others several times.

Busby. More wear them that are laymen, than such as are priests.

Baron *Street.* Needham, it seems you wore them whilst you said your prayers, that they might be more acceptable?

Needham. Such like vestments are worn by laymen in several places

Busby. I desire one Mr. Charles Umphrevill may be called, to speak to my being an alien born. (Who being called for the prisoner was not sworn.)

Umphrevill. To Mr. Busby's being an alien, I have known Mr. Busby several years, and I have heard his mother and brother affirm he was born at Brussels: and I have an affidavit from the register at Coddington of all their children born in England, and we do not find Mr. George Busby's name in the register.

Baron *Street.* How can you be sure of that? You ought to have brought the man along with you to testify it.

Umphrevill. My lord, the sexton is an old man, above sixty years of age, and could not come; but he made affidavit of it, which is here.

Baron *Street.* That does not signify any thing at all; that affidavit cannot be allowed, for he might be born there, and yet not registered; but what makes you say we? what makes you concerned?

Umphrevill. I say we, because I was one of those employed to get Mr. Busby's Habeas Corpus. (Upon Mr. Umphrevill's being at a stand, and Busby directing him to tell what he had seen beyond sea, the judge taking notice thereof said,)

Baron *Street.* What would you have him say, Mr. Busby? Tell him.

Umphrevill. I have seen canons beyond sea wear such vestments that are not in orders; I have seen children wear them, and they, I am sure, are not in orders.

Busby. I call Mr. Mayo to prove that I am not a natural-born subject of the king's.

Baron *Street.* Come, sir, though you are not upon your oath, yet you must tell us the truth as faithfully as if you were.

Mayo. I have searched the register at Coddington, and I do not find George Busby's name, the prisoner, registered; I have searched all the books, and I find no register of him

Baron *Street.* An hundred children may be born in that parish within these 20 years, and not registered; all that are baptized, are registered only.

Busby. Mr. Mayo, satisfy my lord of the disappointment I had of my Habeas Corpus, which you got for me.

Baron *Street.* To what purpose? but Mr. Busby you shall not say but I will hear him: What say you, Mayo?

Mayo. My lord, I was employed about an Habeas Corpus for Mr. Busby in Easter Term last, and did obtain one for him then, but by reason of some slackness it was presently out of date, and so became ineffectual. Also in Trinity Term, I procured another Habeas Corpus for him, which was delivered to the under sheriff of this county of Derby, who was then very sick at London, of which sickness he died there at last, and that Habeas Corpus, for that reason, did likewise fall short; by which disappointments Mr. Busby is not so prepared for his trial at this time as otherwise he might, if he had not really depended upon his being removed to London by Habeas Corpus.

Baron *Street.* All this is too little to the purpose; for if he expected to have had his trial there, and was prepared for it a term or two ago, how comes it to pass he is not prepared now? Come, come, Mr. Busby, what can you say more?

Busby. I could not be born at Coddington, I was born beyond sea, out of the kingdom. My lord, here is not one word proved of the substance of the indictment, not a word proved that I took orders beyond sea, nor here, from any person that saw me take orders; not a word of that proved; nor not a word of the substance of that statute of queen Elizabeth, which I am indicted upon; only some few women say they heard me pray in an unknown

language, which was no more than family-duty; and I can produce a witness that women say their prayers publicly in an unknown tongue, and all answer; and by these circumstances I am accused for being a priest.

Baron *Street.* I find, Mr. Busby, you understand the law. But pray you, is the Sacrament given by women? And is absolution given by women?

Busby. If they understand not the language, they understand not the thing: treason may be spoke in French, and I not know it to be so.

Baron *Street.* Then it seems no man can prove a priest that does not understand the Latin tongue.

Busby. None of the witnesses has sworn that I gave absolution, nor that I said mass, but in an unknown tongue. What they have sai[illegible]y circumstances, and do not prove the indictment; and what they say I did, are things that are performed by those who are not priests. I offer it again to your lordship's consideration, that I have not been proved a born subject of the king's. I was deprived of my Habeas Corpus, which was detained in the sheriff's hand, and so lost the benefit of it; (these things are material;) and have not had time to produce witnesses that I was not born in England, but beyond sea: at London I could have got evidence to prove that; and here has been no proof made of that, but a story told of me when I was a child: I have proved that my name cannot be found in the register at Coddington. For the rest I have not had time; if I had had the benefit of my Habeas Corpus, to have been tried at London, I had friends there that could have proved me born beyond sea: this Dudley that appears an evidence against me, was a servant of Mr. Powtrel's, who was gone away upon disgust; he sent away several loads of goods, and now he comes to swear against me; I am verily confident that he carried away above three horse-load of goods, that he carried privately out of the garden, of plants and such things, and sent them all away.

Mr. *Gilbert.* My lord, they were his clothes, and other things of his own, which he took with him when he went away.

Baron *Street.* All this signifies nothing, if it be proved; but bring what witnesses you will to prove it.

Busby. I hope your lordship will consider that I am an alien born, and that by the loss of my Habeas Corpus I had not time to bring my witnesses; and that the prayers I said were only family-duties: I hope that will be considered; and that those people that have sworn I said mass and absolved, do not know what mass is, nor absolution. My lord, here is nothing proved of the indictment against me.

Baron *Street.* You have said all this six times over, if you have nothing farther to say in your defence, I must sum up the evidence to the jury.

Baron *Street.* You of the jury, the prisoner at the bar, George Busby, stands indicted of treason upon the statute of 27 Eliz. cap. 2, the principal branch whereof is this: 'And be it 'further enacted by the authority aforesaid, 'that it shall not be lawful to or for any jesuit, 'seminary priest, or other such priest, deacon, 'or religious or ecclesiastical person whatso- 'ever, being born within this realm, or any 'other of her highness's dominions, and here- 'tofore, since the said feast of the nativity of 'St. John Baptist, in the first year of her ma- 'jesty's reign, made, ordained, or professed, or 'hereafter to be made, ordained, or professed, 'by any authority or jurisdiction, derived, 'challenged or pretended from the See of 'Rome; by or of what name, title or degree 'soever the same shall be called or known, to 'come into, be or remain in any part of this 'realm, or any other her highness's dominions, 'after the end of the same forty days, other 'than in such special cases, and upon such 'special occasions only, and for such times 'only, as is expressed in this act: and if he 'do, that then every such offence shall be 'taken and adjudged to be high-treason: and 'every person so offending, shall for his offence 'be adjudged a traitor, and shall suffer, lose, 'and forfeit, as in case of high treason.'

This makes every offender against this statute a capital offender, and guilty of high-treason: now whether he is within this law, you are to consider. Mr. Gilbert has told you that he is a reputed priest and jesuit in the neighbourhood, and that as such he had an order from his majesty to apprehend him. He used his endeavours to take him for some time, but could not apprehend him till the 16th of March last, and then he found him; but in such an obscure hole, that no body would hide himself in, but such an extraordinary offender. Innocent people do not obscure themselves in that manner. Joseph Dudley, to prove him a native and not an alien, tells you, that when soldiers in the time of the late wars, came to plunder his father's house, he heard him say, that at two years old he hid himself in the curtains in his mother's chamber for fear of the soldiers. But (says the prisoner) my memory could not serve me at two years old to retain what I did then. But our parent tells us what we did then. If a man be asked, what age are you of? No man can tell but as his parents tell him. My father told me I was six years old, and from thence I remember it. His father and mother were not out of England, as appears, till about 1646, and then the war was ended; and the prisoner confessed himself to be about forty years of age, which shews him born in England. He that but observes his language will find that the tone of the English language remains with him. One born in Wales (though he came young from thence) he will have a Welsh tone as long as he lives. The prisoner tells you, that no man has proved his being in orders of the Church of Rome, nor where, when, or by whom made a priest: but if all that were to be proved, it would make the law

idle and insignificant. If he be made a priest in England, it is as much as if made at St. Omer's or Rome. He did own to Joseph Dudley, that he was made a jesuit, and laboured to make a convert of him in the garden, when he was alone with him. The next was Thomas Hollis, who courted a woman, and must not have her, unless he turned Roman Catholic. Busby must discourse him, and make a convert of him. He hears Busby preach three times, and heard him say mass several times: and was not only married by him, but has been confessed and absolved by him divers times. But Busby's fallacious argument has no weight in it, that because he understood not Latin, therefore he proves it not mass nor other services of the Church of Rome. Dorothy Saunders speaks to the same purpose, that he confessed and absolved her. And she tells you, that she has seen him elevate the host, and has shewed you the manner how; and he gave her the Sacrament, which she and the rest took from him as the Sacrament: and that she has seen him officiate in some of the robes produced in Court. Sarah Clark speaks to the same purpose, and so did Elizabeth Evans. But Busby says, because this was done in an unknown tongue, they cannot swear it; and that he is no priest, because they do not swear where, and when, he received his orders. Whoever does exercise that profession, we do believe him of that church. When a minister of our Church preaches or officiates, we do not say, pray let us see your orders first; but if he officiate usually as a priest, it is taken for granted that he is one. He can tell where he received his orders, but it may be cannot produce them upon all occasions. Must he therefore be no priest? Upon the whole, if you believe the witnesses, or any two of them, you are to find the prisoner guilty; I believe you have had full evidence; go together, and consider of it.

The Jury went forth, and after a short stay came back into the Court.) And then,

Clerk. Gentlemen of the jury, have you agreed on your verdict?—*Jury.* Yes.

Clerk. Who shall say for you?

Jury. The Foreman.

Clerk. George Busby, hold up thy hand: look upon the prisoner.

Clerk. Do you find George Busby Guilty of the high-treason and felony he hath been arraigned of, or Not Guilty?—*Foreman.* Guilty.

Clerk. And so you say all?—*Jury.* Yes.

Clerk. Look to him jailor.

Baron *Street.* Though I must pass Sentence upon you of course, the Jury having found you guilty; yet I must tell you, that his majesty hath commanded me to reprieve you from execution.

Then Mr. Baron Street passed Sentence. 'That you the prisoner, now at the bar, be 'conveyed hence to the place from whence you 'came, and that you be conveyed thence on a 'hurdle to the place of execution; where you 'are to be hanged by the neck; that you be cut 'down alive, that your privy members be cut off, 'your bowels taken out and burnt in your view; 'that your head be severed from your body; 'that your body be divided into four quarters; 'which are to be disposed of at the king's pleasure: and God of his infinite mercy have 'mercy upon your soul.'

281. The Trial of STEPHEN COLLEDGE, at Oxford, for High Treason: 33 CHARLES II. A.D. 1681.*

THE PETITIONS OF STEPHEN COLLEDGE, precedent to his Trial, with the Orders made thereon.

To the King's most excellent Majesty: the humble Petition of STEPHEN COLLEDGE, now Prisoner in your Majesty's Tower of London;

MOST humbly sheweth; That whereas your Petitioner being charged with high-treason, is under strait confinement, that he hath not liberty to see or speak with any of his friends or his children, and being lately informed, that it is ordered your petitioner shall come to his trial at the city of Oxon about the middle of the next month; Your petitioner therefore most humbly prays your sacred majesty, that leave may be given for Mr. Aaron Smith and Mr. Robert West to come to him; and also to have the use of pen, ink, and paper, in order only to make his legal and just defence, and also to have the comfort of seeing his two children. And your petitioner as in duty bound shall ever pray, &c.

* See his Examination at the Trial of Lord Stafford, vol. 7, p. 1465, of this Collection.

"Soon after this Dugdale, Turbervill, Smith, and the Irish witnesses came under another management; and they discovered a plot laid against the king to be executed at Oxford. The king was to be killed, and the government was to be changed. One Colledge, a joiner by trade, was an active and hot man, and came to be known by the name of the Protestant Joiner. He was first seized on: and the witnesses swore many treasonable speeches against him: he was believed to have spoken oft with great indecency of the king, and with a sort of threatening, that they would make him pass the Bill of Exclusion. But a design to seize on the king was so notorious a falsehood, that notwithstanding all that the witnesses swore, the Grand-jury returned 'ignoramus' upon the bill. Upon this the court cried out against the juries now returned, that they would not do the king justice, though the matter of the bill was sworn by witnesses whose testimony was well believed a few months before: it was

At Hampton-Court, July 23, 1681.

Upon reading this day at the board the Petition of Stephen Colledge, prisoner in the Tower, praying that in order to the making his defence at his trial, which he hears is to be the middle of the next month, he may be permitted to see his two children, to have the liberty of pen, ink, and paper, and that Mr. Aaron Smith, and Mr. Robert West may come to him; his majesty was pleased to order, that the lieutenant of the said Tower of London do permit the said Stephen Colledge to have pen, ink, and paper, and to see his two children, and the said Mr. Aaron Smith, and Mr. Robert West, and to converse with them as often as he shall desire in presence and hearing of the warder who attends him.

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commonly said, these juries would believe every thing one way, and nothing the other. If they had found the bill, so that Colledge had been tried upon it, he would have been certainly saved: but since the witnesses swore that he went to Oxford on that design, he was triable there. North went to Oxford, Colledge being carried thither: and he tried him there. North's behaviour in that whole matter was such, that probably, if he had lived to see an impeaching parliament, he might have felt the ill effects of it. The witnesses swore several treasonable words against Colledge, and that his coming to Oxford was in order to the executing these: so here was an overt-act. Colledge was upon a negative: so he had nothing to say for himself, but to shew how little credit was due to the witnesses. He was condemned, and suffered with great constancy, and with appearance of devotion. He denied all the treasonable matter that had been sworn against him, or that he knew of any plot against the king. He confessed, that a great heat of temper had carried him to many undutiful expressions of the king: but he protested he was in no design against him. And now the court intended to set the witnesses to swear against all the hot party; which was plainly murder in them, who believed them false witnesses, and yet made use of them to destroy others. One passage happened at Colledge's trial, which quite sunk Dugdale's credit: it was objected to him by Colledge, to take away his credit, that, when by his lewdness he had got the French pox, he to cover that gave it out that he was poisoned by papists: upon which he, being then in court, protested solemnly that he never had that disease; and said, that if it could be proved by any physician that he ever had it, he was content that all the evidence he had ever given should be discredited for ever. And he was taken at his word: for Lower, who was then the most celebrated physician in London, proved at the council board that he had been under cure in his hands for that disease; which was made out both by his bills, and by the apothecary that served them. So he was never more heard of." 1 Burnet, 501.

"It is certain, that his majesty had taken great offence at the Oxford parliament, for the particular zeal of the people in many of their elections; and for the particular respect paid the members of the city of London, in a great retinue waiting on them, &c. Of this number of attendants was one Stephen Colledge, commonly known by the name of the Protestant Joiner, a busy man, and a great zealot against popery, who went down to Oxford, and there spoke words, and recited rhimes, that were said to reflect upon the king. This mechanic was to be made an example of meddling with politics; so an indictment of high-treason was exhibited against him to the Grand-jury of Middlesex; but the jury returned an ignoramus upon it: for which Mr. Wilmore, the foreman, was, out of all course of law, apprehended, and examined before the council, August 16th, and sent to the Tower: and was afterwards forced to fly beyond the seas. When the design had thus miscarried in London, they laid a new scene against this offender at Oxford, where they hoped to find a more pliable Grand-jury: and to make sure that the bill might not a second time miscarry, the witnesses were sent down post to the assizes, and by secret management were privately shut up with the jury till they had found the bill: which was afterwards complained of, as an intolerable practice. As soon as the bill was found against him, a jailer and a messenger were sent away to hurry him down to his trial, who, by order of the king's counsel, took from him all his instructions for his defence, and carried them to the counsel, for them only to make their use and advantage of them. This way of procedure was thought to be very harsh and illegal; yet the poor man, under these severe circumstances, was not wanting to himself, but stoutly made his defence; and, as sir John Hawles observes upon that trial, the best defence, all circumstances considered, that ever man made for his life. But indeed, it seemed to be a matter resolved upon above, he must die; and so he was, August 18th, found guilty of high-treason, and on the 31st of the same month executed in Castle yard." 3 Kennet, 409.

"In the interval between the Oxford parliament and that Michaelmas 1682, a time of much discovery, there happened two notable cases. One was Stephen Colledge, and the other of one Rous. The first of these was a joiner by trade, but, being a pragmatical man, and a fanatic, was set up as a prime operator in the desperate doings of the party; and, after their way of abusing the word Protestant, (which was first derived from the Lutheran protestation in Germany, and since is used to distinguish all reformed churches) by applying it to every thing they approved, or that run sideling along with the faction, as also the word papist for the contrary, and so, by an art of calling names, finding means for casting no little prejudice upon things, this handycraftsman was made famous by the title of the

To the King's most excellent Majesty, and to the Right Honourable the Lords of his Majesty's most honourable Privy Council. The humble Petition of STEPHEN COLLEDGE, now Prisoner in the Tower of London.

Humbly sheweth; That your petitioner having been a close prisoner ever since his first commitment, is altogether ignorant of the particular matters charged against him, and of the names of the witnesses who are to prove the same; upon his knowledge of both which, as well the nature as the manner of his defence must depend; and because upon the consideration of his case, several matters of law may arise as well before as at the time of his trial, in which counsel will be necessary to assist him, and several matters of fact preparatory to his trial, with which, under his con-

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Protestant Joiner; and his province lay in managing of sedition and treason among a lower order of men; and he had, in particular, a great charge incumbent upon him, to conduct that which was dressed up for the Oxford parliament.

"I would first note that, when the public began to settle a little, after the Oxford parliament dissolved, there were daily discoveries of the rogueries intended there; and whoever has a mind to know the forms, language, and conceptions of the treason company one with another, and the methods of the directors to engage them, with the authority the faction-mongers of the city had over the whole, tending to the great work of taking off the king and the duke, may read Mr. Zeal's Narrative, entitled Villainy Displayed, 1683. I do not mention this pamphlet as a voucher of truth in all respects, because there was a spice of the pickthank in it; but it affords such natural images of faction, with their ordinary dialect and converse, and pratique of treason, as cannot well be all fictitious: And, for the gross facts, every one may trust or distrust as they find cause. As for Colledge there was early evidence of rank High Treason against him; and therefore an Indictment was preferred to the Grand Jury at the Old Bailey; but against full evidence, as the following proceedings shew, the return was Ignoramus.* This obviated all farther criminal prosecution there; the door was shut, and no entrance into the common course of justice was to be had. But the scandalous Ignoramus was no discharge, and it was considered that the overt facts, of the treason against him, were the stirring up of war, and, in order to it, preparing arms and habiliments, advising others to do the like, and designing to seize the person of the king, and declaring he would be one; and that no good was to be expected from the king, who minded nothing but beastliness, and the destruction of his people, and to establish arbitrary government. All which facts were done as well in Oxfordshire as in Middlesex, whereby the treason lay in two counties; and, in that case, the king by law may choose in which county he will pursue, for both are proper. It was determined thereupon, that, since the justice of an Indictment was denied by the Middlesex Grand Jury, to proceed to indict and try Colledge in Oxfordshire. And, there being an opportunity by means of the assizes then at hand, the witnesses were sent down, and an Indictment preferred to the ordinary Grand Jury, who found the bill. This could not be unequal; for this case was not thought of when that Grand Jury was returned. After the bill found, the assizes did not continue long enough to bring on the trial of the prisoner, for he would have complained of too short warning. Therefore an extraordinary commission of Oyer and Terminer issued to the judges of the western and Oxford circuits to try the prisoner; and the two former were ordered to return from their circuit by Oxford, and to be there at the day. So these Judges met and held the sessions, and after a long trial, upon the Indictment found by the county Grand Jury, and full evidence in the hearing of a vast assembly of all sorts of people, the prisoner was found Guilty of High-Treason, and, soon after, executed; as I am about to relate.

"It is not to be conceived what a thunder-clap it was for the faction, to hear that a prime instrument of theirs should be brought to answer, much more to be attain of Treason. They thought their whole party safe ensconced behind the sheriffs of London and Middlesex, with their partisans of Ignoramus; and that the law was enervous as to them. And now, for one of them to be haled forth to an indifferent trial, with the consequences, was of the last importance, and would render the most zealous of their party less daring, and many (as was found in diverse instances already) go over and become discoverers. This made the whole party engage, as *pro Aris et Focis*, with all the skill and interest they had, to boom off this fire-ship, and save their friend. And accordingly they went to work, inventing, contriving, soliciting, by all possible means, if it might be brought about, to baffle the trial. And the attendance was accordingly, for there was scarce a pragmatical town party-man absent; and abundance of the vulgar sort of them. Aaron Smith, as far as he durst, and that was not a little, took the post of solicitor for the prisoner. It was he that was agent for the Scotch rising in the Rye plot. There was Dr. Oates booted, and spurred, and sworded, and the whole trained band of his dependence to help out, that could so well help in at a dead lift. With this armament and attendance, not unlike that which was at the meeting of parliament, this Protestant Joiner came down to be tried at Oxford.

"When the western Judges, that is the Lord Chief Justice North and Mr. Justice Jones, arrived, just at his lordship's alighting from his coach, a servant put into his hand a letter left

finement he cannot be furnished without the help of a solicitor, and he is like to be wholly uncapable of receiving any benefit from the privilege allowed by law of peremptory challenge to several jurors, especially in a country where he is absolutely a stranger, unless he

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directed for him. He opened it, and found only these words,—'You are the rogue the Court 'relies on for drawing the first innocent blood.' After his lordship was in his chamber and some friends with him, he shewed it to them, saying only, that, 'These men think me so poor spirited, 'as to be frighted from my duty by such silly 'stuff as this.' It is a thing of course for men, in the circumstances of this criminal, to desire time after time, and to insist upon all dilatories, and to be very querulous, if every thing they ask, be not granted; for they are never in haste; and it is always one request for friends to have access to them. And, in this case, there was enough of all this; for petitions upon petitions had been preferred, praying such kind of indulgences, which were granted, as appears by the petitions and orders printed at the beginning of the trial, to silence the lying spirits of the party, who then (as this author, in this his Complete History, hath) falsely pretended that he had neither time nor means allowed for his reasonable defence. In the list of the prisoner's counsel we find Mr. Smith, that was plot counsel to Oates, and one West, deep in the Rye conspiracy; and these gentlemen, with their assistant, had penned for the prisoner's use, not only captious law questions, but florid speeches and harangues, with the cues where they were to be pricked in, as the course of the trial went on. The contents were recrimination and libel upon the government, charging popery, French counsels, cutting off protestants, arbitrary power, and the like factious stuff, such as, if not helping the prisoner off, might fill the trial, when printed, with libel upon the government; an art usual with the faction. After the prisoner was come, the Judges, at his desire, allowed free access of his friends to him. But one of the officers observed that one of them put a parcel of papers into his hand; and, upon his information they were sent for and inspected, and found to be, partly concerning his defence, as witnesses names, &c. but abundance of the aforesaid libellous harangues. When the court was set, any one, that knew persons, might be diverted by observing the diligence of the soliciting crew, and how they had posted themselves in the view of the prisoner, and made signals at all turns with winks and lip-bitings. The prisoner was arraigned, and, after much ado, pleaded Not Guilty, and, upon his complaint about his papers, they were distinguished, and all, that were not mere libel, returned to him, and his trial was appointed the next day. It is a pity our author had not copies of these harangues to put in full length into his History, they would have sat very well there.

"I do not propose to make a report or extract of this trial, to represent the numerous cavils and chicaneries that were used in it, for the whole is in print, and readily had; and let that suffice. I shall only note a passage or two, as I think singular, and then speak with the author about the honest copy he has made from so just an original. It was Aaron Smith that put the papers into the prisoner's hand, and being questioned about it, lifted up as high as he could stretch, and, said publicly—'It is high time to 'have a care when our lives and estates are beset 'here.' The chief justice rose up and (calmly) said to the clerk, 'Record those words.' The consequence of that was a conviction without farther trial; upon which the court might have adjudged a punishment. But Smith was aware of that, and fell to recanting and explaining, which diverted the proceeding; and the judges only took his recognition to attend during the session. This passage of recording the words is not put in the printed trial, because, as I suppose, nothing being done, it went for nothing. Sir George Jefferies, and one of the prisoner's witnesses, had a parree of wit. It was one John Lunn, an old quondam drawer at the St. Dunstan's, alias, Devil Tavern, and gifted like an army saint. He was once heard praying by the spirit against the cavaliers, and, among other spiritual elegancies, he cried, 'Scatter'em, 'good Lord, Scatter'em,' which gained him the nickname of Scatter'em. Sir George Jefferies was somewhat too busy in asking him questions: and, sir George, said he, I never was upon my knees, as you were, before the parliament. Nor I, said sir George, for much, but you were so when you cried Scatter'em. Oates was also called to witness for the prisoner, against the credit of some of his brother evidences that had testified for the king. He affected to pronounce *ore rotundo*, the round oaths and ribald stuff that he charged the others to have uttered. And, among other things, he said of one Smith, who was a minister, that he once admonished him of his oath upon the gospel, and his answer was G— d— the gospel; and that vile sentence Oates mouthed out so odiously, as very much offended all (not so bad as himself) that heard it. And the manner of his behaviour shewed the genius of the man more than any description can do. He did but use the privilege of a theist or free-thinker; of which crew, or worse, he plainly declared himself by this passage, He told of his waiting with some company for dinner in the city, and. said he, to divert ourselves, we entered into a discourse of philosophy; and the questions were concerning the being of a God and the immortality of the soul, whether those could be proved by natural demonstration. And he seemed much gratified in this opportunity of talking profanely in public. But enough of these base mementos. It is time to come to our author, who pretends to sink deep for the intrigue of this man's case.

"He begins with his character, which after his rule of the times, was meritorious; and his

may have some knowledge of them before his trial.—In full assurance therefore of the great justice and clemency of your majesty and this honourable Board, which he hath lately had some experience of, and doth with all humility and thankfulness acknowledge, your petitioner

treason no other than zeal against popery, 'that 'he was a busy man, and a great talker against 'popery.' A good workman at disjoining, whoever paid him; and, as for his offence, 'he 'went down to Oxford, and there spoke words 'and recited rhymes, which were said to reflect 'on the king.' What a barbarous way of writing is this! Only 'said' to reflect on the king. The author is so far from allowing any thing treasonable in his case that he carries it no farther than a few words and rhymes which were but 'said' or supposed, not that they really did reflect on the king; and, if they did, we know that is but misdemeanor and not treason. Why did he not shew what the words were, the tendency and use of the rhymes, and other fact proved? It would then have appeared he was poet and singing master as well as songster. He was good at draught and design, and could make hieroglyphics of popery and arbitrary power: and represent emblematically the downfall of his majesty; as in his Raree-show and Mackninny, as I touched before. But those were bawbles for the underling mob to be engaged with. His magazine for action was of another sort, iron ware and arms, besides notable persuasive discourses he had to incite folks to use them against the king, whom, by his slighter implements, he vilified and derided most execrably. Thus, like the hero, 'tam Marti quam Mercurio,' he plied his work. If the trial had not been in print, it had been needful to have given a fuller account of this case: But I decline the *tædium* of a nice examination, at this time of the day, superfluous; it is enough to shew the perfidy of the account given in this History.

"It goes on to sum up all in a little; shewing that this mechanic was to be 'made an example,' not for any treason, or so, but, 'for meddling 'with politics,' the rest follows of course; but observe an admirable conciseness, and so an indictment was preferred against him. I am really afraid of being suspected for abusing an historical writer. It being almost incredible any pretender that way, even of the Grubstreet order should take upon him to relate facts and proceedings, and write such stuff as this. But with leave of his 'and so,' the indictment came replete with facts of high treason as touched before, and all proved by lawful witnesses against him, before the London grand jury; but they (just as our author here) made a mere ballad of it, and rejected the bill. Then as the party concluded, College was safe. Now comes in the author with a fresh subject of libel. 'For which (Ignoramus) Wilmore the 'foreman, was, out of all course of law, ap'prehended and examined before the council, 'and sent to the Tower, and was afterwards 'forced to fly beyond the seas.' Now, upon my small experience of affairs, which tells me this 'for which' cannot be true, I will out with my purse, and wager all that is in it that the scandal is false. But I fear every reader will not venture so deep, being (perhaps) inclined to think a grave writer should not affirm a fact, in manner and circumstance, so very untrue. That Wilmore, by his perjurious Ignoramus, was not much recommended to his majesty's favour, so as by his extraordinary interposition, to be taken out of the hands of the law, when it had seized on him for crimes, I readily grant; as also that if a man will effrontuously break the sacred trust of justice, in a matter of treason against the state, more like a partisan than a sworn enquirer, that the state will lay hold on him, if he be found, in any respect, obnoxious to the law: And farther, that a man must needs be a saint, indeed, that practises barefaced against lawful authority. All these things I grant; whereof the consequence is that Mr. Wilmore, and every one else of his bold usurpation, must look to their hits; for, if they may, they will be caught napping. But, as to the said 'for which,' that is for his return of Ignoramus, I deny that it either was made or mentioned to be any part of his crime; but he was taken up by lawful warrant, and not, as the author abusively affirms, for his verdict, which could not be so. It seems, some of the neighbours, that had him in detestation, informed that he was a kidnapper, and that he had sent one or two young men to the plantations; and it was verily believed he had sold them there. Upon this, he was taken up and examined, and, afterwards, not only tried at the King's-bench bar and convict (as I find in the Chronological History of England, 24 May 1682) but was also obnoxious, if not charged by a writ de Homine replegiando, and committed (as the nature of which writ requires) until he produced the persons in order to be replevied, this was the ancient remedy for the liberty of the subject, and is indeed more effectual and expedite than an Habeas Corpus. The difference is that the former is the process of the government, that took care of the people's liberties (wherefore men affected to style themselves the king's subjects) against the great men that tyrannised; and the latter is chiefly intended against the government itself, and the abuses of its power. But, as for Wilmore the kidnapper, he found means to clear himself by the activity of his heels. Whoever would know the steps of this matter, may find somewhat of it in the pamphlets of the time, and particularly in L'Estrange's Observators; out of which the whole story may be picked.

'In such a case as this, so defamatory of a settled government, an author should have made good his charge by some authoritative evidence, as the order of council, warrant of commitment, or return of an Habeas Corpus, as might have been had for the looking for. O!

doth humbly beseech your majesty and this honourable Board, that he may have a copy of the indictment against him, or the particular charges of it, that his counsel and solicitor may have free access to, and private conference with him; and because their own private affairs or other accidents may call away some of his counsel from his assistance, that Mr.

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but then, his saying it was for his verdict had appeared to be a falsity, and had spoiled a very fluent libel. Marry, he thanks you for that; no, though the matter lay fair enough for reflection, as to have said that, for revenge of his Ignoramus a pretence of kidnapping was taken, &c. for he would not abate an hair of the venom of his libel, and therefore says it positive, without any pretence at all. But, to do the faction justice, I must allow that, according to their scheme, they were much in the right; for having a government to undermine, then lies and libels served as spades and mathooks to work with. But now, to go on with the story, for I think I must transcribe the whole paragraph. 'To make sure that the bill might not 'miscarry a second time, where (at Oxford) they 'hoped to find a more pliable grand jury, the 'witnesses were sent down post to the assises.' Whether by post with the horn sounding before, or, as I guess the truth was, by coaches in which there might be six horses, which trotting apace, and galloping sometimes, saved their tide and reached the assise town before the business was done. Now this word 'post' has a *je ne sçai quoi* sound of a deep design. But *oportet mendacem esse memorem*; for now it is 'hoped,' a line or two before it is 'made sure,' that is they made 'sure hopes.' But, to wave bulls, why might not they in Oxfordshire make sure, when it was evident no unpacked and unprepared grand jury could reject such an indictment? Then, as for his 'pliable,' the chief gentry in the county of Oxford are his humble servants for the compliment; for men of honour are very 'pliable' to perjury.

"Now, to go on with this hedge libel; 'and, 'by a secret management shut up with the 'grand jury till they found the bill.' A bailiff at the grand jury chamber door, to let in those that have business and none else, is a manager of secrets. Do but observe the hot and cold dealing. In Rous's case it was a privilege to be secret, and now it is management. The malicious and false insinuation is that the grand jury chamber, being free for all comers, as an open court of trials is, yet, in this case, it was shut up for management. O woeful law-divine, that doth not know that place is always close, and not open to any that are not called, or have no business; and that no defences being heard, only the prosecutors and their witnesses attend to shew that there is reason for the prosecution. And how could these men, as they are sworn, keep the king's secrets and their own, if they were not close. If all people might come in at such examinations, prisoners would have spies upon the testimony, which would be of ill consequence. But the true grievance of the faction was, partly, the want of that, and, partly, that the solicitors and agents of diverse species, sent down to labour about freeing the prisoner, were deprived of the opportunity of standing behind, whispering and commenting, during the examination; as for instance—'this is popish work'—'that is an Irish papist'—'knaves come to destroy protestants'—'no protestant plot,' and the like; and, perhaps, take the boldness to ask questions pragmatically, or otherwise, though by their looks, affront the testimony. Whereby, if, in ordinary cases, the crowd used to be let in, as they were not, yet, in this case, it was reasonable to hinder it. And now comes the tag to this fine lace. 'This was afterwards complained of 'as an unsufferable practice,' that is not letting the crowd into the grand jury chamber; but by whom, or to whom complained of? By Shute to Pilkington, or by Pilkington to Shute? It could not be by any one man of common sense and knowledge of things to another. If he means any formal complaint to authority, as for an hardship or wrong done, the sentence is a great untruth.

"He comes now to the circumstances about the trial, which, I hope, was no private management; but 'he was hurried down.' This is like the posting down of the witnesses. Libel trades much in words that sound without any sense in them: For what was this 'hurry?' If it was the long trot of the horses, and swift passage to Oxford, it is a foolish expression. If it was so that the prisoner was deprived of any just means of defence, as the libel seems to intend should be understood by it, it is false; and the prints before the trial, as also the trial itself, that shews all the material circumstances, confutes it. But tragical words sometimes heat the willing imagination, so as to form in itself a lye when the author durst not say it. But we shall grow more and more direct; for, about the papers, taken and (except the libellous harangues) restored, the author says, 'This way of procedure was thought to 'be very harsh and illegal.' Neither the one nor the other; for, as the known law was then, prisoners were urged to make their defence upon their innocence of the fact, to be tried by the country, without foreign assistance to invent exceptions of form, and dilatories; for which reason no counsel used to be allowed them: But, if they could, by any means, shew to the court any matter of law, in point of form or otherwise, the court was trusted to give them the full benefit of it; as they were also if it appeared to them without the prisoner's shewing: which made it a common saying that the court is the prisoner's counsel. Nor is this to be accounted an harsh law (for law it was) however thought fit since to be altered; for offences, of this kind, are so clancular, and withal so dangerous to government, that it is necessary they have some power

Wallop, Mr. Smith, Mr. Thompson, Mr. Darnel, Mr. West of the Middle-Temple, Mr. Hawlles of Lincoln's-Inn, Mr. Rotherham, Mr. Lovell, Mr. Rowny of Gray's-Inn, Mr. Pollexfen, Mr. Ward of the Inner-Temple, may be assigned him for counsel, and Aaron Smith for his solicitor, and that he may have a copy of the jurors to be returned upon his

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over criminals in the way of justice, more than is regular in common wrangles of *meum* and *tuum*, that are of little consequence. For, if justice is not had in such cases, force will take place; and nothing is extraordinary when a court of justices sworn have the power of the whole form of a trial, by which right is to be done between the government and traitors. And to imagine that lawful judges are corrupt, is barbarous; because of the necessity of judging, and consequently of powers to judge, especially when a trial is in public, for all the attendance to observe and judge even the judges, who are in a sort (in captious times at least) upon the terms of good behaviour, because men may see their partialities when the case is so, as it was not here. But, since artifice is not allowed to prisoners by the means of formal counsel, why, I beseech you, by written speeches and the [illegible]al harangues, which were, in truth, impertinent to a just defence, and contrived for another end, and that was libel upon the government. It had been a rare device to publish libels with safety, had it been permitted the prisoner to read them to the people out of his papers.

"But the author still thinks him 'under severe circumstances.' It is well the trial is in print, else these poetical expressions would sadly paint this man's case in the minds of those that know no better. But, from the old rule, 'sit liber judex,' I may take assurance, and affirm that no man, that ever was tried for high-treason, had, or could claim, more latitude or scope of defence, than was allowed to this man; which is sufficient in answer to all that ever was or can be alledged against this trial. And the author is but a summist of the libel upon this head; for, near the time, faction was not desperate, but bold, and they not only railed at the judges publicly, but put out libellous pamphlets, out of which the author has his excerpts, which, at the time, were answered sufficiently to the common satisfaction of all equal persons; but out of the answers, no word to be found here. Now see how an historian can side with a traitor in his time! For the author hath the brass to add, 'But indeed it seemed a matter resolved from 'above, he must die, and so ———.' One that knows this author to be a divine, would conclude him a fatalist, and that he speaks of heaven above, and not of an earthly king. The words 'indeed it seemed' are singular English: But, pass forms, if any thing from hell can stink worse than this sulphurous sentence, I have no nose. The very shewing is enough to disturb the entrails of any candid person not abandoned to infamy. One, that slanders within the lines of possibility, is a sincere person, and an artist to this that defames with impossibilities; that is, that a man sent down to the law, and fairly in the face of the nation, tried and attaint, was doomed before-hand; right or wrong, 'He must die.' So here is premeditated murder charged upon king, counsel, officers, judges and jury all at once. I am sorry that the author's insufferable malice to the times of this reign, shewed in his falsifying this trial, has drawn me to lose so much paper and ink about it. One, that is weary, and has a mind to have done, must grieve at such provocations; and, as the common saying is, flesh and blood can scarce bear with him, who hath given no historical account at all of the matter, but only hath put together, as under a common place, a parcel of sentences, every one sublimated libel." North's Examen, 585.

"A Bill of Indictment was presented to the Grand Jury of the City of London against Colledge the Protestant Joiner, as he was always called. The witnesses against him were Mr. Smith, Mr. Dugdale, Mr. Haynes, the two Macnamara's, and sir William Jennings. They all positively swore, that Colledge told them, there was a design to seize the king at Oxford, and bring him to London, and there keep him, till he had complied with them, or else to bring him to the block, as they did his father; and that in this design the House of Lords and Commons were concerned, and that there was an army ready at London to assist them. It is certainly true, that never men swore more firmly than they did in court, before the jury, who demanded of the court a copy of their oaths, and that the witnesses might go with them, to be examined apart; which request was granted to the jury, and after two or three hours consideration, the jury returned, and found the bill *ignoramus*. Upon which the lord chief justice demanded, whether they would give no reason for this verdict; and whether they believed those six witnesses perjured? to which they replied, That they had given their verdict according to their consciences, and that they would stand by it. To which the lord chief justice North said, There was never such a verdict brought in the world. The grand jury, before they were discharged, delivered a petition to the court, desiring the removal of the priests and Jesuits farther from the Lords in the Tower, they holding correspondence with them. Upon bringing in this bill [illegible]*nus*, Colledge [illegible]ll be sent to be tried in Oxford, where the judges arrived the 15th of July. Their commission was opened, and the grand-jury was sworn, of which sir Thomas Spencer was Foreman; the rest were all gentlemen of loyalty, and Protestants, and of good estates; and upon hearing the evidence against Colledge, they found the indictment 'Billa vera, nemine contradicente.' One of the evidence against him swore, That if the king did not agree with his

trial some days before the trial. And your petitioner shall ever pray, &c.

At Hampton-Court, August 11, 1681.

It is is ordered by his majesty in council That the friends and relations of Stephen Colledge, a prisoner in the Tower, shall have liberty of visiting and freely conversing with him; and the lieutenant of the Tower having first caused their names to be taken in writing, is to suffer such friends and relations to have access to the said Stephen Colledge, without any interruption from time to time accordingly.

THE TRIAL OF STEPHEN COLLEDGE, AT OXFORD.*

On Wednesday the 17th of August, 1681, the lord Norreys, Lord Chief Justice North, Mr. Justice Jones, Mr. Justice Raymond, Mr. Justice Levinz, commissioners of Oyer and Terminer and Gaol-delivery, met at the Court-house in the city of Oxford; and after procla-

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parliament, there was a design to seize upon him, and 30,000 men were ready in the city of London to back the design; and that if the king refused to pass the bill of exclusion, they would serve him as they did his father. This Colledge was brought to his trial at Oxford, before the lord chief justice North and justice Jones. The trial lasted from two in the afternoon, till two in the morning, so much time was taken up in examining the witnesses. The evidence against the prisoner was the same which was at the Old Bailey; those for the prisoner were chiefly Mr. Oates, Mowbray, and Waldron, who said, that Dugdale and Smith told them, they knew nothing against Colledge; but they denied it upon their oaths, and the jury brought him in guilty; and some hours after the prisoner received his sentence, the court meeting again for that purpose. Some days after, Colledge was executed, and his head was set upon Temple Bar, to be a warning to others to avoid his fate." Bulstrode, 325.

* It appears from Oldmixon, that the counsel against him were sir Robert Sawyer, Attorney General, Finch, Solicitor General, sir George Jefferies, and Mr. North. The jury were Henry Standard, William Big, Robert Bird, John Shorter, William Windlow, Charles Hobbs, Roger Browne, Timothy Doyley, Ralph Wallis, John Benson, John Piercy, and John Lawrence. Roger Coke, after mentioning that the London Grand Jury had returned an ignoramus upon the bill against Colledge, proceeds:

"The fright of Fitzharris's discovery of the new Popish Plot being seemingly allayed by his death, Revenge with winged haste pursues the discoverers of the old. It was in Trinity Term that Fitzharris was tried and executed; and after this term, an indictment of high treason was exhibited to the Grand-jury of London against Stephen Colledge, a mean fellow but a great talker against the Popish Plot, who was more known by the name of Protestant Joiner than Stephen Colledge. The foreman was one Wilmer: this indictment would not down, but the Grand-jury returned an Ignoramus upon it, for which Wilmer was forced to fly his country.

"The design not succeeding in London, the scene against Colledge is laid at Oxford; the judges were chief justice North, justice Jones, justice Raimond and justice Levins: to make sure of a bill to be found there against Colledge, the king's counsel had prepared witnesses at the assizes to post thither; and there, to make sure work, the king's counsel are privately shut up with the jury till they had found the bill, which Mr. Hawles says was a most unjustifiable and insufferable practice.

"Whilst these things were contriving, Colledge had the honour, as well as Fitzharris, to be committed and continued a close prisoner in the Tower, yet the Lords impeached in parliament had the liberty of it, and free access was permitted to them; it is true indeed, Colledge was permitted to have a solicitor and counsel, which was Mr. West, I think a Plotter or Setter in the Rye-plot, as dark as Fitzharris's, and as like it as two apples are one to the other.

"But this was not out of favour to Colledge, but to betray him; for when the Bill against Colledge was found at Oxford, Murrel, a gaoler, and Sewel, a messenger, were sent to bring Colledge to trial; who, after they had taken him out of prison, run him into a house, and by order of the king's counsel, took from him all his instructions for his defence, and carried them to the king's counsel, as well to disable him to make his defence, as to enable the king's counsel how to proceed against him, by some way he was not provided to make his defence.

"Upon Colledge's arraignment, he demanded his papers taken from him by Murrel and Sewel; which were denied by the Court till he had pleaded guilty or not to his indictment. Here take notice, that sir Francis Pemberton, sir Thomas Jones, and justice Raimond having done the Court's job in Fitzharris's Trial, a new set of four is made to do this of Colledge's: the chief of these was sir Francis North (a man cut out to all intents and purposes for such a work, and as if born to do it, his father was a committee-man in all the late times against king Charles 1st, and his grandfather one of the seven who condemned archbishop Laud) it is no matter who were the other three, for North was the mouth of the Court.

"This was the first time that ever any prisoner had his instructions taken from him to make his defence, and at a time when there were such contrivances to take away his life. My Lord Chief Justice told Colledge he took not away his papers; but College replied, they were taken from him upon pretence of bringing them to his lordship.

"The Court and Counsel had a twofold design upon Colledge, in seizing his papers; one,

mation for silence, the commission of gaol-delivery was read, and then the commission of Oyer and Terminer. Proclamation was made for the sheriff to return the precepts to him directly: the justices of the peace of the county of Oxford were called over; and the appearance of the Grand-jury summoned to attend this commission was taken.

to trepan Colledge to plead guilty or not, before they delivered the papers; which having done, it was too late to plead either to the jurisdiction of the Court, or that the indictment was erroneous, as it was, it being of different natures, as, for treason and misdemeanors.

"Here I leave it to the learned to judge whether the Court and king's counsel did not in this indictment endeavour to depose the parliamentary authority, and usurp it themselves, for though the Commons may impeach generally for treason and misdemeanors in the same impeachment, yet neither by the common, or any statute law, any such indictment can be.

"The other design was to disable Colledge to make his defence after his pleading not guilty: Colledge finding himself thus beset, though a mean man, yet with a Roman courage said, this was a horrid conspiracy, not only against his life, but against all the Protestants of England: and herein he proved a true prophet.

"The courage of the man put the Court and king's counsel to the whisper, which was never before done in any Court of common law; and now the Court must be adjourned, the pretence being for dinner, though they had breakfasted but a little before: and before their return, the king's counsel altered their method of proceeding against the prisoner; and so sorted their evidence, that they might not contradict one another, and so would not examine some of his evidence.

"Yet upon the return of the Court, the attorney sir Robert Sawyer moved, the king's evidence might be examined in the hearing of one another; which though over-ruled, yet it was not observed: and to satisfy the jury, the Court told them in summing up the evidence, they would inform the jury what part of it was treason, and what misdemeanor, which they did not.

"The Court and counsel thus armed cap-a-pee, and the prisoner bound hand and foot, you need not doubt of a glorious victory over him. The first champion against Colledge was Stephen Dugdale, who swore, that in a barber's shop and a coffee house he had spoken vilifying words of the king; that Colledge had shewed him several scandalous libels and pictures, of which he was the author; that Colledge had a silk armour, a brace of horse pistols, a pocket-pistol, and a sword; that he had several stout men would stand by him, that he would make use of them in defence of the Protestant religion, and that the king's party were but a handful to his. Now let's see what credit could be reasonably given to any of the evidence against him.

"1. Dugdale's evidence was confronted by Dr. Oates, who testified that Dugdale said, He knew nothing against any Protestant in England; and being taxed by Oates, that he had gone against his conscience in the evidence he gave to the Grand-jury at London, against Colledge, Dugdale said, It was long of colonel Warcup (a worthy person, who, for this and such like services, is since knighted) for he could get no money else. Elizabeth Hunt testified, that after Colledge was in prison, Dugdale told her, he did not believe Colledge had any more hand in conspiring against the king, than the child unborn; and that he had rather have given 100*l.* than have spoken what he had, and that he had nothing to say against Colledge which would touch his life. And Yates testified, that when he said Colledge was an honest man and stood up for the king and government, Dugdale answered I believe he does, and I know nothing to the contrary.

"Haynes swore Colledge said, unless the king would let the parliament sit at Oxford, they would seize him, and bring him to the block; and that he said, the city had 1,500 barrels of powder, and 10,000 men ready at an hour's warning.

"2. To confront this evidence, Hickman testified that Haynes swore, God damn him he cared not what he swore; for it was his trade to get money by swearing. Mrs. Hall said she heard Haynes own, that he was employed to put a Plot upon the dissenting Protestants. And Mrs. Richards said, she heard him say the same thing. Whaley said, Haynes stole a silver tankard from him: and Lun said, Haynes said, the parliament were a company of rogues for not giving the king money; but he would help the king to money enough out of the fanatics estates. Everard testified that Haynes said, his necessity and hard pay drove him to say any thing against the Protestants. Turbervile swore Colledge said at Oxford, that he wished the king would begin; if he did not they would begin with him, and seize him; and that he (College) came to Oxford for that purpose.

"3. Oates said, Turbervile said, a little before the witnesses were sworn at the Old-Bailey, that he was not a witness against College, nor could give any evidence aguist him; and that after he came to Oxford, he had been sworn before the Grand-jury against College, and that the Protestant citizens had deserted him, and God damn him he would not starve.

"John Smith swore, Colledge's speaking scandalous words against the king, and of his having armour, which he shewed Smith, and said, these are the things that will destroy the pitiful guards of Rowley; and that he expected the king would seize some of the members of parliament at Oxford, which if done, he would be one should seize the king; that Fitz-Gerald had made his nose bleed, but before long he hoped to see a great deal more blood

L. C. J. (North.) Gentlemen, you that are returned of the Grand Inquest, there has been a sessions so lately that in all probability there will be no great matter to trouble you with at this time. And so I shall not trouble myself nor you to give you any charge, because we know of no business yet that we shall need you for. The court hath recorded your appearance. You will do well to be in the way either in the town or here about the court, that you may be ready if any thing should happen. It it is necessary for us to have your attendance, but we know not of any thing that we have in particular to trouble you with. We have an Indictment before us, let us proceed upon that.

Cl. of Crown. Gaoler, have you your prisoner?

Gaoler. We will fetch him presently.

Then the Prisoner was brought to the bar.

Cl. of Cr. Stephen Colledge, hold up thy hand. (Which he did). "Thou art here indicted by the name of Stephen Colledge late of Oxford, in the county of Oxford, carpenter; for that thou as a false traitor against the most illustrious, most serene, and most excellent prince, our sovereign lord Charles the Second, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. thy supreme and natural lord, the fear of God in thy heart not having, nor weighing the duty of thy allegiance; but being moved and seduced by the instigation of the devil, the cordial love, and true, due and natural obedience which true and faithful subjects of our said sovereign lord the king towards him our said sovereign lord the king, should, and of right ought to bear, wholly withdrawing and machinating, and with all thy strength intending the peace and common tranquillity of our said sovereign lord the king of this kingdom of England to disturb, and sedition and rebellion, and war against our sovereign lord the king, within the kingdom of England to move, stir up and procure; and the cordial love, and true and due obedience which true and faithful subjects of our said sovereign lord the king, towards him our said sovereign lord the king should, and of right ought to bear, wholly to withdraw; put out and extinguish, and him our said sovereign lord the king to death and final destruction to bring and put, the 10th day of March, in the 33d year of the reign of our sovereign lord Charles the Second, by the grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. at Oxford, in the county of Oxford, falsely, maliciously, subtilly and traiterously, did purpose, compass, imagine, and intend sedition and rebellion within this kingdom of England, to move, stir up, and procure, and a miserable slaughter among the subjects of our said sovereign lord the king to procure and cause, and our said sovereign lord the king from his regal state, title, power, and government of his kingdom of England, to deprive, depose, cast down and disinherit; and him our said sovereign lord the king to death and final destruction to bring and put, and the government of the said kingdom at thy will and pleasure to change and alter, and the state of all this kingdom of England, in all its parts well instituted and ordained, wholly to subvert and destroy, and war against our said sovereign lord the king, within this kingdom of England to levy; and thy said most wicked treasons and traiterous imaginations and purposes aforesaid to fulfil and perfect, thou the said Stephen Colledge the said 10th day of March, in the 33d year of the reign of our said sovereign lord the king, with force and arms, &c. at Oxford aforesaid, in the county of Oxford aforesaid, falsely, maliciously, subtilly, advisedly, devilishly and traiterously didst prepare arms, and warlike offensive habiliments to wage war against our said sovereign lord the king. And thyself, in war-like manner, for the purposes aforesaid, then and there falsely, maliciously, subtilly, advisedly, devilishly, and traiterously didst arm, and one Edward Turbervile, and other subjects of our said sovereign lord the king, to arm themselves, to perfect thy traiterous purposes aforesaid, then and there advisedly, maliciously and traiterously didst incite and advise. And further, then and there falsely, maliciously, subtilly, advisedly, devilishly and traiterously didst say and declare, that it was purposely designed to seize the person of our said sovereign lord the king at Oxford aforesaid,* in the county of Oxford aforesaid.

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shed for the cause: that if any, nay Rowley himself, came to disarm the city, he would be the death of him.

"4. To confront this evidence, Blake testified that Smith said, Haynes's discovery was a sham Plot, a Meal-Tub-Plot. Bolron said, Smith would have had him swore against sir John Brooke, my lord Shaftesbury, and Colledge, things of which he knew nothing, and told him what he (Bolron) should swear, lest they should disagree in their evidence. Oates testified, Smith said, God damn him, he would have Colledge's blood: and Mowbray testified that Smith tempted him to be a witness against Colledge and sir John Brooke, and said, if the parliament did not give the king money, and stood on the bill of exclusion, that was pretence enough to swear a design to secure the king at Oxford. And Everard and others testified, Smith said he knew of no Presbyterian or Protestant Plot; and said, Justice Warcup would have persuaded him to swear against some Lords a Presbyterian Plot, but he knew of none.

"These were the material evidences thus confronted, which should prove Colledge's treason and misdemeanor for taking away his life. But this evidence was so baffled, that for shame, the king's counsel never played them after against any other but my lord of Shaftesbury, but were forced to set up new against my lord Russel, colonel Sidney," &c. 2 Coke's Detection, p. 303.

And that thou the said Stephen Colledge, in prosecution of thy traiterous purpose aforesaid, would be one of them who should seize our said sovereign lord the king at Oxford aforesaid, in the county aforesaid. And that thou the said Stephen Colledge, thy said most wicked treasons and traiterous imaginations, compassings and purposes aforesaid the sooner to fulfil and perfect, and discords between our said sovereign lord the king, and his people to move, cause and procure, then and diverse times and days, as well before as after, in Oxford aforesaid, in the county of Oxford aforesaid, in the presence and hearing of diverse liege subjects of our said sovereign lord the king, then and there being present, falsely, maliciously, subtilly, advisedly, devilishly and traiterously didst say and declare, that nothing of good was to be expected from our said sovereign lord the king, and that our said sovereign lord the king did mind nothing but beastliness and the destruction of his people: and that our said sovereign lord the king did endeavour to establish arbitrary government and popery, against the duty of thy allegiance, against the peace of our sovereign lord the king, his crown and dignity, and against the form of the statutes in this case made and provided."

How sayest thou, Stephen Colledge, art thou Guilty of this high treason, whereof thou standest indicted, and hast now been arraigned, or Not Guilty ?

Colledge. My lord, I do desire, if it please your lordship, to be heard a few words.

L. C. J. Look you Mr. Colledge, the matter that hath been here read unto you is a plain matter, and it hath been read to you in English, that you may understand it. It is an Indictment of High Treason ; now you must know, that no plea can be received to it, but either Guilty or Not Guilty, as to the fact : if you can assign any matter in law, do it.

Colledge. Will you please to spare me, that I may be heard a few words. I have been kept a close prisoner in the Tower ever since I was taken : I was all along unacquainted with what was charged upon me. I knew not what was sworn against me, nor the persons that did swear it against me, and therefore I am wholly ignorant of the matter. I do humbly desire, I may have a copy of the indictment, and a copy of the jury that is to pass upon me, and that I may have counsel assigned me, to advise me, whether I have not something in law pleadable in bar of this Indictment.

L. C. J. These are the things you ask, you would have a copy of the Indictment, you would have counsel assigned to you, to advise you in matter of law, and a copy of the jury

Colledge. One word more, my lord, I desire to know upon what statute I am indicted ?

L. C. J. I will tell you for that. Is it not 'contra formam Statut.' with an abbreviation ?

Cl. of Cr. Yes.

L. C. J. That refers to all manner of statutes that have any relation to the thing in the Indictment that is High-Treason. For it may be meant, 'contra formam Statut.' which are all the several statutes that are in force concerning High Treason. Now for those things that you demand, you cannot have them by law. No man can have a copy of the Indictment by law ; for counsel you cannot have it, unless matter of law arises, and that must be propounded by you ; and then if it be a matter debatable, the court will assign you counsel, but it must be upon a matter fit to be argued : For I must tell you, a defence in case of High-Treason ought not to be made by artificial cavils, but by plain fact. If you propose any matter of law, the court will consider of it, and assign you counsel, if it be reasonable. For a copy of the Jury, that you cannot have neither, for there is no such thing as yet ; there is no issue joined whereupon such a jury should be impannelled. When you have pleaded to issue, then we must award the sheriff to impannel a jury to try that issue. So as to what you say as to want of preparation for your trial, we cannot enquire what notice you have had ; and yet if you had never so little time, there is no cause why you should not plead, though you were but just now taken and brought to the bar to answer it, and never heard of any thing of it before. So that I think you ought to plead presently.

Colledge. My lord, I am wholly ignorant of the law, I may ruin myself by mistaking the law ; I desire counsel, not to delay my trial, but only to advise me, whether there is not something in law proper for me to plead to this Indictment, and those things I alledged were not at all to delay the trial, but only that I may not be wanting to myself in what I may by law have.

L. C. J. I tell you, counsel cannot be assigned you, till the court be possessed of some matter to grant it upon.

Colledge. I had some papers, my lord, that were taken from me, which I desire may be restored to me. I only plead, that I may have my birthright, and that which the law gives me ; if I may have justice, I desire no more. Those papers were taken from me in the house over the way since I was brought from the prison ; they were papers that concerned my defence ; some directions and instructions how to manage myself in that defence. If you please to let me have those papers, I will not take up much of your time ; I desire to have but common justice, and that which is my right by law.

L. C. J. That which you demand, justice, you shall have by the grace of God to the best of our skill, without any partiality in the world. But you must trust the public justice of the kingdom. We are to be of counsel for you, so far as to see that all things proceed fairly on all sides. And when things come before us that are fit for you to have counsel upon, you shall have counsel assigned you ; for we are tender of the life of a man, as well as the life of the king, and of the public justice of the

kingdom. But this is no reason why you should not now plead. For the papers you speak of, we will take an examination of them afterwards. If they were papers that are necessary for your defence upon your trial, in God's name you must have them restored to you; but we know not which way you came by them, nor what they are.

Colledge. They were taken from me just now, under pretence of bringing them to your lordship.

L. C. J. How comes any body to give you papers? Nobody can solicit for one that is under an accusation of High-Treason, unless he be assigned so to do by the court.*

Colledge. God have mercy upon any man that is so accused then; for it is not possible for him to make his defence, if he cannot be at liberty to look after it himself, nor any of his friends permitted to do it for him.

L. C. J. You can say, whether you are Not Guilty without any papers.

Colledge. My lord, I know not but there may be something in law for me to plead to this indictment, which I shall lose the benefit of if I plead. I humbly conceive, you are to be my counsel; and as you are judges, are to proceed according to the law. You are upon your oaths to do me right according to law.

Just. *Jones.* But till you have proposed a matter of law fit for counsel to argue, there i no counsel to be assigned you.

Colledge. If I had those papers I could tell what I should plead. My lord, this is one thing, I am a freeman of London, and I am not impleadable by the charter of London any where out of the liberties of the city in pleas of the Crown.†

L. C. J You are indicted in Oxfordshire for High-Treason committed here. If there be not any thing of High-Treason proved, don in Oxfordshire, you will be acquitted. But a freeman of London cannot have a privilege to commit treason in Oxfordshire, but must be tried for it there.

Coll. Will you please to order me my paper back that were taken from me?

Just. *Jones.* You ought first to plead. Yo have a right to demand counsel in matters of law, but then it must be upon such matters of law as you yourself propose to the court, an the court shall judge to be matters of law fit to be debated: Till then we cannot assign you counsel.

Coll. It was so in the trial of Lilburne, and .. the trial of my lord Stafford, there was counsel assigned to them.

Just. *Jones.* Not before they pleaded to the indictment.

Coll. Did not your lordships, some of you, that are judges of the king's-bench say, that it was the right of the prisoner, to have a copy of the pannel and of the jury before the trial.

Just. *Jones.* No, sure here are two of us that are of the court, and we never heard of any such thing.

Coll. Pray, my lord, do me right, I am ignorant of the law, and through my ignorance may mistake.

L. C. J. God forbid we should not do you right; you may expect it from us; we are upon our oaths to do all the king's subjects right.

Coll. I am ignorant in the law, and it is impossible for me to make my defence without the assistance of my papers.

L. C. J. Cannot you tell, whether you be Guilty or Not Guilty of this treason?

Coll. I can so; but I know not what error I may run myself into, if I should plead presently, and lose the benefit that the law may give me.

L. C. J. All matters of law are saved to you after you have pleaded.

Coll. Pray, my lord, let me have my papers again that were taken from me.

Cl. of the Cr. You must plead to the court Guilty or Not Guilty.

Coll. Shall I not have my papers after I have pleaded?

L. C. J. We will not capitulate with you. Move what you will then; but till you have pleaded, we can enter into no other business.

Coll. I know not but I might plead some other thing to the indictment.

Just. *Jones.* Propose what you will, if it be a matter in law fit to be argued, you shall have counsel assigned you.

Coll. Pray, my lord, let me have my papers again. If it were not my right to have them, or to have counsel, I would not ask it; but if it be, I would not lose what is my right.

L. C. J. You must plead first. I know not but he may be a criminal that brought you those papers; for we allow no solicitors in cases of treason.

Coll. Some of those papers were received from me in the Tower, and were brought back to me, and taken away but to day, I desire they may be returned.

Cl. of the Cr. Are you Guilty or Not Guilty?

Coll. Those papers tell me I have a plea in law, but what it is, I cannot directly tell without my papers.

L. C. J. You must mention it and propose it, and then we will do what is fitting for us to do in it.

Coll. I have not that method about me, nor

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* "This was very strange treatment of the prisoner, who had an Order of king and council appointing him a counsel and solicitor, which is printed before the Trial." Note to former Edition.

† "College's trial lasted three or four hours, in dispute whether a man within the liberties of London, could be tried at Oxford. Oates was witness for him; but exposed himself, so as to do his business, even with his own party. The examination of witnesses lasted till midnight. Colledge excepted to eleven of the jury." Life of king James the Second written by himself. (See Introduction to Clarendon's Case, vol. 6, p. 291, of this Collection.)

can I directly tell it without my papers; but it is something of law about the indictment.

L. C. J. You are not bound up to forms of law. For if you propose the matter never so loosely, yet if it be a matter of avail, and that which the law is not clearly against you in, you shall have counsel, and time to draw it up in form.

Coll. I cannot propose the matter so regularly as if I had my papers.

Just. *Jones.* You are not bound to propose it in formality of law, my lord tells you; only let us know what it is.

Coll. If I have a privilege in law, I hope you will give me the benefit of it.

L. C. J. We will deny you nothing that the law gives you; but we cannot give you counsel. It is not one particular case, but the common course of justice is concerned. Without a matter of law arises, we cannot assign you counsel; if we would, we cannot in justice till you have proposed the matter which the court thinks fit to be argued.

Coll. My Lord Coke says, it is the birth-right of every Englishman to have counsel in matters of law, and Lilburne* had it upon solemn argument in his Trial.

Just. *Jones.* What times were those? That was before the High Court of Justice.

Att. Gen. (Sir Robert Sawyer.) If there be matter in law, it must be proposed to the court, and they are to judge, whether it be a point fit to be argued, and then counsel is to be assigned you, and not till then.

Coll. My lord, I know not but there may be somewhat in law for me to plead to this indictment, till I have my papers I can't tell what it is.

L. C. J. We know nothing of your papers what they are: you must answer whether you be Guilty or Not Guilty.

Coll. If I had my papers, I would answer to it immediately; but I hope I shall not be murdered.

Just. *Jones.* Have a care of aspersing the court. Pray who intends to murder you?

Serj. *Jefferies.* I remember in Lilburne's Trial, that he speaks of, such words were used indeed.

Coll. My lord, I hope I shall not be denied what is necessary for my defence. This design is not only against me, but against all the Protestants.

Att. Gen. How long have you been a Protestant, Mr. Colledge?

Coll. Ever since I knew what religion was, Sir; I never was any thing else. For God's sake, my lord, let me have the justice of the nation, and what by law an Englishman ought to have.

L. C. J. You must plead Guilty or Not Guilty, or you must shew some matter that you will plead, that is proper for us to assign you counsel. If we should record your refusal, you would be judged to stand mute, and sentence would pass upon you.

Coll. If I have a privilege in law as an Englishman, I will not forfeit it, if I can help it, for any thing in the world. Therefore I desire I may have my papers again, that I may see if I can plead any thing in law; for if I have a privilege by the law, before I will forfeit it, you shall do what you please with me.

L. C. J. You will have the advantage of all that matter that is in your papers after you have pleaded, if there be any advantage.

Coll. Pray, my lord, order me my papers that were taken away from me.

L. C. J. They were not taken away by me.

Coll. They were taken away by the keeper, under pretence to bring them to your lordship.

L. C. J. I know not how you came by them. There came one to me last night that is a common solicitor, one Aaron Smith, and desired he might have liberty to go and speak with the prisoner; I told him, I did not understand till he were assigned by the court, that any could justify soliciting for a man that is accused of high treason, nor could any be of counsel till they were assigned: for a defence against treason ought to be by plain matters of proof and fact, and not by artificial cavils. But if you will propose any thing of substance as a matter in law which the court shall think fit to be argued, propose it, and then we will assign you counsel.

Coll. Is it not my right, that I ought to have a copy of the jury?

L. C. J. Look you for that now, you cited the opinion of the judges of the King's-Bench. My brothers two of them that are here who are judges in that court, say, they know nothing of any such matter: but I tell you, you have liberty by law to challenge 35, by your sight peremptorily without shewing cause. They are bound to look upon you when they come to be sworn, and if you have just cause, you may except against as many more as you will. But now we that proceed upon a commission of gaol-delivery, are to proceed with expedition; there are no particular men designed for a jury that I know of. But when you have pleaded, we shall award the sheriff to impannel a jury.

Coll. If the law allows me the liberty of challenging, it does intend it me, that I may challenge those persons that I think will not do me justice; but where they are strangers unto me, if I can have no information about any of them by my own inquiry or my friends, I may challenge my friends as well as my foes: and should there be any person that has a prejudice against me, and I not know it, he may chance to be one.

L. C. J. I hope they will be neither friends nor foes, but true men.

Coll. I know not that, my lord.

Just. *Jones.* This that you say as to a copy of the jury is unseasonable. There is no jury, nor can be awarded till you have pleaded. There must be first issue joined; and that cannot be but upon your plea of Not Guilty. Therefore you must plead first, and then say all you will.

* See vol. 4, p. 1293, of this Collection.

Cl. of Cr. Are you Guilty or Not Guilty?

Coll. My lord, may not I have a pannel of the jury.

Just. *Jones.* There is no such thing in being.

Coll. I know not what to say to it; pray, my lord, let me have my papers.

Cl. of Cr. You have heard the opinion of the court, you must first plead.

Coll. I cannot plead first. I must lose my life, if I must; I neither know who accuses me, nor what it is they accuse me of: it is impossible I could defend myself if I have not my papers.

L. C. J. We know not what papers you mean.

Coll. The gaoler took them from me, and one of the king's messengers. Pray, my lord, will you order them to be returned to me again? Let me but see whether I have any right or no, and whether I have any thing to plead or no: when I have perused my papers, I will propose it as well as I can to you. Pray, my lord, let me have a fair trial.

L. C. J. We promised you a fair trial, but you must put yourself upon that trial by your pleading.

Coll. I cannot do that without my papers, my lord. Let me but have them again, and I will not delay your time at all.

L. C. J. You can tell whether you are Guilty, or Not Guilty, cannot you?

Coll. If I have a plea in law against the indictment, I hope you will not hinder me of that which is my right. It is possible the indictment does not lay it right, either as to the matter of treason, or as to the place.

Just. *Jones.* That is upon the issue of Not Guilty upon your trial. If there be not matter of fact, or words proved that are treason in this place, you will have the advantage of it upon your trial.

Coll. I know not, my lord, but that the indictment does mention something of treason, and something of misdemeanor.

Just. *Jones.* That which is misdemeanor, will not amount to a proof of the treason upon the trial.

L. C. J. If they prove no treason against you here, but only misdemeanor, I do not understand that the jury can find you guilty of that misdemeanor, for it is another crime, and there is another sort of proceedings for it. In misdemeanor, there are no peremptory challenges; in misdemeanor counsel is to be allowed for the prisoner, but not in treason.

Coll. Pray, my lord, be pleased to order me my papers again: I know not what to say without I have the assistance of my papers; when I have them, I shall be ready to plead presently according as I shall find I may by law. This I am sure, I have done nothing, nor said nothing of treason, and I pray for nothing but justice, and that which is my right. This is a most horrid conspiracy to take away my life; and it will not stop here, for it is against all the Protestants in England.

L. C. J. Mr. Colledge, you do not only trifle, but run out into very great extravagancies. Who has any conspiracy against your life? You shall be allowed to give in evidence any thing of any conspiracy against you, or contrivance against you when you are upon your trial. Now the question is, Are you Guilty, or Not Guilty? I see no use of papers that you can have as to the plea.

Just. *Jones.* You will run into danger by spending of time.

Coll. Pray, my lord, order me my papers, they are in the hands of Mr. Murrell the gaoler, and Sewell the king's messenger.

L. C. J. When you have pleaded, we will take it into consideration.

Coll. It may be too late then.

L. C. J. It is a plain matter before you, whether you be guilty or no. You know what to answer.

Coll. I will give a direct answer, after I have my papers again.

Just. *Jones.* You can give an answer to that without papers.

L. C. J. Consult with your own heart, and there you may receive an answer to that question.

Att. Gen. Mr. Colledge, can any body tell whether you be guilty or no, better than yourself?

Just. *Jones.* If you expect any papers, they ought to be framed by yourself; for by law, none can advise you what to plead.

Coll. I don't expect it in matter of fact, but if matter of law arise.

Just. *Jones.* But this is a matter of fact, and therefore you may plead Not Guilty, as well without your papers, as if you had them.

Coll. But if there be any matter of law, that I ought to have the advantage of.

Just. *Jones.* Then you ought to have no advice, till they be assigned by the court: For by the law, neither counsel nor advice are allowable to you, till the matter has been proposed, and the court think fit to assign you counsel.

Just. *Levinz.* You talk of the privilege of an Englishman; you have all the privileges of an Englishman: You are here brought to an open trial, according to the law, and by that law you must plead. Now if a man be indicted for High Treason, he is bound to plead either Guilty or Not Guilty, unless he has a matter in law to excuse him from that plea, which must be proposed to the court, and then counsel will be assigned; and if so be matter of law arises upon any evidence that is given against you at the trial, you may demur upon that evidence, and pray counsel of the court to argue that demurrer, and they will not deny you; but I think you must plead presently.

Coll. I suppose other persons that have been tried, have had counsel before they have pleaded.

Just. *Jones.* But never before the matter was proposed to the court.

L. C. J. It was so in the case of my lord Stafford. The court made him propose his matters in law, and so it was in Lilburne's Case.

He did insist upon a great many matters in law, and had the books there himself.

Coll. I am wholly ignorant of the law, my lord.

Serj. *Jefferies.* Your lordships are the judges of the law in this case. The question here in short is, whether the prisoner be Guilty or Not Guilty, and that being demanded of him by the court, if he refuses, let him take the consequence of it.

Coll. What is that, pray, sir George?

Att. Gen. Judgment of High-Treason. For if a person stand mute, and will not plead to an Indictment of High Treason, the common judgment of pressing to death must not pass upon him, but an attainder of High Treason.

Coll. Well, if it be so, I cannot help it. I thank God, I am innocent of any treason, or any such thing.

L. C. J. Why don't you plead Not Guilty, then?

Coll. I do not refuse to plead, I am willing to plead with all my heart, if I may have my right.

Just. *Jones.* If you do not plead, you refuse to plead.

Coll. Pray, my lord, let me have my papers.

Att. Gen. Pray give the court an account, where had you those papers?

L. C. J. Nay we will not enter into any examination of that matter now, Mr. Attorney; he can have no use of papers to see whether he should plead Guilty or Not Guilty.

Serj. *Jefferies.* We know nothing of those papers, we desire that he may answer to the question shortly, whether he be Guilty or Not Guilty; if not, we pray your lordship's judgment.

Coll. I had them not all from one person, they were received from my own hands, some of them in the Tower; and being brought back to me, they were taken from me to day; let me have but one of them: the paper of instructions in point of law, that I may know what is my right: I would not throw away my life, if I have any thing that is my right that can preserve it.

L. C. J. You are to give a plain answer, whether you are Guilty or Not Guilty, now for that you have no use of papers: for you can best tell whether you be guilty or not. If you can propose any matter of law that you can have to plead, do it.

Coll. If I have any plea, that I may plead besides Not Guilty, I desire I may have my papers to consider of it, and that I may have counsel assigned me.

L. C. J. If you have any such plea, tell us the matter and substance of it.

Coll. I do not know what really are matters of law; if I had those instructions that are in my papers, I could give you a direct answer presently.

L. C. J. You ought not to have any advice to decline your trial: when you propose matter of law yourself, you may have advice upon it. But you ought not to have advice to decline your trial before-hand.

Cl. of the Cr. Are you Guilty or not Guilty?

Coll. Mr. Attorney, pray let me have a copy of the indictment.

Att. Gen. Apply yourself to the court for it, we must receive our directions from thence.

L. C. J. You have had the opinion of the court, you can't have it.

Just. *Levinz.* You have been told nothing can be received from you, but a plea of Guilty or Not Guilty, and the court have given you their opinion, and that you cannot have a copy of the indictment, nor counsel assigned you, till you offer something for them to be assigned upon.

L. C. J. And that was it which was done in the King's bench in the case of Fitzharris, which I suppose you meant when you speak of the judges opinions.

Just. *Jones.* Nothing was done there till he himself assigned the matter in law that he would plead, and then counsel was assigned him.

Serj. *Jefferies.* Mr. Colledge was in the court at that time, and can tell what was done.

L. C. J. If you desire the indictment read over again distinctly, that you may have.

Att. Gen. Ay, with all my heart.

Coll. Pray let me hear it again, my lord, if you please.

L. C. J. Read it over again to him, and read it distinctly.

Cl. of the Cr. Thou art indicted by the name of Stephen Colledge, late of Oxon, in the county of Oxon, carpenter, as a false traitor.

Coll. I have observed one thing already; my lord, I pray I may have pen and ink.

L. C. J. Ay, give him pen and ink, let him make what observations he can.

Then the Clerk read the Indictment through.

Cl. of Cr. Art thou Guilty of this High-Treason, or Not Guilty?

Coll. This Indictment, if I understand it, says, there was a plot and conspiracy by me and others; now I know when my lord Stafford was tried, they did proceed to prove, first, that there was such a plot, and then that my lord was guilty of it; first, that there was such a conspiracy by the papists, is it not requisite they should first prove such a plot, and conspiracy there was, before they go to prove me guilty of it?

Just. *Jones.* What before you have pleaded?

L. C. J. When you have pleaded, the next thing is to try you, and to give the evidence; but what way the king's counsel will take to manage your trial, that we can't tell.

Just. *Jones.* But they are not to be directed by you, Mr. Colledge.

Coll. It was so done, I say, in my lord Stafford's case.

L. C. J. He pleaded first, however, you have not yet pleaded.

Cl. of Cr. Are you Guilty or Not Guilty?

L. C. J. Do not trifle any longer, it is a

plain matter, and requires a very short and plain answer.

Coll. Your lordships are my counsel, as well as my judges, and I do desire if I have any right to plead any other matter, you will be pleased to declare it to me, for I am ignorant in the law.

Just. *Jones.* We have declared our opinion already, that you have no right to have any solicitor or council, till matter of law do arise.

Coll. Is it your lordship's opinion, that I have no plea in law?

Just. *Jones.* Have you no plea in law?

L. C. J. He would have our judgment, whether there be any or no.

Just. *Jones.* You yourself know best; we know nothing you have to plead.

Coll. I cannot, unless I have counsel and my papers.

L. C. J. There does nothing apppear to us.

Coll. I know nothing of the law.

L. C. J. Then plead Not Guilty, that is a ready plea.

Just. *Jones.* You have had our opinion over and over again. You have as much counsel as is allowed in these cases, for every man is best judge of his own case, what to plead whether Guilty or Not Guilty: You have had as fair play as ever any man had.

Att. Gen. Mr. Colledge has said, he knows of no plea in law he has, and therefore there is none; for 'de non apparentibus et non existentibus,' the reason is the same.

L. C. J. In matter of fact, there is no plea, but Not Guilty.

Coll. The court are judges in matter of law, and they are my counsel.

Just. *Jones.* And the court have all of them declared, they know of nothing in law that you have to plead.

Coll. Is not counsel to be allowed to one under my circumstances?

L. C. J. If you have any thing for counsel to be assigned upon, you shall have them.

Coll. If I am ignorant of that, and cannot propose it, shall I not have the assistance of counsel?

Just. *Jones.* No, we have told you the law plainly, and that which is frequent in practice in like cases, and you must be contented with the same measure.

Coll. My lord, I am ignorant of the law.

L. C. J. Then rely upon the fact, and plead Not Guilty.

Coll. But if I have a right to any point in law let me have it.

Just. *Jones.* You have a right if you will propose any matter of law, but we cannot propose it for you.

Att. Gen. Mr. Colledge, no man ought to propose your plea for you; 'Ignorantia juris non excusat.'

Coll. Shall my ignorance destroy me, Mr. Attorney?

Sol. Gen. You have heard the opinion of the court, you have a right to propose any other plea that you can yourself; but you have no right to ask counsel before you have pleaded.

Serj. *Jefferies.* If Mr. Colledge have such a thing as a solicitor, I shall crave leave to put that solicitor in mind of the case of one that was indicted of High-Treason.

Att. Gen. We shall talk of that by-and-by.

L. C. J. The same methods are used in our case, as are in all cases of the like nature, as far as my knowledge reacheth.

Coll. If I have a right to the law, I must not lose it for my own ignorance of the law; but if you deny me both my counsel and my papers, you take away the means of my coming to that right, and make me uncapable of making my defence.

L. C. J. You have been told you must plead before you do any thing.

Coll. This is the person (pointing to a person by him) that had the papers. Be pleased to command him, that I may have them again: He said, he had orders to take them from me, and bring them to your lordship.

L. C. J. I know of no use you could have of any papers, to plead Guilty or Not Guilty.

Sol. Gen. If there be in those papers advice in matters of law, that you have been told you ought not to have, till the court has assigned you counsel to give you advice.

Coll. Then if there be a right in law, and a privilege which I ought to have, I must lose it by my being ignorant of it, and have no one to advise me about it neither.

L. C. J. You may propose it, if you have any, if not, you must plead to the indictment.

Serj. *Jeffries.* My lord, it has not been usual for us, that are of the king's counsel, to enter into dialogues with prisoners at the bar. The first thing that is to be done in such cases, is for the prisoner to plead Guilty or Not Guilty, or to offer something to the court that may be a matter in law fit to be debated; and this we pray may be done in this case, and that the prisoner may plead presently, or else we desire your judgment.

Coll. Pray let me have my papers again, my lord.

L. C. J. You go in a circle, and run round from one thing to another, and will receive no answer. We have told you our opinion, and we must tell you, though you hold long discourses, yet you will be judged lost and mute, if you plead not a legal plea: Therefore you must plead Guilty or Not Guilty, or offer something that may be a plea in law, and then you shall have the assistance of counsel, but you must have none till then.

Coll. But shall I not have my papers, my lord?

L. C. J. We know nothing of them.

Coll. Pray, my lord, order the man to give them to me, that took them from me.

L. C. J. We will order no such thing. He may be a criminal perhaps that did give them you at first; but when you pleaded, we will hear any motion you will make about them.

Coll. It may be I ought to plead, that words were spoken in another place than the place laid in the indictment.

L. C. J. You will not need to plead any such thing; for if there be nothing proved of treason that you said or did in Oxfordshire, you must be found Not Guilty.

Coll. Here is another thing, my lord, I am indicted by the name of Colledge, carpenter.

L. C. J. What then?

Coll. I am not a carpenter, but a joiner; is that any bar to it?

L. C. J. The addition signifies nothing, I do not know any difference betwixt a carpenter and a joiner in law.

Just. *Jones.* They might have indicted you by the name of labourer, and it had been good.

Coll. Pray, my lord, either give me my papers or assign me counsel, or else I may throw away my life, for I am wholly ignorant of the law.

L. C. J. When you have pleaded, we will hear any motion you will make, and do that which is just upon it; but I see no use you can have of papers to plead Guilty or Not Guilty, which is the only question is asked you.

Cl. of Cr. Are you Guilty or Not Guilty?

Coll. Will you promise me, my lord, there shall no advantage be taken against me, if I do plead so?

L. C. J. We will make no bargains with you. Plead as you ought by law to do.

Coll. If matters of law arise, shall I have counsel to speak to them?

Just. *Jones.* Yes, you shall, you need not doubt it. Propose any matter now fit to be argued, and you shall have counsel to it.

Coll. I am not capable of doing it. I know not when I have any right.

Just. *Jones.* The court is of counsel to you.

Coll. If you are my counsel, then have I any plea in law to make?

Just. *Jones.* You have heard the indictment read, what say you? For you must propose the matter.

L. C. J. We know of none but Guilty or Not Guilty; if you can tell any, do.

Coll. I pray I may have my papers again; if there be no other plea for me, pray let me have my papers again.

L. C. J. You have heard the opinion of the court, you must plead.

Att. Gen. Certainly, Mr. Colledge, you cannot be guilty of these things, you need not to scruple it, to plead Not Guilty, sure.

Coll. My lord, having been kept a prisoner as I have been, without pen, ink, or paper, no conversation with my friends, or knowledge of the fact, and being ignorant of the law, not knowing where I have a right, nor when I have a right, if you do force me upon this plea, and it cost me my life, at your doors lie it.

Just. *Jones.* You will lose your life if you do not plead; if you plead Not Guilty, and are not proved Guilty, you will save your life by this plea.

Coll. I am willing to plead what the law requires of me to plead, and if I have right in law, I would not lose it.

Cl. of Cr. Are you Guilty or Not Guilty?

Coll. Why then as they have laid it in that indictment, in manner and form as it is there laid, I am Not Guilty?

Cl. of Cr. Culprit, by whom wilt thou be tried?

Coll. By God and my country.

Cl. of Cr. God send thee a good deliverance.

Just. *Jones.* Not Guilty is his plea.

L. C. J. Now he has pleaded, Mr. Attorney; he speaks of some papers, if there be any memorandums, or any thing that must assist him that is necessary for his defence in his trial in those papers, it will be hard to deny him them.

Att. Gen. If your lordships please to give me leave, I will give you an account of them. The messengers just now did deliver these papers to be delivered to the court.

Coll. Pray speak out, Mr. Attorney, and let me hear.

Att. Gen. When he came to prison he had none, but Mr. Aaron Smith, the messenger informed me, did deliver them to him.

L. C. J. Whose hand-writing are the papers in?

Coll. He received them from me in the Tower.

Just. *Jones.* You received them from him first.—*Coll.* No.

Att. Gen. What were the papers you delivered to him in the Tower?

Coll. The three pieces joined together that contains directions how to govern myself; there is another to the same purpose, which instructs me to demand a copy of the indictment, and of the pannel of the jury, and those were instructions to tell me what the law allows me.

Att. Gen. Here is a speech made for you that begins thus: 'Before you speak, speak to 'this purpose.' Pray, my lord, I desire that may be examined, and Mr. Smith may be called to give an account how he came to give the prisoner those papers; for here are abundance of niceties proposed for him to move, and there will be a strange sort of proceedings at this rate, if men go about to espouse the cause of traitors.

Coll. I am no traitor, Mr. Attorney.

Att. Gen. You stand indicted of High-Treason.

Coll. That is by a Grand Jury made up that morning, as I am informed.

Att. Gen. Here is a list of the names of several men of the county returned to be of the jury, and particular marks set upon them, who are good men, and who bad men, and who moderate men.

Coll. Ought I not to have that paper, my lord?

Att. Gen. No, I hope not.

L. C. J. Whether they are material, or not material, if we should judge them not material for his defence, yet it would look like an hard point upon the prisoner; and to deliver them into an hand that they may be carried away or stifled, in case there were a crime in the delivering of them, that would not do well on the

other side: therefore I would have these papers put into some safe hands, that what may be for the prisoner's use he may not want, and yet they may not be taken away, if there be occasion to use them upon another account.

Att. Gen. But if it please your lordship, I desire you would enter into the examination of this matter; for I have an account from London by a special messenger, that there are several persons go up and down to procure witnesses against the king's evidence, making it a public cause; and here, my lord, is another paper which is a list of men as witnesses picked up together against the king's witnesses.

L. C. J. He must have that, deliver him that presently.

Att. Gen. But, my Lords, others have gone about and framed witnesses for him.

L. C. J. You must give him the list of his witnesses, for I see not what use you can make of it.

Serj. *Jefferies.* This no man will oppose sure, if any thing that is delivered to him be fit to be delivered, the person that delivers it must come and own it; but before any person delivers any papers to the prisoner, for him to make use of against the king's evidence, we desire to know what those papers mean, and who gave them.

L. C. J. Look you, brother, we will have nothing of heat till the trial be over, when that is over, if there be any thing that requires our examination, it will be proper for us to enter into the consideration of it. But in the mean while what hurt is there, if the papers be put into some trusty hands, that the prisoner may make the best use of them he can, and yet they remain ready to be produced upon occasion: if a man be speaking for his life, though he speak that which is not material, or nothing to the purpose, there will be no harm to permit that.

Serj. *Jefferies.* With submission, my lord, that is assigning him counsel with a witness.

Att. Gen. If people are permitted to go up and down and ask counsel of persons, and bring it in papers to the prisoner, it is the same thing as if counsel came to him. Here is a busy solicitor, and he gets advice from counsel, and then he delivers it to the prisoner; it is the first of that kind certainly that ever was allowed; and if this be not to assign him counsel, I know not what is.

L. C. J. What think you of our perusing the papers?

Att. Gen. With all my heart, my lord.

Coll. If you take away all helps from me, you had as good condemn me without a trial.

Att. Gen. You ought not to have helps to plead dilatories.

Coll. Not to help me to my right in law?

Att. Gen. We are to go upon the fact now: and, my lord, I pray your judgment about them, when you have perused them.

Then the Judges looked upon that paper that was called the Speech.

L. C. J. We have read enough of this to suppress it, and to examine how this came to his hands.

Just. *Jones.* Where is Aaron Smith?

Att. Gen. My lord, here is another that is worse than that, charging the justice of the nation. Pray call Mr. Aaron Smith, and Mr. Henry Starkey.

Mr. Smith appeared.

Att. Gen. Mr. Smith, did you deliver these two papers to the prisoner?

Smith. Does any body accuse me that I did?

Att. Gen. You are accused of it.

Smith. I desire proof may be made against me.

Att. Gen. That will be done.

L. C. J. Look you, we will not interrupt the trial with it. Mr. Smith must be taken into safe custody, only to secure him till we can examine it, not as charged with any crime, but only that he may be forthcoming to be examined.

Att. Gen. You do not make a direct answer, Mr. Smith, in the case, it will be proved upon you.

Smith. Mr. Attorney, I know not what answer to make better than I have given; our law says no man is bound to accuse himself.

Att. Gen. But our law says, you shall be examined.

Smith. I come to give no informations here, Mr. Attorney; if I did I should be then examined.

Att. Gen. Here are instructions given to the prisoner, they say you gave them.

Smith. I desire to have it proved.

L. C. J. Mr. Attorney, you will take a recognizance of Mr. Smith, to be forth-coming during this sessions.

Smith. I will not depart, my lord, I assure you; and I hope Mr. Attorney will take my word.

Att. Gen. Indeed I will not, Mr. Smith, because you have broken it with me already; when I gave you leave to go to the prison, I did not think you would have abused that kindness, to give him papers.

L. C. J. Well, take his recognizance.

Smith. It is high time to have a care, when our lives and estates, and all are beset here.

L. C. J. What do you mean by that, Mr. Smith?

Smith. I said it not, meaning by it the Court, for I declare I abhor that expression to be so interpreted, that I reflected upon the Court.

L. C. J. Why do you use such loose expressions then, Mr. Smith?

Smith. Because I have been threatened since I came to town, though I have not spoke one word in any public company since I came.

Just. *Jones.* It seems you will reflect here in the face of the Court, and in the face of the country, upon the government, upon the justice of the kingdom.

Smith. No, my lord, I have told you what I meant by it; I neither reflected upon the

Court, nor upon the government, nor upon the justice of the kingdom.

L. C. J. You should have done well to have forborn such expressions as those were.

Coll. Shall I not have the use of my papers, my lord: will you not please to deliver them back to me now you have perused them?

Just. *Jones.* One of them is a speech, and a most seditious libellous speech, to spit venom upon the government in the face of the country. We cannot tell who made it, but it seems to be beyond your capacity; and therefore we must enquire into it: but we do not think fit to let you have the use of that paper.

L. C. J. For that which contains the names of the witnesses, that you have again: for the other matters, the instructions in point of law, if they had been written in the first person, in your own name, that we might believe it was your writing, it would have been something; but when it is written in the second person, you should do so and so, by which it appears to be written by another person, it is an ill precedent to permit such things; that were to give you counsel in an indirect way, which the law gives you not directly.

Coll. If I am ignorant what questions to ask of the witnesses, shall not my friends help me, my lord?

L. C. J. We will sift out the truth as well as we can, you need not fear it.

Coll. Some of those things I took out of the books myself: and if you are resolved to take away all my helps, I cannot help it; I know not that Mr. Smith wrote one of those papers.

Att. Gen. But Mr. Smith would have given four guineas, it seems, as a bribe, to the gaoler, and he offered four more to let him have the liberty to come to him.

Serj. *Jeff.* It is time indeed for Mr. Smith to have a care.

Keeper. It was Mr. Starkey that offered me the four guineas.

Att. Gen. Pray call Mr. Henry Starkey. (But he did not appear)

Then the Court took a recognizance of 100*l.* of Mr. Smith to attend the Court during the session.

Coll. Pray, my lord, let me have my papers delivered to me, I cannot make my defence else.

L. C. J. We are your counsel in matter of fact, and to give you your papers were to assign you counsel against law, they being not your own papers, but coming from a third hand.

Coll. Will you please to give me the paper that has the questions in it, to ask the witnesses?

L. C. J. There are no papers with any particular questions to any one witness, but only instructions how to carry yourself in this case

Coll. A great deal of it is my own, my lord.

L. C. J. Mr. Attorney, truly I think, that which does not contain matter of scandal, may be transcribed and given to the prisoner.

Coll. My lord, I desire I may have that, that has in the margin of it, the cases of Lilburne and Stafford.

Just. *Jones.* You shall not have the instructions to scandalize the government, all that is necessary for your defence, you shall have.

L. C. J. If he had writ it himself I cannot well see how you could take it from him; and truly as it is, I had rather let him have too much than too little.

Coll. My lord, I thought I might have had counsel to have assisted me, but if I may have counsel neither before my plea nor after, I that am an ignorant may be lost by it, but cannot help it.

L. C. J. If matter of law arise, you shall have counsel to it.

Coll. I know not but it might have admitted of an argument, that which, if I had had my papers, I should have offered to you.

L. C. J. Mr. Colledge, we shall not go any farther now, I know not how many witnesses will be produced either of one side or another, but it is too late to go on this morning, and because we attend here only upon this occasion, we shall go on with the trial at two o'clock in the afternoon.

Coll. My lord, will you be pleased to order the papers for me to peruse in the meantime.

L. C. J. We have ordered that you shall have a transcript of the paper of instructions, leaving out that which is scandalous.

Coll. I desire I may have a copy of the whole.

Just. *Jones.* No, we do not think fit to do that.

Coll. Pray let me know which you do except against.

L. C. J. Look you, Mr. Attorney, I think we may let him have a copy of the whole.

Att. Gen. My lord, before you rise, I desire you would be pleased to take the examination of Mr. Gregory about Mr. Starkey.

L. C. J. Swear him. (Which was done)

Att Gen. What do yo know concerning Mr. Starkey, and what did he offer you?

Gregory. When they came by your lordship's permission to Mr. Colledge, they brought some papers which they delivered to him: and afterwards Mr. Starkey took me aside, and told me, it was hard usage that the prisoner could not have his counsel permitted to come to him: do him what favour you can, and I shall not be ungrateful; so he clapped four guineas in my hand, but I immediately laid them down upon the table, and would not take them.

Att. Gen. My lord, I desire you would please to send for Mr. Starkey.

L. C. J. Let him be sent for.

Cl. of Cr. You must go and take up Mr. Starkey.

Messenger. Must I keep him in custody? I do not know him.

Cl. of Cr. No, you must order him from the Court to attend here.

Just. *Jones.* These papers Colledge shall not

be debarred of for his defence, nor you, Mr. Attorney, from prosecuting upon them.

L. C. J. No, we will put them into such hands as shall take care of that.

Coll. Very few, my lord, have appeared to do me any kindness, some have been frightened and imprisoned, others are now in trouble for it.

L. C. J. Well, you shall have the use of your papers.

Coll. May I have any friends come to see me in the mean time?

L. C. J. They must not come to you in the prison, to give you advice; but I will tell you, since you move it, if my brothers think it convenient, whilst the Court does withdraw, any body of your friends may come to you, in the presence of your keeper.

Just. *Jones.* Certainly you cannot think you can give a privilege to any friends of your's, to commit any misdemeanor to offer bribes to any person.—*Coll.* I know not of any such thing.

Just. *Jones.* We do not charge you with it, but Mr. Starkey did.

Coll. I have been kept a strict close prisoner, and if my friends are so kind to me, as to help me in order to my defence, I hope you will not be against it. Pray, my lord, let me have my papers.

L. C. J. You shall have them, but they shall be put into such hands as the Court may have command over; they shall be in the Sheriff's son's hands, and you shall have the immediate use of them.

Coll. If there be any thing else in those papers necessary for my defence, I pray I may have it.

L. C. J. The Speech is not fit for you; what other papers would you have?

Coll. Another paper there is, that is something of law.

Just. *Jones.* Nothing but libellous, and what is a scandal to the government.

Att. Gen. You are to have nothing of matter of law, but what you are to propose yourself.

Coll. If you take away all my helps, I cannot propose any thing.

Serj. *Jeff.* To allow you those papers, is to allow you counsel by a side wind.

L. C. J. Look you, the papers of instructions shall be delivered to the Sheriff's son, who shall let you peruse it in this interval, and make use of it in your trial; but it must be in safe custody to be used upon further occasion, as the king's attorney shall think fit.

Then the Court adjourned till two in the afternoon: when the Court returned, and Proclamation was made for attendance, and for the under sheriff to return his jury.

Coll. My lord, ought not I to have a copy of this jury?

L. C. J. No.* They are to look upon you as they come to be sworn, and then you are to challenge them.

Cl. of Cr. Stephen Colledge, hold up thy hand, and hearken to the court; those good men that you shall hear called, and personally appear, are to pass, &c.

Coll. Pray sir, let the way be clear, that I may see them.

Cl. of Cr. Ay, ay.

Coll. Pray sir, how many are there of the jury that appear?

Att. Gen. There are enough.

Cl. of Cr. Make proclamation for information, (which was done.)

Cl. of Cr. Henry Standard, who was sworn. Richard Croke, who was challenged by the prisoner. William Bigg, challenged.

Just. *Jones.* Do you challenge him peremptorily, or with cause?

L. C. J If he do not shew cause, it must be supposed it is peremptory.

Coll. I suppose he was upon the Grand-Jury.

L. C. J. That would be a challenge with cause.

Mr. *Bigg.* No, I was not.

Coll. Then I do not challenge him; I know him not. (He was sworn.)

Cl. of Cr. Thomas Marsh challenged, Thomas Martin did not appear, Gabriel Merry, being almost 100 years of age, was excused, Robert Bird, John Shorter, William Windlow, sworn, Edward Ayres, William Ayres, and Richard Ayres, challenged, Charles Hobbs, Roger Brown, Timothy Doyley, sworn, Richard Dutton challenged, Ralph Wallis sworn, John Nash challenged, John Benson sworn, John Piercy sworn, William Web challenged, and John Lawrence sworn.

They were counted, and their names in order thus, Henry Standard, William Bigg, Robert Bird, John Shorter, William Windlow, Charles Hobbs, Roger Browne, Timothy Doyley, Ralph Wallis, John Benson, John Piercy, John Lawrence.

L. C. J. Mr. Sheriff, there are a great many of the jury that are not sworn, they are discharged, let them go out of the court, and so you will make room for the witnesses.

Cl. of Cr. Gentlemen, you of the jury, look upon the prisoner, and hearken to his charge. He stands indicted by the name of Stephen Colledge, late of Oxford, in the county of Oxford, carpenter; for that he as a false traitor, &c. *prout* in the Indictment *mutatis mutandis*, and upon this indictment he hath been arraigned, &c.

Mr. *North.* May it please your lordship, and you gentlemen, that are sworn, this is an indictment against Stephen Colledge, the prisoner at the bar, for an endeavour to raise a rebellion within this kingdom, wherein he is accused, and the jury find that he as a false traitor, against the king's majesty, contrary to the duty of his allegiance, on the 10th of March, in the 33rd year of the king's reign, at Oxon here did traiterously conspire, and compass the

* Chief Justice Pemberton said in lord Russel's Case, It was never denied in case of life, that he knew of, it was allowed to count Coningsmark. See the Trials, *infra.*

death of the king, and the subversion of the government, and to raise a rebellion in the kingdom, and to slaughter his majesty's subjects, to put the king to death, to levy war against him, and to deprive him of his royal state and government, and to alter the government at his own will and pleasure; and to accomplish this, he did at Oxon here prepare arms for the carrying on the war, and excited one Edward Turbervile and others, to arm themselves against the accomplishment of this design (and did declare his purpose was to seize the king's person at Oxon, and that he was one of those that was to do it; and to bring the said Turbervile and other subjects to his purpose, did falsely, maliciously and traiterously declare in their hearing, That there was no good to be expected from the king, that he minded nothing but the destruction of his people, and arbitrary government, and to introduce popery. And this is laid to be against the duty of his allegiance, against the king's peace, and against the form of the statutes in those cases made and provided. The prisoner, you hear, upon his arraignment hath pleaded Not Guilty, which issue you are to try, and if the evidence for the king, which are ready to be produced, prove that which is laid to his charge, you are to find it accordingly.

Att. Gen. May it please your lordship, and you gentlemen of the jury; the prisoner at the bar stands indicted of a very high crime, no less than High-Treason, and that too of the deepest dye; it is for an endeavour to destroy the king, to subvert the government, to raise a rebellion among the king's subjects. And, gentlemen, these instances that we shall give you, and produce our evidence to, for the proof of that, are these: He laid his design to seize the king at Oxon; and he did not want his accomplices to do it; but they were not men, gentlemen, that were protestants, but men that were rebels in the late war, they were men of such a kidney, that he associated himself with, and these were the persons that were to assist in this attempt. In order to this he had prepared arms in an extraordinary manner, arms of a great value, for one of his condition, who is by trade a joiner; for if a true estimate were taken of the value of the arms, I believe they were worth twice his whole estate; he prepared a good horse, extraordinary pistols, a carbine, a coat of mail, an head piece; and so being armed cap-a-pee, with that design he came hither to Oxon. And you will judge whether these be fit tools for a joiner.

Coll. I beseech you, sir, have you any body to prove this? If you have not, you do hurt to the jury as well as me, to speak it.

L. C. J. Be patient, Mr. Colledge, and let Mr. Attorney go on to open the charge. I will tell you and the jury too, that what he says further than he makes good by proof and witnesses, will serve for nothing.

Coll. It is hard the counsel should plead against me, and open things that he cannot prove.

L. C. J. I will do you all the right imaginable, and therefore I do tell you again, if they do not prove it, all he says is nothing.

Coll. But I beseech you, my lord, since there hath been such extraordinary means and methods used to contrive my death, that the witnesses may be examined apart, and far from the hearing of one another.

L. C. J. That we will take care of by and by.

Att. Gen. Mr. Colledge, this shews your temper, you are inordinate in your way of expressing yourself.

Coll. Mr. Attorney, I should not interrupt you, if I were not afraid this was spoken to prepossess the jury.

Att. Gen. I hope to prove what I have said, or every word of it shall pass for nothing.

Coll. It is impossible for all the men on earth to prove it.

Att. Gen. Gentlemen, these were the particulars I was opening to you, in what manner he was armed, and how accoutred he came hither. We shall likewise shew you that he made it his business to persuade others to undertake the design, and join with him, as if open war was already declared; he gave out a sign, which was a blue ribbon, a wrought ribbon with letters in it, and this was the mark and sign they were to know one another by. This was given out by him frequently; and that it may not seem an extraordinary thing, gentlemen, though indeed it was a wild attempt, yet you will cease to wonder when you have heard of the exploits of Venner, who with a few men raised such a commotion, soon after the king's coming in, and the several exploits that have of late in Scotland been carried on by a few discontented persons. So that men of the like principles, as we shall give you an account of this gentleman's principles what they were, may well be thought to engage in such an extraordinary exploit. And we shall prove what the encouragement was he was to have; for he boasted of himself, that he should be in a little time a colonel.

Coll. What, sir?

Att. Gen. A colonel, a great preferment for a joiner.

Coll. Yes, it was so.

Att. Gen. We shall shew to you that this was not a sudden unpremeditated thing; for we shall prove that he had entertained the horridest malice against the king, that ever subject entertained against his sovereign: For we shall give this evidence, and his front will not oppose it, that he had made it his common discourse in coffee houses, and public-houses, (and I believe I could bring you 40 and 40 witnesses to it) to defame the king and murder him in his reputation, and was one of the accomplices with Fitzharris, who was lately executed for that venomous Libel: We shall prove that he justified it, and maintained it to be as true as the gospel. We shall give evidence that he carried on the same design with that arch traitor who was a papist; and I believe if this gentleman were examined thoroughly, he would be found to be one of the same stamp

and acted by the same principle; for I think that no Protestant subject would attempt such things as we shall prove to you. I believe, Gentlemen, you have frequently heard as none of us but have, that the king has been traduced as a designer of arbitrary government, and his reputation blasted maliciously and falsly, as an introducer of popery: Whence comes all this generally but out of the popish quiver; who make it their business to set the king's good subjects at variance amongst themselves, and against their prince, by stiling the king a papist, as this prisoner hath done; nay, he hath been so impudent as to report that the king was in the plot against his own life. We shall prove to you, how here and at other places he hath frequently done this; to go further, we shall produce to you the evidence that he drew the king's picture, and exposed him in all the reproachful characters imaginable, and that the picture might be the better understood, he adds a ballad to it: and that he may not have the confidence to say this is not true, we shall produce to you a whole bundle of these papers, among those which his son made a discovery of, when they were sent to his uncle to be hid, and we shall prove him to be the author of them; and yet this man should have the confidence to say he is a good subject, and a good Protestant, when by all ways imaginable he goes about to ruin the government and defame the king. And gentlemen, when we have given this account by witnesses, for I would have you believe me in nothing, but according as I prove it, you will not wonder then that he should say his life was in danger, (for so it is indeed!) And if any man ever was guilty of High-treason, sure he is, and being guilty of the greatest treason, he deserves the greatest punishment.

Coll. Pray, gentlemen of the jury, take Mr. Attorney General at his word, and remember, sir, you desire not to be believed yourself, but what you prove.

Serj. *Holloway*. May it please your lordship, and gentlemen, pursuant to what Mr. Attorney hath opened, we will call our witnesses, and we will begin with Mr. Dugdale, who was a witness against my lord Stafford, at his trial in parliament, whose credit Mr. Colledge did attest at that trial, asserting him to be an honest good man, and I believe his evidence will go in a good measure through all that Mr. Attorney hath opened, and when we have done with him we hope to second him with other witnesses of as good credit, and that will say as much to the purpose.

Then Mr. *Dugdale* was sworn.

Att. Gen. Mr. Dugdale, look upon the prisoner, and tell the court whether you know him.

Dugdale. Yes, I do know him, sir.

Att. Gen. Will you give us an account of your knowledge with him.

Coll. My lord, I humbly desire they may be examined a-part, and not in the hearing of one another.

Att. Gen. That, with submission, ought not to be in the king's case, though we think there are none of them that will speak any more than the truth.

Coll. Here are several of them, my lord, they are all of a gang.

Serj. *Jefferies.* Not of your gang, Mr. Colledge.

Coll. I pray they may go out, my lord, (which was ordered accordingly.)

Dugdale. If your lordships please, whether or no I may deliver in these papers?

Att. Gen. By and by, time enough, when we ask for them? speak your own knowledge.

Dug. My lord, I have been, I think, acquainted with Mr. Colledge two years or thereabouts. I have been several times in Mr. Colledge's company, and truly sometimes he hath been mightily bent against popery; he hath at sometimes uttered himself, because the king did not prosecute the papists according as he thought sufficiently, that the king was a papist himself, that he was as deep in the plot as any papist of them all, that he had an hand in sir Edmundbury Godfrey's death. This Mr. Colledge I appeal to yourself, whether you have not said it: And in this town of Oxford you have several times told me, that nothing was to be expected from him, he would do nothing.

Just. *Levinz.* Who did tell you so?

Dug. Mr. Colledge did tell me, that there was nothing to be expected from the king but the introducing of popery and arbitrary government; this I believe Mr. Colledge will acknowledge to be true.

Coll. Where was this spoken?

Dug. This was spoken at a coffee-house called Combe's Coffee-House in this town, and at the Angel-Inn in this town at a barber's shop; that day the king went out of town, we were in the same shop.

Coll. Who was there besides?

Serj. *Jeff.* Do not interrupt our witnesses, let us have done with him, and you shall have your time to ask him questions after.

L. C. J. For your instruction I will tell you, your time is not yet come, if you chop in and interrupt the witnesses, you will disturb any man living; but your way is this, when he hath delivered his testimony, ask him any questions then; and he shall be bound to answer you, and in the mean time you shall have pen, ink and paper, to help your memory.

Dug. That day the king went out of town, presently after he went, you and I went into the Angel-Inn; and we went into the barber's shop that is just within the inn, and being charging your pistols there, you said Rowley was gone, the rogue was afraid of himself, he was shirked away, and here I appeal to your own conscience, whether you did not speak of it.

Coll. I know nothing of it.

Att. Gen. Don't appeal to him, it is nothing for that.

Sol. Gen. Who did he mean by Rowley?

Dug. The king.

Serj. *Holloway.* Was that his common appellation for the king?

Dug. It was his common word concerning the king. And at other times speaking that the king did not do those things that were fair, he hath given mighty great words against him: He hath told me, that there was no trust to be put in him; for it was the people we must trust to, and we must look to arm ourselves, and that he would arm himself, and be here at Oxford; and he told me here in the town accordingly when I came out of the country, and he said that he had several stout men that would stand by him in it. Their intention was, as he said, for the rooting out of popery, by which name he always termed the church that is now established by law, as to be of the same nature the papists were. This I believe Mr. Colledge will acknowledge.

Att. Gen. Well, go on, Sir.

Dug. And at a time when he had Dr. Tongue at his house, he told me, that as for Dr. Tongue, he had much ado with him, and he had been at a great charge to keep him in order, that he was forced to neglect his own business to look after him; for if he had not done so, the rogue, as he said, had a mind to fling all upon the Protestants, that is, the dissenters, for he does not count the Church of England to be so; that he had much ado to keep him in order; for he had said he had drawn papers for that purpose, but those papers are secured, for where they are I can't tell.

Att. Gen. Who were they that were to be with him in that design of his?

Dug. He told me, capt. Clinton, capt. Brown, and one Dr. Lewes, and he brought them into town here, when he came with him.

Att. Gen. To what purpose did he bring them.

Dug. Expecting there would be a rising.

Just. *Jones.* Did he tell you that here?

Dug. Yes, the Friday, I think it was, after the first parliament sat.

Just. *Jones.* How did he express himself what they had to do?

Dug. They were to be here, in case there were any rising, which he expected.

Just. *Jones.* What use did he say he would make of them?

Dug. For the defence of the Protestant Religion, against the king and all his adherents.

Just. *Jones.* What did he say he would do to the king? I would not lead you.

Dug. He did not say what particularly.

Just. *Jones.* What did he say, if the king did not yield to the parliament?

Dug. If the king did not yield to the parliament, he should be forced to it.

Just. *Jones.* Where did you hear him say that?

Dug. At Oxford.

Serj. *Holloway.* Did you hear him declare this at London?

Dug. He did say at London, he expected there would be something done at Oxford, and that he would go thither with his horse and arms, and those gentlemen I named before would go with him. And he said, let them begin when they would, he did not care how soon, his party was the greatest party.

Att. Gen. What was that capt. Brown? Did you know him?

Dug. Yes, I knew him very well; he did much frequent Mr. Colledge's company; he was in the late army against the king.

Serj. *Jeff.* Did you see him have any pistols?

Dug. Yes, I have seen him carry pistols about him.

Serj. *Jeff.* Where, in his pocket?

Dug. I saw them in the house.

Serj. *Jeff.* At Oxford?—*Dug.* Yes.

Serj. *Holloway.* Did you see them in his hand?

Dug. I cannot tell that, he had them in the house, I saw them three.

Serj. *Holloway.* Did you see him in his silk armour about the Parliament-House, the lobby, or any place?—*Dug.* I cannot say that.

Att. Gen. What did you know of his delivering any marks or signs for persons to be distinguished by?

Dug. I had as much ribband from him as came to 40*s.* with 'No Popery,' 'No Slavery,' wrought in it; and he gave it me to distribute among my friends in the country, that they might be known by other persons that would wear the same.

Just. *Jones.* Where had you it?

Dug. At London, from Mr. Colledge.

Just. *Jones.* Where was it to be distributed?

Dug. Among those that I knew to be Dissenters in the country.

Just. *Jones.* Were you to come to Oxford, by agreement, with Mr. Colledge?

Dug. I promised him to come to Oxford, and did so.

Att. Gen. Well, go on. What more do you know?

Dug. At London, I was once at a coffee-house with Mr. Colledge, and with some of the members of the House of Commons; it was a little before they met; and they were earnestly talking of the parliament at Oxford, and of some disturbance that was likely to happen here. And it was then fully agreed, and Mr. Colledge was by, that it would be the best way, out of every country, where the parliament had the best interest in the people, to leave one in every county that might manage the people. This I appeal to Mr. Colledge, whether it be true.

Coll. You appeal to me, shall I speak now, my lord?

Just. *Jones.* No, you will remember it by and by.

Att. Gen. What do you know of any pictures?

Sol. Gen. Pray let him speak that over again which he mentioned last.

Dug. Being in a coffee-house with Mr. Colledge, there were some of the members of the House of Commons by; and speaking of a disturbance that might happen here at Oxford, was then agreed, that in every quarter where

the parliament had the most interest in the people, they should not all come up, but some remain there to manage the people.

Att. Gen. What do you know of any pictures or papers, have you any about you?

Dug. Yes, I have one thing I received from Mr. Colledge, that is, the Letter pretended to be intercepted to Roger L'Estrange.

Att. Gen. Pray, what account did he give you of it? Who made it?

Dug. He told me he was the author of it himself, and he shewed me it in manuscript before it was printed; and he told me, he got one Curtis, or his wife, to print it; but he would never trust them again, for they cheated him of some of the gain.

Att. Gen. Who was the author, did he say?

Dug. He himself.

Att. Gen. Pray produce it, Sir.

Dug. This and others he delivered to me to disperse.

L. C. J. What is it, Mr. Attorney?

Att. Gen. It is a letter, and a great part of Fitzharris's libel is taken out; it seems Colledge was the author, and this is the original of the libel.

L. C. J. Did he tell you, this was of his own making?—*Dug.* Yes.

Att. Gen. Did he disperse them to any body else?

Dug. Yes, there was some given to one Mr. Boson, he had some at the same time, and Mr. Baldwin had some.

Then the Paper was read.

Cl. of Cr. First Q. 'Whether they that 'talk'—

Att. Gen. Pray give my lord an account what more papers and libels he delivered to you.

Dug. I received one like this, I cannot say it was the same, where all the bishops were changing their hats for Cardinals caps.

Serj. *Jeff.* Where is Rary Shew, for it seems he hath expounded the meaning of that? (Then it was produced.) I suppose it is his own cutting too.

Dug. I heard Mr. Colledge sing it.

Serj. *Jeff.* Where?

Dug. In Oxfordshire, and in Oxford-town, at my lord Lovelace's?

Serj. *Jeff.* Where, at my lord Lovelace's?

Dug. At his house in the country.

Serj. *Jeff.* Who were in the company there?

Dug. Sir Robert Clayton, sir Thomas Player, Mr. Rouse, Mr. Colledge.

Serj. *Jeff.* You say you heard him in Oxford, and in Oxfordshire, and at my lord Lovelace's, where is that?

L. C. J. My lord Lovelace is here himself, and hears what he says.

Dug. I might mistake the county, but I heard him sing it at Oxford town, and at my lord Lovelace's house again.

L. C. J. Where is that?

Dug. I cannot tell the town.

Serj. *Jeff.* How came you there?

Dug. Sir Thomas Player did invite me thither.

Serj. *Jeff.* Where is it in Oxfordshire?

Dug. I cannot tell, it is four miles from Henley.

Serj. *Jeff.* Was my lord at home?

Dug. Yes, he was.

Serj. *Jeff.* Now for the cut, then; did he shew you this cut?

Dug. Yes, he told me he would get it printed.

Serj. *Jeff.* Was it before it was printed then that he sung it?

Dug. Yes, it was.

Serj. *Jeff.* Who did he tell you did make it?

Dug. He told me he was the author of this cut, and he gave me one, and we sang it together presently after it was printed.

Att. Gen. How did he describe it to you when he shewed it to you?

Dug. That which hath the pack on the back of it, he describes it to be the king; those that follow him were Topham, Cooper, Hugh, and Snow, and that company of men there is the House of Commons.

Serj. *Holloway.* What was meant by the pack?

Dug. The parliament and all his retinue: and then here is the king in the mire again, according as it is represented in the song—

Serj. *Jeff.* Ay, he goes on well. And this here is the bishops which they thrust into the pack, when they have got him down in the mire, and then they thrust them all away, as it is in the song, to hoot them away.

L. C. J. Did he make this explication to you?—*Dug.* Yes.

Serj. *Jeff.* Who were the 'All?'

Dug. King, and clergymen, and all.

Serj. *Jeff.* Where was this that he explained it?—*Dug.* At London.

Serj. *Holloway.* Is there any thing relating to White-Hall? What name did he give that?

Dug. Yes, he said, Louse-Hall was White-Hall, because of its poverty.

Then the Ballad was read.

Cl. of Cr. 'Rary Shew.' To the tune of, 'I am a senseless thing'——

Att. Gen. This shews you what a sort of man he is.

Serj. *Jeff.* Here you say he explained this with the pack at the back to be the king?

Dug. Yes, he told me so.

Serj. *Jeff.* What did he mean by the two faces?

Dug. That he was half a Protestant, and half a papist.

Just. *Jones.* Did he make any comparison between his own party and the king's party?

Dug. He said, they were but a handful to them

Just. *Jones.* To whom?

Dug. To his party, that was the Dissenters.

Att. Gen. Speak that out.

Dug. That their party was but a handful to their's.

Att. Gen. Their's and their's, who did he mean?

Dug. He meant the dissenters; for the Church of England he reckoned among the papists.

L. C. J. Tell us the words he said.

Dug. He said, his party was the true Church of England, and that which is established by law, were but Protestants in masquerade.

Just. *Jones.* Tell us when he made the comparison, what words he did use, and upon what occasion.

Dug. When he perceived the king at Oxford would not yield to the House of Commons, he said, let him begin as soon as he would, he did not care how soon he did begin, for their party, meaning the king and his party, was but an handful to him and his party, calling them the true Protestants; the others were Protestants in masquerade.

Att. Gen. What did he desire you to do? To be assisting in any thing?

Dug. He always desired me to be true of that side, he hoped I was, and to get good arms for myself.

Serj. *Holloway.* Did he in Oxford desire this of you?—*Dug.* No, he did not.

Sol. Gen. For what purpose did he desire you to arm yourself?

Dug. He said, the king had a design on the people to introduce popery and arbitrary government, and he expected every day when they would begin, and the sooner the better, he would be provided for them.

Just. *Jones.* Was that in Oxford?

Dug. He spoke it in Oxford, and in the city too.

Just. *Jones.* Did he tell you of any that were listed?

Dug. He spoke of captain Brown, and captain Clinton, and Don Lewes, and abundance more he said he had.

Just. *Jones.* Did he tell you he had them here?

Dug. Yes, about forty of them were there, he said.

Serj. *Holloway.* Did he tell you of any that were listed, in order to the coming down of the parliament at Oxford.

Dug. Not listed, but were intended to come down; and at Oxford he told me they were come down.

Just. *Jones.* Were you in their company in Oxford here?—*Dug.* Yes, I was.

Just. *Jones.* In the company of whom? Name them.

Dug. Of captain Brown, Don Lewes, and several others of that gang; I know not their names, but I know their faces.

Sol. Gen. Did he take notice to you that they were come down?—*Dug.* Yes.

Sol. Gen. To what purpose?

Dug. He expected there would be a rising in Oxford, and to this purpose; Mr. Colledge was one that debated it at Richard's coffee-house, and it was to be carried from thence to the King's-Head club, whether it were not best to leave a parliament-man in every county?

Att. Gen. Where was this?

Dug. This was at Richard's coffee-house in London, against they met here.

Att. Gen. We could give you an account of a volume of these things, abundance of scandalous pamphlets, both songs, libels, and ballads, that were made by this gentleman, and all seized in his custody.

Just. *Jones.* But he sung this libel?

Att. Gen. All these, gentlemen, (shewing a great bundle) were to be dispersed over England.

Serj *Jeff.* It was, it seems, expounded and sung by the prisoner at the bar; he gave you the ballad at Oxford, you say, Mr. Dugdale.

Dug. No, I heard him sing it here.

Just. *Jones.* Pray, Mr. Dugdale, what was the use was to be made of this ballad?

Att. Gen. Come, go to the next. we call this evidence to shew you the malice of the man.

Coll. Pray, my lord, let me ask some questions of Mr. Dugdale.

Serj. *Jeff.* Ay, now let the prisoner ask his questions (to do him right) before we go to another witness.

Dugd. My lord, I have a word or two more about a libel in manuscript, that very day the sheriffs were to be chosen, it was to be printed, and he told me the printer durst not print it, it was so dangerous.

Serj. *Jeff.* What was it, can you remember any part of it?

Dugd. No; but it was the worst I ever heard in my life against the king and government.

L.C.J. Now ask him what questions you will.

Coll. Pray, when was the first time you gave this evidence?

Dugd. Truly, Mr. Colledge, I don't keep an account of time, I cannot give an account of time.

Att. Gen. As near as you can tell him.

Dugd. I cannot tell whether it might be in June, I think it was.

Coll. How long before I was taken?

Dugd. It might be about the time you were taken.

Coll. Pray, who did you give it before?

Dugd. I gave it to sir Lionel Jenkins.

Coll. Where did you swear these things were done then?

Dugd. What was done in the city, I swore to be done there.

Coll. What city?

Dugd. London; the same words were said in the city of London, and over again here. I have repeated, for the most part, only the words you said here, but more was in the city than here.

Coll. Did you swear then, that the words you swear now were spoken at London?

Dugd. It may be we might not name Oxford then.

Serj. *Jeff.* He says well, it might not be named then.

Coll. Then you did give in your information, that I spoke these words at Oxford.

Dugd. I was not examined about what was done at Oxford; I believe I have heard you speak the same words to me at my lord Lovelace's, but I do not know what county that is in.

Coll. I ask you positively, whether you did not swear that what you now say was spoken at Oxford, was spoken at London?

Dugd. I did not name Oxford then.

Coll. But did not you say that was done at London, that now you say was done here?

Dugd. Truly, you said them both at London, and here.

Coll. Pray, Mr. Dugdale, what had you to give this your information?

Dugd. Truly, I can't say I have received the worth of a groat.

Coll. Nor was ever promised any thing.

Dugd. No, I never received any thing, nor ever was promised, but only what the king gave me for going down into the country for my charges.

Att. Gen. Was that the same allowance you had when you were witness for the Popish Plot?—*Dugd.* Yes.

Serj. *Jeff.* Have you any other allowance than what you had before, when you gave evidence at my lord Stafford's Trial?

Dugd. No, nor have got all that yet neither.

Coll. But pray observe my question, Mr. Dugdale, and answer it. Did you not swear at London that I spoke these words there, which now you say I spoke here?

L. C. J. Pray observe, he says he did not then name Oxford; but in the giving of his evidence now, he tells you a series of what passed between London and Oxford; and I must tell you further, if a treason be committed, and the evidence prove it to be in two counties, the king may choose which county he will prosecute and bring his indictment in, and give in evidence the facts in both counties. But you shall have your objection to it afterwards, and we will take it into consideration. I tell you this, that it may not seem to you that the witnesses speak impertinently of what was done at London; but if nothing was done or said at Oxford, then it will be taken into consideration, you shall have it saved afterwards. I only hint it now, that you may not think it impertinent.

Coll. I beseech your lordship give me leave to speak one word: When he made his affidavit before sir Lionel Jenkins there about seizing the king, about the party I had, and the arms I had provided, ought not he at the same time to have said where I said those words to him? But he did swear then it was in London that I said those words to him; and coming before a grand jury of honest gentlemen in London, they were so wise and honest as to do me justice, and not find the bill; so their design failing there, then they changed it to Oxford.

L. C. J. You did not come to your trial there; if you had so done, then they would asked him in particular what was said at Oxford, and what at London, as it is now, being done in both counties. But look you, if you will ask any particular questions, do, for they have other witnesses to produce.

Coll. My lord, I only ask this question, Whether it be not rational to think, that when he swore before sir Lionel Jenkins, he should not swear the words were spoken, and things done?

Dugd. He hath said the same words to me at my lord Lovelace's, as I lay in bed with him, and this I never mentioned but now in my evidence.

Coll. What words did I say there?

Dugd. If you must have them repeated, they were about the king.

Coll. What were they?

Dugd. That he was a papist, and designed arbitrary government.

Coll. Did I say so to you at my lord Lovelace's?

Dugd. Yes, as we lay a-bed.

Sol. Gen. Did you lie together?

Serj. *Jefferies.* Yes, yes, they were intimates.

Coll. I had not six words with you when you went to bed, for you said you were weary, and went asleep presently.

Dugd. I say you said this in the morning, for we had an hour's discourse when we were a bed, and all our discourse was about the parliament and the king.

Coll. Where was it I said these words in Oxford?

Dugd. At Combe's coffee-house was one place.

Coll. Was there nobody by?

Dugd. No, but at the Angel-Inn there were several persons standing by.

Coll. Surely then some of those heard the words as well as you.

Dugd. It may be so, I am sure many at London have been by, as Mr. Starkey by name, Mr. Bosom, Mr. Baldwin; they have rebuked you for it, and I have rebuked you too.

Coll. What words have they and you heard, and rebuked me for?

Dugd. When you have been railing against the king, and said, that the king designed nothing but the introducing of popery and arbitrary government, and that he was a papist.

Serj. *Jefferies.* He loves to hear it repeated.

Coll. What arms did you see of mine in this town?

Dugd. I saw pistols; you had some pocket pistols.

Coll. None but one I borrowed of you, and that you had again; had I? Pray speak; did you see any more?

Dugd. It may be there might not, but there were pocket-pistols in the room, and you had them in your hand.

Coll. He swore but now that he saw me have

pocket-pistols, when it was but one and that was his own.

Serj. *Jefferies.* Hark you now, you talk of pistols, do you know, that he had any pistols in his holsters at Oxford?

Dugd. Yes, he had.

Coll. Yes, I know that, I don't deny it.

Serj. *Jefferies.* I think a chissel might have been more proper for a joiner.

Coll. You say I was confederated with capt. Brown and other men.

Dugd. You have told me that capt. Brown had a good allowance, and it was pity he had not a better allowance; and you would speak he might have a better allowance, for he was able to do good service when the time came.

Coll. From whom?—*Dugd.* Among you.

Coll. Among whom?

Dugd. You know there were several gatherings among you that I was privy to.

Coll. What do I know?

Sol. Gen. You know money was gathered many times.—*Coll.* For what purpose?

Dugd. You never told me particulars; it was to distribute somewhere, I had none of it.

L. C. J. He does not say these men were concerned with you, but you said so.

Dugd. You know, Mr. Colledge, there were many gatherings of monies.

Coll. Did I tell you there were any gatherings for captain Brown?

Serj. *Jefferies.* He says, you told him no particulars; if you have a mind to ask him any more questions, do.

Coll. Pray sir George, don't interrupt me, I am here for my life. Did I tell you there were any gatherings for captain Brown?

Dugd. I do not say for him, nor whom you distributed it to; but you gathered money one among another, and you have paid money.

Coll. I have paid money! When, and to whom?

Att. Gen. You will not deny that, you confessed, upon your examination, that you gave a guinea.

Coll. Sir, did you see me any more at Oxford, than in the coffee-house, and at that inn, when I went out of town, and was going home with the city members?—*Dugd.* Yes.

Coll. Were you in my company any where but in those two places?

Dugd. I was with you at the Chequer.

Coll. Did you come a purpose to speak with me, or had you any business particularly with me?

Dugd. Truly, Mr. Colledge, I have forgot whether I had or no; I was in the room with you there.

Coll. Where is that room?

Dugd. I cannot tell all the rooms in that house.

Coll. Was it above stairs, or below?

Dugd. Both above and below, two days I was there with you.

Coll. Was there any of this discourse you speak of passed there between us?

Dugd. I know I was with you in these two places I mentioned before; you called me aside to drink a glass of mum, and there was none in the room but us two at that coffee-house.

Coll. Sir, you came to town but on Friday, I think it must be Saturday, Sunday, or Monday this was; for he stayed no longer in Oxford.

Dugd. Nay, I came to Oxford either Wednesday night, or Thursday morning; and I saw you and Mr. Hunt together the same day I came.

Coll. Did I explain any pictures to you at London, or owned I was the author of them?

Dugd. Yes, upon my oath, you have explained pictures to me, and there is one picture that I have not shewed yet, which you have explained what the meaning was.

Serj. *Jeff.* It is your common trade it seems.

Dugd. You told me you got them done.

Clerk reads, "A Character of a Popish Successor," &c.

Serj. *Holloway.* How did he explain it to you, Mr. Dugdale?

Serj. *Jefferies.* I would see what opinion he had of the church of England; there are some church-men, what are they a doing?

Dug. They are a parcel of tantivy-men riding to Rome; and here is the duke of York half man, half devil, trumpeting before them.

Coll. You have got somebody to explain these things to you, Mr. Dugdale.

Dug. You did it, upon my oath.

Coll. Oh, fie upon you, Mr. Dugdale, consider what you say.

Serj. *Jeff.* All this you did explain, it seems.

Dug. And in one place of the other libel the king was termed a rogue; but they put him in by another name.

Serj. *Jefferies.* Where is it?

Dug. It is in Rary Shew; in the manuscript it was, 'Now now the rogue is down.'

Serj. *Jefferies.* Let me see it; I took notice of it, 'Now, now the giant is down'

Coll. I ask you, Sir, whether the song which you say was sung at my lord Lovelace's and other places, was the same with this?

Dug. For the general it is, I can't tell for every word: You sang it half a dozen times there, and the music played to you.

Coll. I ask you, whether it was the same with this?

Dug. I can't tell for every word you sang.

Coll. Was there any body by at my explaining of these pictures?

Dug. Mr. Baldwin was by, and reproved and corrected you, that you would be so open.

Coll. Was there any body at Oxford when you did hear me talk of arming myself?

Dug. They were walking up and down in the barber's shop, and I know not whether they did hear or no.

Att. Gen. Was that gentleman sworn at my lord Stafford's trial, Mr. Dugdale?

Coll. Yes, I was sworn there, I acknowledge it.

Att. Gen. Did he swear any thing on your behalf, for your credit, Mr. Dugdale?

Coll. That was by hear-say, Mr. Attorney, at the Tower; I know nothing of my own knowledge; but I did believe him another man than I find him.

Serj. *Jefferies.* No question, or else you would not have trusted him.

Att. Gen. Swear Stevens. (Which was done.) Do you give my lord and the jury an account where you found this precious ballad.

Stevens. The first draught I found in his bed-chamber.

Serj. *Jefferies.* What of all of them? Which is it?

Stevens. The Rary Shew: We found the first draught of it in his house, when we came to search his papers, by order of council; and the printer that printed the ballad hath told me since, he had it from him——

Att. Gen. What say you yourself? speak you own knowledge.

Stevens And Mr. Atterbury was by when we seached the house.

Att. Gen. Well, Mr. Atterbury will tell his own story.

Stevens. I have seen you on horseback, with holsters before you, with some hundreds of men after you, coming out of the Bell savage-Inn; they said, you were going to chuse parliament-men: I have known you three or four years, you were joiner to our hall.

Serj. *Jefferies.* We call you to that particular of the papers, and you run in a story of a cock and a bull, and I know not what.

L. C. J. Will you ask him any questions?

Coll. No, only this; Do you swear, upon your oath, that you found the original in my house?

Stevens. Yes, Sir, you will see it with my hand to it, and some more of them.

Att. Gen. And you found too those that were printed?

Stevens. Yes, both our names are to them that were concerned in the searching of them.

Serj. *Jefferies.* You found the paper in the house?—*Stevens.* Yes.

Serj. *Jefferies.* That is Towzer; but have you the original of the Rary Shew? (It was looked for, but could not be found.)

Coll. Pray, gentlemen, observe, he swears that is an original.

Serj. *Jefferies.* No, no, he found the paper in your house.

Coll. I ask about the original of Rary Shew.

Serj. *Jefferies.* He says, he saw a paper drawn with a pencil that was like the original.

Atterbury. There was an original drawn with a pencil upon Dutch paper, it is long since, for we do not see it here now, which at the same time we found upon Colledge's table in his bed-chamber.

Coll. Did you find an original in my chamber?

Atterbury. Yes, we found a paper drawn with black lead.

Coll. Pray, where is it?

Atterbury. I did see it, it was drawn in black lead, it was upon Dutch paper, and lay upon the table in your chamber.

Stevens. Sure I am, it was taken when we searched the house.

Coll. I am sure you could never find the original of any such thing in my house.

Att. Gen. Then where is Mr. Sewell? (Who was sworn.) Sir, did you see that trumpery taken?

Sewell. I had a warrant to seize Mr. Spur, and his brother-in law, Mr. Colledge. So I went down to seize Mr. Spur, and search his house for such papers as I should find. I could not find them in the house; but I enquired of him after I had searched, and could not find them, where they were; because I saw him at Mr. Colledge's when we first searched; he denied them a pretty while, but at last he told me, they were in the hay-mow in the barn. When I came there, he was bawling, and told me, his wife, Colledge's sister, had taken them down, and carried them into a room where I had searched before, but could not find them; and the man was angry then, so we run after his wife, and found her with all these papers in a bag.

Att. Gen. Are these the same papers?

Sewell. Yes; and there were two other cuts, the man himself is about the place somewhere.

Att. Gen. Swear Mr. John Smith, (which was done.)

Just. *Jones.* Come, Mr. Smith, do you know Mr. Colledge?—*Smith.* Yes.

Serj. *Jeff.* Give us an account what dealings you have had with him, where, and when; what he hath said about the king; and tell us first, whether you be intimately acquainted?

Smith. We were intimately acquainted. The first time I heard Mr. Colledge discoursing any thing of this nature, that is, concerning treason, or any such thing, was once at a coffee-house by Temple-bar; there I met Colledge, and he told me he was invited to dinner, and he likewise invited me to it. I asked him, who provided the dinner; he told me it was one alderman Wilcox; I told him I was a stranger, and did not care for going: he told me, I should be very welcome there; and at last prevailed upon me to go: and as I was going along, I asked him what the alderman was; he told me, he was a man that was as true as steel, and a man that would endeavour to root out popery: Said I, that may be done easily, if you can but prevail with the king to pass the bill against the duke of York. No, no, said he, you are mistaken, for Rowley is as great a papist as the duke of York is, (now he called the king Rowley) and every way as dangerous to the Protestant interest, as is too apparent by his arbitrary ruling. This was the discourse between the coffee-house and the tavern where he went to dine. When we came in I asked Colledge again whether the alderman was there; he said he was not there at that time: I asked him the second time, what kind of

man he was; he said, he was one that lived in his country house, and gave freely to several people to buy arms and ammunition: and I asked him to what purpose? And he said, it was to bring the king to submission to his people: adding thereto, that he wondered Old Rowley did not consider how easily his father's head came to the block, which he doubted not would be the end of Rowley at the last. After this discourse the alderman came in; we dined, and every one went his own way about his own business. Mr. Colledge then told me, if I would go with him to his own house, I should see how he was prepared with arms and provision. Soon after I met with him, and he desired me to go along and dine with him; and I did so, and there he did shew me his pistols, his blunderbuss, and his great sword; and he shewed me his armour, back and breast; and he shewed me his head-piece, which, if I am not mistaken, was covered over with camblet, it was a very fine thing; and, said he, These are the things which will destroy the pitiful guards of Rowley, that are kept up contrary to law and justice, to set up arbitrary power and popery.

Coll. What did I say, Sir, about my armour?

Smith. Thus you said; It was to destroy Rowley's guards, (those were your words) that were kept up contrary to law and justice, to set up arbitrary power and popery. After I had dined with him, I parted with him. A little before the parliament was to meet at Oxford, I met him again; and we were discoursing of several things, what preparations the city were making, how they were provided with powder and bullets, and for his part he would go down to Oxford, for he expected a little sport there, upon the divisions that were like to be between the king and parliament. Then, said I to him, Why, what is the matter there? Why, said he, we expect that the king will seize upon some of the members, and we are as ready as he: and, says he, for my part, I will be there, and be one that shall seize him if he secure any of the members: (and I believe he did go down;) says he, you know how the city is provided: I told him, no, not so well as he; but he told me all was very well. After he came up again, I met him another time, and he told me, he went down in expectation of some sport: but Old Rowley was afraid, like his grandfather Jamy, and so ran away like to beshit himself.

Serj. *Jeff.* Did he say, if he had not run away he would have seized him?

Smith. He said nothing of that; but before, he said, he would be one of them should seize him, if he seized any of the members. After this he told me, that Fitzgerald and he had had a quarrel at the parliament door of the House of Lords, at Oxford; that Fitzgerald had called him rogue; and, said he, Fitzgerald made my nose bleed; but before long, I hope to see a great deal more blood shed for the cause. After this again, when there was a discourse of disarming the city, that my lord Feversham was to come to do it, he told me, he was well provided, and if Feversham, or any man, nay, Rowley himself should attempt any such thing, he would be the death of him, before any man should seize upon his arms.

Serj. *Jeff.* Did he discourse any thing to you about arms to provide for yourself?

Smith. Yes, he did, I had an armour from him.

Serj. *Jeff.* What did he say to you about it?

Smith. He did desire me to get me arms, for I did not know how soon I might make use of them. I had an armour from him upon trial; he said it cost him 30 or 40*s.* I had it upon trial, but it was too big for me, so I gave it him back, and bought a new one.

Att. Gen. Did he tell you to what purpose you should arm yourself?

Smith. No, he did not name any purpose; but he told me, I did not know how soon I might make use of it.

Att. Gen. What did he say to you about any one's seizing the king?

Smith. He told me the parliament were agreed to secure the king, and that in order to it, all the parliament-men came very well armed, and accompanied with arms and men; and he told me of a great man that had notice from all the gentlemen of England how well they came armed.

Just. *Jones.* What did he say of himself?

Smith. He would be one that should secure the king, if he seized any of the members.

Just. *Jones.* When he had been there, what did he say?

Smith. If they had had any work, he was ready provided for them.

Att. Gen. But pray, tell us again what he said of the king's running away?

Smith. He said, Rowley was afraid, like his grandfather Jamy, and run away ready to beshit himself.

L. C. J. If you have done with him, Mr. Attorney, let the prisoner ask him what questions he will.

Coll. Mr. Smith, where was this discourse I had with you?

Smith. Which do you mean, the former part, or the latter?

Coll. The first discourse you talk of, what I told you going to Mr. Wilcox's to dinner; and when it was?

Smith. You know best when it was, I can't exactly remember the time; but you know 'tis true.

Coll. Where was it?

Smith. As we went along thither we had the first part of it, and when we came thither, you and I talked till Alderman Wilcox came in; and you and I were alone together, and several persons that were there, were drawn into cabals, two by two.

Coll. Where?

Smith. In the room where we dined; and you know there was a little room by, where some were drinking a glass of wine.

Coll. You say by two and two, the company were drawn into cabals.

Smith. I tell you, most of them were in cabals, two and two together, only those two gentlemen that belonged to the alderman went up and down, and gave wine.

Coll. What religion are you of?

Smith. Is it for this man, to ask me, my lord, such a question?

L. C. J. Yes, answer him.

Smith. I am a Protestant.

Coll. You were a priest?

Smith. Yes, what then? and I am in orders now.

Coll. That was from the Church of Rome.

Smith. Yes, and that is a good ordination; I came in voluntarily to discover the Popish Plot, and was no pensioner, nor received any salary from the king. I have spent several pounds, several scores of pounds, but received no recompence: and I was the darling at one time all over the city, when I did adhere to what they would have me to do.

Serj. *Jeff.* Did not you swear against my lord Stafford?

Att. Gen. Were you not a witness, Mr. Smith, at my lord Stafford's trial?

Smith. In that case I did give a general account of the design of the Papists; they did not then question my reputation, and I defy all the world to say any thing against it.

Coll. Pray hear me, Sir, if you please; the first discourse that you speak of about Mr. Wilcox's being a good man for the cause, and contributing money, this was when we were at dinner.

Smith. This was that day when we went to dinner with him, you know it very well.

Coll. Where were the other discourses I had with you?

Smith. Which part of them?

Coll. When I came from Oxford?

Smith. By the ditch-side, by your own house, I have two or three to prove it, we were an hour or two discoursing together about this business.

Coll. What business?

L. C. J. He tells you of two discourses, one before you went to Oxford, and one after you came from thence.

Coll. He does say, that I did discourse him about our coming down hither to Oxford, that the parliament would secure the king, and that I would be one of them that should seize him, and this was the time when we dined with Alderman Wilcox.

L. C. J. Not so, he says, after that time, and before you went to Oxford, he had such a discourse with you.

Smith. Yes, my lord, so it was.

Coll. And does he speak of another time, when I shewed him the back, breast, and arms?—*Smith.* Yes.

Coll. But he said, I discoursed then, that the city was provided with arms, and that the parliament were resolved to bring the king to submission.

Smith. When I was in the house with him, he then said Mr. Wilcox gave money to provide arms: I asked, for what? he said, it was to bring the king to submission to his people; and then he added, he admired that Rowley did not remember how easily his father's head came to the block; and he doubted not but that would be the end of him too.

L. C. J. He spake of several times, you know.

Coll. I do not know one word of it, nor can I distinguish the times: But, Mr. Smith, the last discourse, you say, about Oxford business was by the ditch-side.

Serj. *Jeff.* The discourse about bringing the king to submission, was in the way as you went to dinner.

Smith. The last discourse, when you returned from Oxford, was by the ditch-side; but both before and after you spake to me at that place about this design of bringing the king to submission.

Coll. You said, it was at Wilcox's at dinner.

Serj. *Jeff.* You mistook him then.

Coll. Nay, sir George, you took him not right.

Serj. *Jeff.* I have taken him right, I assure you, and you shall see it by and by.

Coll. He is the falsest man that ever spoke with a tongue.

Att. Gen. Swear Bryan Haynes. (Which was done.) Tell my lord and the jury whether you know this gentleman, what converse you had with him, and what discourse he hath had with you. Apply yourself to Mr. Colledge's business only.

Haynes. I suppose he will not deny but that he knows me very well; I have been acquainted with him ever since March last, before the sitting of the parliament at Oxford. My lord, there was a warrant against me for High-Treason, and I made my application to Mr. Colledge, and desired him to go to a person of honour in England, and ask his advice, whether I might supersede the warrant by putting in bail, and carry the supersedeas in my pocket: Mr. Colledge told me, he would go to this person of honour, for he would do nothing of his own head; and he bid me come to him the next day. My lord, I came to Mr. Colledge the very next day, and I met him at his house, and I asked him what was the result, and what advice he had from that person of quality: He bid me be of good cheer, that the parliament would be, and sit at Oxford soon; that I should not value the king a pin; for, said he, the king is in a worse condition than you or I; for you shall see, said he, he shall be called to an account for all his actions.

Serj. *Jeff.* Who should?

Haynes. The king; for all the world may see, says he, that he does resolve to bring in arbitrary power, and popery: and, said he, unless he will let the parliament sit at Oxford, since he hath called them together, and put the people to charges in choosing of them, and them in coming down, we will seize him at

Oxford, and bring him to the block, as we did the logger-head his father: the parliament shall sit at Guild-Hall, and adjust the grievances of the subject, and of the nation: and you shall see, said he, that no king of his race shall ever reign in England after him.

L. C. J. Where was this he said so?

Haynes. At his own house I met him, he and I did walk all along from his own house, over the bridge that is against Bridewell, and so went all along till we came to the Hercules Pillars, and we had some discourse there; we went up one pair of stairs and called for some beef; and all this discourse was in that very place of the Hercules Pillars.

Serj. *Holloway.* Do you know any thing of any arms he had, and for what?

Haynes. But, Sir, said I to Mr. Colledge, how can this be done, it is a thing impossible: you pretend, you say, to the duke of Monmouth, that he is a fine prince, and stands up for the Protestant interest. Alas, said he, we make an idol of him to adumbrate our actions, for fear we should be discovered. do you think the wise people of England shall ever make a bastard upon record king of England? No, said he, for though we praise his actions, yet we cannot endure him, because he is against his own father. But, said he, further, unless the king do expel from his counsel the earl of Clarendon, cunning Lory Hyde, the earl of Halifax, that great turn-coat rogue, that was before so much against the papists, a rascal, we shall see him hanged, and all the Tory counsellors, except the king do it, we will make England too hot for him.

Coll. Who did I say this to? To you?

Haynes. Yes, to me.

Coll. Pray, how could this be possible?

Haynes. Yes, you knew my condition; and I intimated to you at that time, that I was as much for treason and villany as you: but then said I to him, how can this be done? Here you have neither officers, nor men of experience, nor men of knowledge; nor you have no ammunition, sea-port towns, nor any ships. And besides, the king, said I, hath a great party in the land, and the duke of York likewise; and for all the men of estates, and the ancient gentlemen, they will not be disturbed, and quit their ease for a civil war. Oh, says he, you are mistaken, for we have in the city 1,500 barrels of powder, and we have 100,000 men ready at an hour's warning; and we have ordered every thing in a due method against the sitting of the parliament at Oxford; and you shall see England the most glorious nation in the world, when we have cut off that beastly fellow Rowley; and speaking of the king, he said, he came of the race of buggerers, for his grandfather king James buggered the old duke of Buckingham; and he called him captain, and sometimes the king, and sometimes Rowley.

Serj. *Jeff.* This was pure Protestant discourse, upon my word.

Haynes. Then he railed at Judge Pemberton; and, said he, let him try Fitzharris if he dare; I shall see him go to Tyburn for it, I hope, a turn-coat rogue; he was for the Plot whilst he was puisne judge, but now he is chief justice, he is the greatest rogue in the world. He is like one of the pensioners in the Long Parliament. So one day I went along with Mrs. Fitzharris, and Mr. Ivy, and he sent a man to me, and desired me to come to the Hog in Armour; thither we came and met him, and went to his lodgings, and there we dined. Then they made some persons of honour believe, that I was a person so and so qualified, and was baneful of the Plot; and he would put me upon charging the king with the firing of London, and the murder of sir Edmundbury Godfrey; and, said he, such and such Lords shall live and die by you; and besides, said he, you need not fear, England shall espouse your cause. But, said I, the law is like a spider's web; that catches the little flies, but the great flies run through the net, and make their escape; so it is with these lords, they put you and me on the danger of acting; and when they got off by interest, a jury of 12 men will hang us by the neck, and so I should perish, whilst others triumphed, and only be a martyr for the fanatics. So in discourse we were talking of the libel of Fitzharris; the devil take me, said he, every individual word is as true as God is in Heaven; and, said he, if you do not join with Fitzharris in his evidence, and charge the king home, you are the basest fellow in the world, for he makes you slaves and beggars, and would make all the world so; and it is a kind of charity to charge him home, that we may be rid of such a tyrant.

Serj. *Jeff.* Mr. Colledge, if you will ask him any questions, you may.

Coll. Certainly, my lord, the thing speaks it; he is not to be talked withal; is it probable I should talk to an Irishman that does not understand sense?

Haynes. It is better to be an honest Irishman, than an English rogue.

Serj. *Jeff.* He does it but to put you in a heat, do not be passionate with him.

Haynes. No, I am not, I thank God, he hath not put me into a heat.

Coll. Where was this discourse about superseding your warrant?—*Haynes.* At London.

Coll. When?

Haynes. It was before the parliament sat at Oxon.

Coll. How long?

Haynes. I cannot tell positively to an hour or a day.

Coll. What month, as near as you can?

Haynes. It was in the month of March.

Coll. Had you ever seen me before?

Haynes Can you deny that?

Coll. I ask you whether you have or no?

Haynes. Yes, I have seen you in the coffee-houses bawling against the government.

L. C. J. Were you an intimate acquaintance of his before March last?

Haynes. No intimate acquaintance.

Coll. Then this is the first time you discoursed with me.

Haynes. Oh, no, my lord. One and I fell out at the Queen's-Head tavern at Temple-Bar, and he set me upon the business, and John Macnamarra and the others; and truly I did the business for him: for we fell out and did box, and our swords were taken from us, and I went to John Macnamarra, and told him, yonder is such a man at such a place, now you may seize upon him.

Coll. What man was that?

Haynes. One Richard Poure.

Coll. He belonged to my lord Tyrone, I think, there were warrants to take him. Do you say I set you upon that?

Haynes. Yes, you were with me the night before, and capt. Brown, and they gave us a signal, a blue ribband, to distinguish that we were Protestants, from the bishops men.

L. C. J. When were you to make use of it?

Haynes. When the king was seized.

Serj. *Jeff.* Well, go on, have you any more?

Haynes. But, my lord, further, after he came from Oxon I met him; and, said I, where are now all your cracks and brags? Now you see the king hath made a fool of you; now you know not what you would have done. Says he, what would you have us to do? We have not done with him yet; for, said he, no servant, no man living did know whether he would dissolve the parliament that day. I was that very nick of time at the Lords' House, and there was a man came in with a gown under his arm, and every one looked upon him to be a taylor, and no body did suspect, no, not his intimatest friends, except it were Fitzgerald, that he would dissolve the parliament that day; but presently he puts on his robes, and sends away for the House of Commons; and when he had dissolved them, before ever the House could get down, he took coach and went away, otherwise the parliament had been too hard for him; for there was never a parliament-man but had divers armed men to wait on him, and I had my blunderbuss and my man to wait upon me. But well, said he, there is a God above that will rule all.

Att. Gen. Call Mr. Turbervile.

Coll. Hold, Sir, I desire to ask him some questions. You say, the first time that I saw you, you had this discourse with me?

Haynes. Do not use tautologies; it is not the first time I have been examined, I know how to speak as well as you.

Coll. Answer my questions, Sir.

Haynes. You know it was after I had made affidavit before the Recorder of London, a copy of which was carried to that nobleman; and you came from him and returned me his thanks, and told me it was the best service I could do him. I would not trouble the Court with circumstantial things: and you told me I should be gratified not only in my own property, but a reward for me and my heirs for ever.

Att. Gen. For what?

Haynes. I made affidavit before the Recorder of London.

Coll. About what?

Haynes. Concerning one Fitz-gerald.

Att. Gen. Is this to this matter?

Haynes. No, nothing at all.

L. C. J. Let him ask any questions what he will.

Coll. I ask when it was the first time you were acquainted with me, so much as to know me well?

Haynes. As to the first time of intimacy, here is Macnamarra will take his corporal oath that I was as well acquainted with him as any one in the world.

Coll. Pray answer me, Sir, when was the first time I talked to you?

Haynes. The first intimate acquaintance we had, was when you put me upon the design about Fitz-gerald.

Coll. Pray, Sir, you go too fast already, as you are still galloping; where was this discourse about his majesty?

Haynes. I told you before.

Coll. Where was it?

Haynes. I went to you after the affidavit was made, and told you there was a warrant out after me, and desired you to go to that nobleman and desire his advice what I might do, or whether I might supersede the warrant. You told me you could do nothing without advice, and you would go and advise with that nobleman.

Coll. My lord, here is Mr. Turbervile come in, they will over-hear one another; pray let me have fair play for my life. (Whereupon Turbervile withdrew.)

L. C. J. Cannot you answer him? When was the first time you came acquainted with him?

Serj. *Jeff.* When was the first discourse you had with him?—*Haynes.* In April last.

Coll. You say it was before the sitting of the parliament, and that was in March?

Haynes. I meant in March.

Coll. So indeed you said at first.

Serj. *Jeff.* He never did say the day of the month, nor the month neither.

Mr. *Jones.* How long was it before the sitting of the parliament?

Haynes. Mr. Jones, truly I do not remember precisely how long it was before the sitting of the parliament; but I am sure it was before.

Serj. *Jeff.* I did take it that he said it was before the sitting of the parliament, and now he says in the month of March. Pray when he talked to you, did not he tell you of the sitting of the parliament, and that they would stand by you?

Coll. He hath said it already, you need not direct him, sir George, he goes fast enough. But you say, Sir, the first time I was ever acquainted with you, was in March; then gentlemen, consider, whether it be probable that at that time I should discourse to him after this manner.

L. C. J. No, I did tell you what he says;

he said the first time he was intimately acquainted with you, was in March; he said he had before seen you in coffee-houses, and he is sure it was before the sitting of the parliament; for he tells you the discourse you had, and by that discourse it appears, it related to a parliament that was afterwards to sit. And then to give you a more particular circumstance, he says, that you put him upon the making the affidavit about Fitz-gerald, and so you came acquainted.

Haynes. Ask Mr. Attorney. My lord, that day he was taken and carried to White-hall before the secretary of state, he said, I do not know who it should be that should accuse me, I believe it is Ivy; as for Haynes, he was taken the other day, he was an honest man.

Coll. You say I desired you to make an affidavit; was it after that, or before I had that discourse with you?

Haynes. It was after: for I came and desired you to go to such a person of quality, and you went to him and advised with him; and then the next morning such discourse as I told your lordship and the whole Court of, he told me.

Coll. Did I speak these treasonable words after the affidavit was made?

Haynes. You said I must make such an affidavit concerning Fitz-gerald.

Coll. But was this treasonable discourse before you made the affidavit, or after?

Haynes. After the affidavit made, you told me this: when I came to his house, and from thence we went to the Hercules Pillars.

Sol. Gen. Will you ask him any more questions, Mr Colledge?

Coll. Did you ever speak with me in your life before Macnamara did call me out of the coffee-house to go along with you, where you would discover a design against my lord Shaftesbury's life?

Haynes. I told you I never had any intimate acquaintance with you in my life before, nor did I ever speak with you before.

Coll. When was that discourse, I ask you once again?

Haynes. After the affidavit made.

Coll. That night?

Haynes. Within a week or thereabouts after the affidavit made

Att. Gen. Call Mr. Edward Turbervile. But Mr. Haynes, I would ask you one question. Did he deliver you any ribband as a mark of distinction?

Haynes. Yes, here it is. (And it was shewn to the Court.)

Then Mr. *Turbervile* was sworn.

Serj. *Jeff.* Pray Mr. Turbervile, will you tell my lord and the jury what discourse you had with Mr. Colledge; and where, and when?

Turbervile. When the parliament sat in Oxon about the middle of the week, I can't be positive in the day, but I think it was in the middle of the week I dined with Mr. Colledge, capt. Brown and Don Lewis, clerk of Derby-house, at the Chequer-Inn. After dinner Don Lewis went out about some business, and captain Brown went to sleep, Mr. Colledge and I fell to talking of the times, and I was observing, I thought the parliament was not a long-lived parliament. Said he, There is no good to be expected from the king; for he and all his family are papists, and have ever been such, you know it, Sir.

Serj. *Jeff.* Nay, don't apply to him.

Turb. Said I, the king will offer something or other by way of surprise to the parliament. Said he, I would he would begin; but if he do not, we will begin with him, and seize him; for there are several brave fellows about this town, that will secure him till we have those terms that we expect from him.

L. C. J. Where was this?

Turb. At the Chequer-Inn.

L. C. J. What said he further?

Turb. He said he had got a case of pistols, and a very good sword, and a velvet cap; and I can't be positive he had armour on, but I believe he had.

Att. Gen. Did he tell you he came down for that purpose to seize the king?

Turb. Yes, and he gave me a piece of blue ribband to put in my hat. He had a great quantity of it.

Att. Gen. What was that for?

Turb. To be a distinction if there should be any disturbance when the thing should be done.

Coll. What thing done?

Turb. I know nothing but of your telling me of it.

Coll. Where was this?

Turb. At the Chequer-Inn in Oxon, Mr. Colledge. You talk much and can't remember all you say.

Att Gen. What did he discourse to you about arms and a horse?

Turb. I told him I had never an horse, and nothing but a case of pistols; he bid me I should not trouble myself, for he would get me an horse.

Coll. What to do?

Turb. To carry on your design, I know not what it was, but by your words.

Att. Gen. Tell what he said of it at the Chequer-Inn.

Turb. He said, there was a design to seize the king.

Att. Gen. Did he desire you to be one of them?

Turb. He did desire me to be ready to assist.

Just. Jo[illegible]. And how much of that ribband had he, pray?

Turb. A very great quantity, 40 or 50 yards.

Sol. Gen. Pray, Mr. Turbervile, will you give your evidence over again, and let Mr. Colledge attend to it.

Turb. When the parliament sat at Oxon, about the middle of the week, I cannot be positive to a day, I believe it was either Wednesday or Thursday, I dined with Mr. Colledge, captain Brown and Don Lewis, who was for-

merly clerk of Derby-house. Don Lewis after dinner went out, and captain Brown lay down on the bed, and Mr. Colledge and I fell a talking of the times, and I told him, I thought this parliament would be no long-lived parliament. Upon which Colledge told me, the king and all his family were papists, and there was no good to be expected from him. Then I replied, the king would perhaps surprise the parliament, or use some stratagem to bring them to his terms. Said Mr. Colledge again, I would he would begin; but if he do not, we will secure him till he comes to those terms we would have from him; for here are several brave fellows, and many more are coming down that will join with it.

Att. Gen. Did he name any one?

Turb. No indeed, he did not; he himself had a case of pistols, a sword, and I believe he might have his armour on.

Coll. Did I discourse who were to join with me?

Turb. No, Mr. Colledge, you did not name any body to me, but capt. Brown was with you.

Att. Gen. Were you examined in my lord Stafford's Trial?—*Turb.* Yes, I was.

Att. Gen. Was this gentleman sworn to your reputation there?—*Turb.* No, not to mine.

Coll. Pray, how came we to talk of such things? What occasion was there that I should talk treason of the king to you? Was there any body besides us two there?

Turb. No, capt. Brown was gone to sleep, and Lewis was gone out.

Att. Gen. It was not at dinner that you talked so, Mr. Colledge, he says.

Coll. Had they been at dinner with us there?

Turb. Yes, and we had a leg of boiled mutton to dinner.

Coll. Did you stay after dinner?

Turb. Yes, and I lay with you afterwards upon the bed.

Coll. I thought you had said capt. Brown went to sleep there.

Turb. Yes, but he was gone too, when we laid down together.

Coll. God forgive you, I can say no more, I never spoke one word of any such discourse in my life.

Att. Gen. Will you ask him any more questions?

Coll. Mr. Turbervile, when did you give in this information against me?

Turb. I gave it to the grand jury.

Coll. Not before?—*Turb.* Yes, I did.

Coll. When was it?

Turb. Truly I cannot well tell, I believe it was a day or two before I came to Oxon.

Coll. Why did you make it then, and not before?

Turb. I will tell you the occasion. Mr. Dugdale told me the grand jury of London would not find the bill: I did admire at it extremely; for I thought every one that conversed with him might be an evidence against him; he was always so very lavish against the king and the government. So then colonel Warcup came to me and took my depositions, and then I came for Oxford.

Coll. What was the reason you did not discover this treason before?

Turb. There was no reason for it, it was not necessary.

Coll. You were not agreed then.

Turb. There was no agreement in the case, there needs nothing of that, I think, but I am not obliged to give you an account of it.

Coll. God forgive you, Mr. Turbervile.

Turb. And you too, Mr Colledge.

Att. Gen. Then call sir William Jennings.

Serj. Jeff. Mr. Attorney, if you please, till he comes, I will acquaint my lord here is a gentleman that hath not yet been taken notice of, one Mr. Masters, that is pretty well known to Mr. Colledge; now he is a man, he must acknowledge, of an undoubted reputation, and I desire he may give your lordship and the jury an account what he knows of the prisoner; because he is so curious for Englishmen, we have brought him an Englishman of a very good repute.

Coll. My lord, I am charged with treason in this indictment; here are a great many things made use of that serve only to amuse the jury, I can conjecture nothing else they are brought for. I desire to know whether the pictures produced are part of the treason.

L. C. J. Stay till the evidence is given, and we will hear what you can say at large when you come to sum up your defence.

Serj. Jeff. Pray, my lord, will you be pleased to hear this gentleman: He will tell you what discourse he hath had with the prisoner.

Then Mr. *Masters* was sworn.

Masters. Mr. Colledge and I have been acquainted for a great many years; and we have often discoursed. I have told him of his being so violent as he hath been several times. But a little before the parliament at Oxford, about Christmas last, after the parliament at Westminster, at Mr. Charleton's shop the woollen-draper in Paul's Church-Yard, we were discoursing together about the government, and he was justifying of the late long parliament's actions in 1640; and he said, that parliament was as good a parliament as was ever chosen in the nation. Said I, I wonder how you have the impudence to justify their proceedings that raised the rebellion against the king, and cut off his head. Said he, They did nothing but what they had just cause for, and the parliament that sat last at Westminster was of their opinion, and so you would have seen it.

Serj. Jeff. What did he say of the parliament since?

Masters. He said the parliament that sat last at Westminster was of the same opinion that that parliament was.

Serj. Jeff. Pray afterwards what discourse had you about his colonelship?

Masters. We were talking at Guild-Hall that day the Common-Council was, the 15th of May as near as I remember, so I came to him,

How now, colonel Colledge, said I, what do you make this bustle for? You mistook me, and said, Cousin, how long have you and I been cousins? Nay, prithee said I, it is not yet come to that, to own kindred between us, I only called you colonel in jest. Marry, mock not, said he, I may be one in a little time.

Serj. *Jeff.* Have you any thing to ask Mr. Masters? You know he is your old acquaintance, you know him well.

Then Sir *William Jennings* was sworn.

Just. *Jones.* What is that you know concerning Mr. Colledge at Oxford, Sir?

Sir *W. Jennings.* My lord, the first time that I heard any thing of Mr. Colledge was, there was some company looking upon a picture, for I knew him not, nor never had any word of discourse with him in my life, any more than seeing him in a public coffee-house. But there was a picture looking on by 7, or 8, or 10 people, I believe more or less, and I coming crowding in my head among the rest, looked upon this picture. After the crowd was over, Mr. Colledge takes a picture out of his pocket, and said he, I will give you one of them if you will. So he gives me a picture; which picture if I could see, I could tell what it was; it was written 'Mac a Top,' and there were several figures in it. (Then the picture was shewed him.) This is one of the same that I had of him, and I had not had it long in my custody, but meeting with Justice Warcup, I shewed it him, who bid me give it him, and so I did. The next thing that I did see Mr Colledge do, was in the coffee-house, not the same day, but another time. I saw him bring in a parcel of blue ribband which was wrought, and these words eight times wrought in it, twice wrought in every quarter of a yard, 'No Popery, No Slavery.' I saw him sell to a member of parliament, as I took him to be, a yard of that ribband for two shillings, and truly I was thinking he would ask me to buy some too, and I saw that gentleman (I took him to be a parliament man) take this ribband and tie it upon his sword. As to the other thing I have to say of Mr. Colledge; that very day the parliament was dissolved, he had been in a quarrel, as he told me, with Mr. Fitzgerald; and I was standing in the School-House Yard, and he comes directly to me without my speaking to him or any thing; but he comes and tells me Mr. Fitzgerald had spit in his face; and, said he, I spit in his face again; so we went to loggerheads together, I think that was the word, or fisty cuffs. So said I, Mr. Colledge, your nose bleeds; he takes his handkerchief out of his pocket and wipes his nose, and said, I have lost the first blood in the cause, but it will not be long before more be lost.

L. C. J. Where was this?

Sir *W. Jennings.* In the school-house yard at Oxon. I never discoursed with him afterwards till I met him at London in Fleet-Street one Sunday in afternoon, and I remember captain Crescett was along with me. And when he came up to me, How now, said I; honest joiner? Says he, You call me honest joiner, some call me rogue and rascal, I have been beating some of them; so that I believe they will be aware of it. So I told captain Crescett, I never met this man but he was always in a quarrel.

Coll. Was it on a Sunday that I told you I had been beating somebody?

Sir *W. Jennings.* You told me so, Capt. Crescett was by.

Coll. I do remember I met you, but I did not tell you I had then been beating any one. But pray sir William, when I met you after the parliament was dissolved, and Fitzgerald and I had quarrelled, did I say, That I had lost the first blood in the cause, but it would not be long ere more were lost? Sir William, you are a gentleman, as for the other men, they don't care what they say, nor do I so much regard them; but you value your word and honour: These were my words, and pray will you recollect yourself before you be positive in the thing whether I did not say, I have lost the first blood for the parliament, (for it was upon my vindicating of the Commons and Dr. Oates, whom Fitzgerald had abused, and upon that the quarrel began: so I said when you met me, and told me my nose bled, I have lost the first blood for the parliament) I wish it may be the last.

Sir *W. Jennings.* Mr Colledge, if you please I will answer you as to that; I do assure you 'tis the first time that ever I came upon this occasion in my days, and I have declared it before, and do declare it now, I would rather have served the king in three engagements, than come in against you or any man upon such an occasion. But I declare to you upon the whole memory of the truth, the words were as I spoke them at first, and no parliament named or mentioned. And, my lord, moreover, I will tell you, when I did tell this story, because that Mr. Crescett is able to tell you, whether I did not relate the words within half an hour, or a little time after. Now I never had a prejudice against you in my days, nor other concern; but having told Mr. Justice Warcup this story, I am brought hither to testify it.

Coll. Sir William, I am very sorry you did not observe and remember my words then.

Sir *W. Jennings.* I must needs say, I could not imagine what the words meant when they were spoken, nor do I understand them to this day; but soon after they were spoken, I related them to justice Warcup, he being a justice of peace.

Serj *Holloway.* Gentlemen, we shall rest here, and conclude our evidence for the king at present, to hear what the prisoner says to it; only with my lord's leave, I shall explain the words to you that are in the indictment, and tell you what is meant by compassing and imagining the death of the king. The seizing the person of the king is in law a compassing and intending his death; and so it hath been adjudged in several cases, as in 1 Jacobi, my lord Cobham, and my lord Grey's case, and

several other cases; and so you may fully apprehend what the charge is, and may understand the words in the indictment, That if you are not satisfied with the general words of compassing the king's death, you may know, that the seizing his person extends to it.

Serj. *Jeff.* My lord, we have done with our evidence, now let him go on with his.

L. C. J. Now Mr. Colledge, you may say what you will for your defence, and call your witnesses that you have to produce.

Coll. My lord, I have heard the evidence that is against me, and I would desire your lordship to resolve me some questions upon it. I think the indictment is for treasonable practices, for a conspiracy; now I desire your lordship will be pleased that I may know from you and the court, whether in all this evidence given in proof against me a conspiracy is proved; or if any thing appears besides what they say I said.

L. C. J. For a conspiracy in you, if the witnesses speak truth, there is a plain proof, and of the degrees of it: first of all, by your publishing libels, and pictures to make the king odious and contemptible in the eyes of the people, and that you should be the author of some of those pictures, and they were found in your custody.

Coll. I conceive that is not proved.

L. C. J. If the witnesses say true, it is proved.

Coll. They do not produce that, they do but say it.

L. C. J. Mr. Dugdale swears, That at Oxford here, you shewed him the picture, you sung the song here, and expounded it at my lord Lovelace's, and a great many of them are found in your custody. Then that you prepared arms, that you shewed Smith the arms of your house, and having those arms, you said, you would go to Oxford, and if there should be a disturbance there, you would secure the king. And you did come to Oxford, where you hear what is said; for I observe Stephen Dugdale and Edward Turbervile speak of what was done at Oxford. John Smith and Bryan Haynes speak of what you said at London before you went to Oxford, and after you came from Oxford. Now I say, if these witnesses speak true, 'tis a strong evidence against you, both upon the statute of the 25th of Edw. the 3rd, and that of this king too. For my brother Holloway told you true, That whereas the imagining the death of the king is high-treason, by the 25th of Edw. the 3d, so a seizing of the king, and endeavour to do that, is a constructive intention of the death of the king; for kings are never prisoners, but in order to their death. And therefore it hath been held in all times, that by the statute of Edw. the 3d that was treason; but then the statute of this king, in the 13th year of his reign, is more strong; for there it says, If any man shall by any words, or malicious speaking shew the imagination of his heart, that he hath any such intention, that is treason too.

Coll. My lord, the foundation of this indictment is said to be laid here in Oxford, as I suppose; pray, my lord, here is only Mr. Dugdale and Turbervile that swear against me for what I should say in Oxon, all the rest speak to things said and done at London. Now, my lord, I desire to know whether they have proved any treasonable practices, conspiracy or design in me against the government, I would fain know that, whether there be matter here to ground an indictment upon; for the one says in one place, the other in the other, which may be distinct matters, and none of them swear facts against me, but only words.

Just. *Jones.* Yes, providing arms for yourself, and offering others arms.

Coll. That I shall make this answer to, I had only a case of pistols and a sword, which every footman and horseman had, that came from London, I think. But further, my lord, I would ask your lordship, whether there ought not to be two witnesses distinct, to swear words at one and the same time

Just. *Jones.* No, no, the resolution of the judges in my lord Stafford's Case is quite contrary.

L. C. J. Look you, it hath been often resolved, That if there be one witness that proves one fact which is an evidence of treason; and another proves another fact, which is an evidence of the same treason, though they be but single witnesses to several facts, yet they are two witnesses to an indictment of treason, that hath been often publicly resolved, particularly in the case of my lord Stafford, mentioned by my brother. And I will tell you my opinion further, If there be one witness that proves here what you said at Oxford, and another that proves what was said in London, if they be in order to the same treason, it is sufficient; for if you do conspire to commit such a treason in London, and you come with such an imagination in your heart to Oxford to complete this treason, though your design was not first formed here, I think it is enough to maintain an indictment of treason, and they are two good witnesses, though but one speak to what was done at Oxford; but I must tell you, in your case, there are two full witnesses, to that which was done at Oxford, besides sir William Jennings.

Coll. That which sir William Jennings speaks of I told you before what it was I said, It was the first blood that was shed for the parliament.

Just. *Jones.* The parliament was dissolved before that which sir William Jennings speaks of, therefore you could not say it was to defend the parliament.

Coll. Mr. Dugdale did say that I spake such and such words in the barber's shop in the Angel-Inn, there I was indeed at the time that he does speak of, and the barber was by, I do think indeed it were convenient to have him here; but I know not where he would charge me, or what it was he would charge me with,

because I never said any thing in my life that was like treason.

L. C. J. Mr. Colledge, call what witness you will.

Coll. But, my lord, pray let me ask you one question more? You take these words distinct from any matter of fact, don't you?

L. C. J. No, complicated with the fact, which was the overt-act, the coming to Oxon, with pistols to make one, if there had been any disturbance, and to seize the king.

Coll. Then, my lord, I would ask you, Whether any act of treason done at London, shall be given in evidence to prove the treason for which I am now indicted, and which was given in evidence before the grand jury, upon which the trial was grounded.

L. C. J. Any act of treason that is of the same kind. And I'll tell you that was resolved in sir Henry Vane's Case; those that gave you that paper understand it. But I speak now to your capacity, and to satisfy your question. He was indicted for levying war against the king, he conspired in Westminster, the war was levied in another county; the conspiracy upon the trial was proved in the county of Middlesex, and the war in another place, and yet it was held sufficient to maintain the indictment in the county of Middlesex.

Coll. There was a war really levied; but God be thanked, here are only bare words.

Just. *Jones.* Yes, actions too.

Coll. What actions, my lord?

Just. *Jones.* Arming yourself, and coming to Oxford.

L. C. J. Well, I told you my opinion; my brothers will speak their's, if they think otherwise.

Just. *Jones.* That is not your case neither, though I am of the same opinion with my lord; for here are two witnesses have proved plain matter of fact at Oxford; the providing arms yourself, and encouraging others to take arms———

Coll. They name no persons.

Just. *Jones.* You will have my opinion, and yet you will give me no leave to speak; I had patience to hear you: You are told there are two witnesses, Turbervile and Dugdale, that prove your providing and having of arms at Oxon, and persuading others to take arms, particularly Turbervile. He told you, he had no arms, or but a case of pistols, and he had no horse; but you told him you would provide him an horse. And then there are two other witnesses, Smith and Bryan Haynes; they do not tell you of any thing done at Oxford, but they tell you what you said in their hearing of what you had done in Oxon, and so I think, if the witnesses are to be believed, there is a very full proof against you.

Just. *Raymond.* I am of the same opinion truly, and I cannot find, but that there is proof, enough by two witnesses, Turbervile and Dugdale, of what was done at Oxford. They swear matter of fact, not words only, but actions also.

Coll. No fact, but that I had pistols and a sword, and that I should tell Mr. Turbervile I would provide him an horse, which is still but words.

Just. *Jones.* But you shall hear anon for the full conviction of you and all others, the statute of the 13th of this king read to you, and you shall there see that such words are made treason.

Coll. But I beseech your lordship to tell me, whether there must not be two witnesses to the same words at the same time.

Just. *Jones.* No, it was the resolution of all the judges in the case of my lord Stafford in the presence of the parliament, and the parliament proceeded upon it.

Serj. *Jeff.* In the same trial where Mr. Colledge was a witness.

Att. Gen. All the whole House of Commons prayed judgment upon my lord Stafford, pursuant to that resolution.

L. C. J. Come, will you call any witnesses?

Coll. My lord, I do not question but to prove this one of the hellishest conspiracies that ever was upon the face of the earth, and these the most notorious wicked men, an absolute design to destroy all the protestants of England, that have had the courage to oppose the popish plot. In which no man of my condition hath done more than I have done. I was bred a protestant, and continued so hitherto, and by the grace of God I will die so. If that they had known of these words that I should speak, and such a design that I should have before the parliament sat at Oxon, and be with me in Oxon when the parliament sat, if they had been good subjects, they ought to have had me apprehended. Turbervile came several times indeed, and dined with me. I did not bid him go out of doors, nor invited him thither; he was a man I had no disrespect for; nay, he was a man I valued, thinking he had done the nation service against the papists; that this man should hear me speak such words against his majesty, who was then in this town, and know of a dangerous design to attempt the seizing his person, or that I should discover a great party that were ready to do it, I think there is scarce any man of reason, but will say, if this were really done and spoken by me, neither of them would or ought to have concealed it, but discover it; none of them has ever charged me with any such thing, they have been in my company since. I never had any correspondence with any of them but Dugdale; then pray consider how improbable it is, that I should talk of such things to papists, priests, and Irishmen, who have broke their faith with their own party, that faith which they gave under the penalty of damnation; men that have been concerned in plots and treasons, to murder and cut the throats of protestants, that I should be such a madman to trust these people, when I could receive no manner of obligation from them, nor could give any trust to them, they having before broke their faith; especially considering I

could lay no such oaths and obligations upon them, who was a protestant; then it is the greatest nonsense, to believe that I would say these things before persons whom I could never hope would conceal my treasons, having discovered their own. If they speak truth concerning the general Popish Plot, that could be no obligation upon me to trust them with another; and they cannot say, that they ever obliged me in any respect. My lord, I thank God, I have had some acquaintance in the world, and have been concerned with some persons of honour, noblemen, and parliament men, that I know are as good subjects as any his majesty has; these never found me a fool, nor a rascal, so great a knave as to have any such thoughts in my heart, nor so great a madman, or so foolish, as to go to discover them to papists, priests, and Irishmen, to men of their condition, that were ready to starve for bread. As for Haynes and Smith that run so fast through all their evidence, the first time that ever I set my eyes on Haynes, was in the coffee-house that he speaks of; Macnamarra comes in, and he desires me to go out with him, and I should hear the greatest discovery of a piece of villainy against my lord Shaftesbury's life, that ever I heard in my life. This captain Brown, who is now dead, a man that I had known but a month before (I think it was in March last when this was) could testify for me; for I came to him, Captain, said I, here is a discovery offered to be made to me, of a design to take away my lord Shaftesbury's life. Macnamarra asks me to go to the Hercules-Pillars, I went along with him, and took capt. Brown with us. Afterwards he fell sick in April, and is now dead, so I lost a main evidence in the case. He was the only man that was by at the time; God knows my heart, I speak nothing but the truth, I took him with me; Haynes began to discover to us, that Fitz-gerald had employed him to fetch over Macnamarra, and if he would come in and swear against my lord of Shaftesbury, which was his design, it would not be long ere his head were taken off, and he said, he had given in a paper of High-Treason against my lord of Shaftesbury. I asked what it was? He told me, that my lord should tell Fitz-gerald, that he had a design to bring this kingdom to a Commonwealth, and to root out the family of the Stuarts. This he said Fitz-gerald had given in, in a paper, under his own hands; and I think he said, he had sworn it, and sent Haynes to fetch Macnamarra to swear against my lord the same things too. I writ down all the heads of the discourse, which capt. Brown heard as well as I. After he had said it, he desired us to conceal it. Sir, said I, You are a stranger to me, and these are great and strange things that you do tell us; Macnamarra, and Brown, and Ivy, and others were there, which (if they were honest men) they would come and testify. I thought them honest men, and that they had none of those wicked designs in their hearts, that now I find they have. So says Haynes, I do not know this man, meaning me: Macnamarra told him, I was an honest man, he might lay his life in my hands. After he had spoken all this, he desired us to conceal it: Said he, I will not only discover this, but a great deal more of their rogueries, that I know very well. Said I to him again, I will not conceal it, nor do you no wrong; for if this be true, my lord Shaftesbury shall know it to night: for where there is a design to take away a peer of the realm, I will not conceal it; but if it be false, and you have said more than comes to your share, recant it again, and we will take no notice of it, only say you are a knave for speaking of it; he swore, Damn him, it was all true, that, and a great deal more, which he said he knew, about seizing and destroying the parliament at Oxon, about an army in the North that was to be raised about the time of the sitting of the parliament at Oxon, of a French army that was to land in Ireland at the same time, that the Duke of York was to be at the head of them, and the intention was to destroy all the Protestants. Upon this, I was resolved, if I lived, to come along with the parliament, and if there was any such design, I was resolved to live and die with them; but I had no more than common arms, a sword and a case of pistols; my cap was a velvet cap, and nothing else. My lord, I had the honour to be sent for, when the parliament sat last at Westminster, the sessions in October, it was an honourable occasion, and I thank these worthy gentlemen that sent to me, for the honour of it; there I began to be popular as to my name; for from that time they began to call me the Protestant Joiner, because the parliament had entrusted me. My lord Grey was pleased to send his footman for me to the Crown Tavern, behind the Exchange, where there were several worthy lords, peers of the realm, and 100 of the Commons, that had dined there that day, it was the day before they sat; after they had dined I came to them, and the duke of Monmouth told me, they had heard a good report of me, that I was an honest man, that understood building, and they did confide in me to search under the parliament-house; they did not really know of any design, but they would not be secure, there might be some tricks played them by the Papists; though we are not afraid of them, said the duke, yet we think fit to employ you to search under the houses, and thereabouts, whether you can find any such practices. So accordingly, my lord, I did go; my lord Lovelace was one of the honourable lords and my lord Herbert that went with me, and some of the gentlemen of the House of Commons; and those worthy Protestant lords were pleased to thank me for my service, and did believe I was active and zealous to find out and discover the bottom of the Popish Plot, so far as it came legally in my way to do it. My lord, upon this occasion there was a great kindness from them to me, and I had upon all occasions testimonies of it; and this very man who swears treasons against me (which God Almighty knows is all false)

did swear in his affidavit before sir George Treby, the Recorder of London (I did never see the affidavit, indeed I was over-night at sir George Treby's, but he was not then at leisure, but he drew it up next day, and swore it) that there was a design to destroy the parliament at Oxon, and there was not only his oath for it, but it was the general belief, that some evil was intended them. All men had cause to fear and to suspect, the Papists did bear them no good-will; and making use of their own observations, they were generally armed with a pistol, or a sword, for themselves, in case they should be attacked by the Papists. In order to this, I did come down with my lord Howard, my lord of Clare, my lord of Huntingdon, and my lord Pagett, those four worthy Protestant lords, and it was two days after the parliament was sat, that we came, and I went out of town again with my lord Lovelace, sir Tho Player, and sir Robert Clayton; and I am sure they were in so great a fear that London should be surprized and seized on by the Papists, but there was no mortal man that ever heard of the king's being seized, or thought of it, till these men come and tell me, that I had such a design, and came hither with that purpose; but, my lord, I declare, as God is my judge, I would not have it thought I speak it to save my life, were it as certainly a truth, as it is most wickedly a falsehood, that I had a design to seize the king, I know not of one man upon the face of the earth, that was to stand by me, parliament-man or other person whatsoever; and how it is possible for me to attempt that, being a single person, with only a sword and case of pistols, let any man judge. And I do declare, I know of no conspiracy or design against the king or government, I never spoke one of the treasonable words in my life, that is laid against me, nor had ever any thoughts of any such thing. God, that is my eternal judge, knows, that what I speak is true.

L. C. J. Well, Mr. Colledge, will you call your witnesses, for I must tell the jury as I did at your request concerning Mr. Attorney, that as nothing he said, so nothing you say is to be believed upon your allegation: for then no man would ever be guilty, if his own purgation by words were to be believed.

Coll. My lord, I thank God, I know my own innocency, and hope to prove it. I have a soul that must live to eternity, either in joy or misery; I act according to those principles, and I hope I have some assurance of my own salvation when I die, I would not call God to witness a lie, to save a thousand lives. My lord, this is a villainous conspiracy against me, and if it takes place against me, it may go a great way, God knows how far: this is the 17th or 18th Sham-Plot the Papists have made against the Protestants, to get over their own; but I hope, my lord, God Almighty will never suffer it. If they can make me a traitor, they will try it upon others, and so hope to sham off their own treasons; but I say, I hope God Almighty will never suffer it. My lord, I think the first witness that swore against me was Mr. Dugdale; and I must call my witnesses as I have them here; I know no person of them hardly, and this that is done for my defence was done abroad My lord, I have been kept close prisoner in the Tower, and none of them suffered to come to me, whilst the popish lords have had the liberty and privilege to talk with their friends. Here are witnesses, I hope, will prove that these are suborned men; for Macnamara did tell me presently after the parliament broke up at Oxon, and whispered it to me in the coffee-house, said he, there is a design laid to make us retract our evidence, and go over to Fitzgerald. Said I, I suppose they have been at that sport a great while. Ay, said he, they make large offers. Said I, by whom? Said he, colonel Warcup hath been at me, and tells me——

Just. Jones. Macnamarra is not produced as a witness at all.

Coll. No, but he told me this, that there was such a design, and, said he, I will get you and some other honest men; and he desired me to be by when he had something more to tell which would [illegible] his business for him, but the next news I heard of him was, he was put into Newgate.

L. C. J. Call your witnesses, Mr. Colledge, and prove what you can.

Coll. Call Mr. Hickman.

Att. Gen. My lord, I desire he may observe the same rule he desired about our witnesses; that he may call but one at a time.

Coll. Yes, yes, I will call them one by one.

L. C. J. Are not your witnesses together? send to them.

Coll. My lord, I do not know, I have not seen one since I come. This is not the first time, my lord, the Papists have designed to take away my life, though it is the first time they went about to take it away by law.

L. C. J. I know not one Papist that is a witness against you.

Coll. There is never a man of them, except sir Wm. Jennings, but what was a Papist.

Att. Gen. What say you to Mr. Masters?

Coll. Mr. Masters says nothing material, it was only a jocose discourse.

Serj. Jeff. It was very pleasant discourse, upon my word; you were as merry as when you were singing of the Rary Shew.

Just. Jones. What do you make mirth of the blackest tragedy that ever was; that horrid rebellion, and the murder of the late king?

Coll. I never justified that parliament in any such thing that they did contrary to law.

Just. Jones. He swears it.

Att. Gen. Hackman does not appear, call another.

Coll. Call William Shewin, (who appeared.)

L. C. J. Look you here friend, you are not to be sworn; but when you speak in a court of justice, you must speak as in the presence of God, and only speak what is true.

Coll. I would not have any body speak any thing for me, but what is truth.

L. C. J. Now ask him what you will.

Coll. I do not know the gentleman. But pray, Sir, will you tell what you know of these witnesses?

Shewin. Name any of them that I know, pray, Sir, I will tell you.

Coll. Do you know Bryan Haynes?

Shewin. I know there is such a man, but I have nothing to say to him.

Coll. Do you know Turbervile?

Shewin. Yes.

Coll. Pray tell what you know of him.

Shewin. My lord, I was in Turbervile's company on Thursday night last at the Golden Posts, at Charing-Cross, and there I heard him say, that if I were at Oxford I should hear strange things against Colledge, and he would lay ten to one that Mr. Bethel and Mr. Wilmore should be hanged at Christmas, and he would lead him by the gold chain along Fleet-street, and down with his breeches in the middle of the coffee-house, with a band about his neck, and a cloak.

Serj. *Jeff.* Did he say all these things against Mr. Sheriff Bethel? I assure you he is a bold man.

Coll. What do you know of Mr Smith?

Shewin. I know him by sight, but I have nothing in particular to say concerning him. I have something to say to Macnamarra, Sir, if he were here.

Coll. Do you know any thing of this conspiracy in general?

Just. *Jones.* What of your conspiracy?

Shewin. I know they did lay who should be hanged at Candlemas, who at Christmas, and who at several other times.

L. C. J. What did you hear Mr. Turbervile say?

Shewin. Those words I spake before about sheriff Bethel, and about the Amsterdam coffee-house.

Coll. Did they say what time I should be hanged? For the discourse rose about me.

Shewin. One told me that there was one that did design to be returned upon this jury, that was resolved to hang him right or wrong.

High Sheriff. My lord, I did hear there was such a one, and I left him out of the jury.

L. C. J. For Mr. Sheriff's honour, we must take notice of what he hath said. He says he heard of a man that spoke something of that nature, and therefore he left him out of the jury.

Coll. Now it is possible these witnesses were at the same sport.

Shewin. Was Mr. Peacock, Mrs. Fitzharris's maid's father, or she here, either of them witnesses against you?

Serj. *Jefferies.* No, they were not, Sir.

Coll. They did swear against me at the finding of the bill.

Serj. *Jefferies.* We have only called these witnesses, if you can say any thing against them, do.

Coll. Call Henry Hickman, (who appeared.)

Serj. *Holloway.* Where do you live, Sir?

Hickman. At Holborn-bridge.

Att. Gen. What trade are you?

Hickman. A cabinet-maker.

L. C. J. What do you ask him?

Coll. Do you know Haynes?

Hickman. Yes, very well; because he used to come to my house to a popish widow that was a lodger in my house where I live now; and this person was a prisoner at Haynes's when he was a prisoner in the Fleet. I always had a suspicion he was a priest, not that I could accuse him really of any thing, but he several times using to come to my house, I thought so of him, and discoursing with my landlady.

L. C. J. Your tenant you mean?

Hickman. Yes, my tenant. I asked her what this fellow was; said she, he is a very dangerous fellow, though he is a papist, and I am one myself, yet he is a dangerous person and he does much care what he swears against any one.

Just. *Jones.* This your tenant told you, what do you know yourself?

Hickman. Another time he came to speak with my tenant Mrs. Scot, who is now gone into Ireland; when he came to the house, he asked me, is Mrs. Scot within? Yes, said I, Mr. Haynes, she is above; and up he goes and there they locked the door and plucked out the key: so I slipt off my shoes, for I thought there might be more danger from such people than I could discover any other way. So I went up stairs, and stood at the door, and hearkened, hearing my landlady talk something to him, he raps out a great oath 'God damn 'me,' said he 'I care not what I swear, nor who I 'swear against; for it is my trade to get money 'by swearing.' Whereupon, my lord, I came down as fast as I could, and a little after I saw him go out, and as soon as my landlady came down, said I, Mrs. Scot, I desire you would provide yourself as soon as you can: I would be civil to you, and I would not put you to a nonplus, because your goods by the law will be seized for not departing according to the king's proclamation. So a while ago since this business of Haynes's swearing against my lord of Shaftesbury, I bethought myself of some other businesses I had heard: To find out the knavery I went to the Fleet, where he hath a very ill character, as well amongst the papists as the protestants. Whereupon I asked one fellow that was a kind of a porter, if he knew any thing of him; said he, go to such an one——

Serj. *Jefferies.* We must not permit this for example sake, to tell what others said.

L. C. J. Nothing is evidence, but what you know of your own knowledge; you must not tell what others said.

Hickman. This I do say, I heard him say; and there are those that can produce a letter—

Serj. *Jeff.* Bring those people, but you must speak nothing, but upon your own knowledge.

Hickman. I was at the chamber-door, and looked in at the key-hole, and he sat down at the window.

L. C. J. How long ago was it pray?

Hickman. A year and a half.

Att. Gen. You are an eves-dropper I perceive.

Hickman. I did not know what danger he might bring men into, because he was a papist. I have taken an oath to be true to the king and I will as long as I live. For this gentleman, I never beheld him till last night, in all my days; though he lived by me, I never saw him.

L. C. J. Well, call the next.

Coll. I never saw this gentleman; but you see what Haynes hath declared.

Serj. *Jefferies.* This man says, he did say so

Coll. And, for ought I perceive, he does accordingly. Call Elizabeth Oliver. (Who appeared.)

L. C. J. Mrs. Oliver, stand up. What do you ask her?

Coll. Do you know Haynes, pray; Bryan Haynes?

Mrs. *Oliver.* Yes.

Coll. Pray tell the court what you know of him.

Mrs. *Oliver.* I know him very well.

L. C. J. What do you know of him?

Oliver. He writ a letter in my father's name unknown to my father.

L. C. J. Did you see him write it?

Oliver. I saw him write it.

L. C. J. Read it. By whom is it subscribed?

Clerk. By nobody.

L. C. J. Why, how is it written in your father's name, when it is not subscribed at all?

Oliver. He writ it as from my father.

Serj. *Jefferies.* Whither did he bring it?

Oliver. He sent it into the country.

Serj. *Jefferies.* Can you write and read, mistress?—*Oliver.* Yes.

Serj. *Jefferies.* Who did he send it by?

Oliver. The carrier.

Serj. *Jefferies.* When is it dated?

Clerk. In 1677.

L. C. J. Read the letter, (Which was done.)

L. C. J. What is all this to the purpose, unless your father was here to prove it was done without his knowledge.

Oliver. My father did not write it.

L. C. J. Was your father in the Fleet then?

Oliver. Yes, my lord, he was a prisoner then?

Coll. Mrs. Oliver, do you know any thing more of him?

Oliver. I have known him a great while; I know him to be a very ill man.

Serj. *Jeff.* Must she tell you all she knows?

Att. Gen. Did you ever know him forswear himself?

Oliver. No, I do not know that.

L. C. J. Come, call another; this is nothing to the purpose.

Coll. Call Mrs. Hall. (Who appeared.) Pray, do you know Mr. Bryan Haynes?

Mrs. *Hall.* Yes, if I see him I know him very well.

Coll. What do you know of him?

Hall. He lodged at my house, and came there the day before Fitzharris was tried, and there was a great discourse about his trial, and I was enquiring of him; and I told him, I must expose my ignorance, I did not know what it was he was tried for: and said he, if you please to sit down, I will tell you: madam Portsmouth came to him, and went upon her knees, and begged of him, if he had any kindness for his majesty, that he would now shew it at this juncture; and she told him, she heard he had formerly acquaintance with one Mr. Everard abroad, and therefore desired him to go now and renew it, and endeavour to get him over; and, if he could possibly, to get over some others to make a Presbyterian Plot of it. This is true, I very well know it; as for this gentleman, I never saw his face before; but those were the words I am sure.

L. C. J. What were the words?

Hall. That they might make a Presbyterian Plot of it.

Coll. Did he say so?

Hall. He said that the duchess of Portsmouth did so.

L. C. J. What a story is this?

Coll. Did not he say, that the duchess of Portsmouth had employed him too?

Hall. No, this was about Fitzharris.

Coll. What do you know more about Haynes?

Hall. One night he had been about some business for me in law with one Mr. Woodward, an attorney at law, and when he returned I was busy in the kitchen with my maid about the house, and he came up to me; Madam, said he, this night I had a message from the king; a justice of peace met me, one brought me word, that the king had sent into Ireland to enquire into the loyalty of my family, and he hath heard, that my father was a loyal subject, but he understood strange things of me; but if I would come in, he would grant me my pardon. I told him, said he, I did not value his majesty's pardon a pin, for I had done nothing that might make me stand in need of it; but I would do any thing that might tend to the preservation of his majesty's person or honour; but to do such base things as are beneath a man, I will never do it; and he whispered me in the ear (as the accusing of several persons) and since he sent me a letter by his mother-in-law, Mrs. Wingfield, that I should not believe it, if I heard he should accuse any body; but I might be confident he had not, nor would accuse any body.

Coll. Was he to swear against the Protestants?

Hall. I did not enquire any questions; but he said, such base things he would never do as the accusing several persons.

Att. Gen. Pray, mistress, did you believe him when he told you he was so honest a man?

Hall. How do you mean, Sir?

Att. Gen. When he said he would not do those base things, did you believe him?

Hall. I never saw his face before he came

there to lodge; but I saw him to be a man that made but little conscience of what he said or swore.

Att. Gen. Did you find him a bragging man?

Hall. I had little discourse, but what he said of himself. But there is one thing more about an Intelligence: when Thompson had written something in his Intelligence concerning Bryan Haynes, he said, he would write an answer to it; and accordingly he reads it to us: he said, he was going that evening to get it put into one of the Intelligences: the words were to this purpose: "Whereas one Nathanael Thompson had falsely and maliciously accused one Bryan Haynes for speaking treasonable words; he the said Bryan Haynes doth declare, that he challenges any man to charge him with it; but he owned he had an hand, or was employed to put the Plot upon the dissenting Protestants."

L. C. J. Did he publish that in the Intelligence?

Hall. I never read it published; but he had writ it, and read it to us several times.

Att. Gen. Do you go to church, mistress?

Hall. I hope I do.

Serj. *Jeff.* To what church?

Coll. Call Mary Richards, Mrs Hall's maid. (Who stood up.)

L. C. J. What will you ask her?

Coll. Do you know this Bryan Haynes, pray?

Richards. Yes, he lodged there where I lived.

Coll. What do you know of him?

Richards. I know he writ that in the Intelligence my mistress spoke of; Thompson, in his Intelligence, accusing him of having spoken treason, he reads what he said he would put into the Intelligence, that he never spake one word of treason, and he writ it for his own vindication; that whereas Nathaniel Thompson, in his Intelligence of the 18th of June, had maliciously accused one Bryan Haynes of treasonable words; there was no such thing.

L. C. J. And that was to vindicate him, that he never did speak any treasonable words.

Richards. Yes.

L. C. J. Will you ask her any thing else?

Coll. I cannot tell what she says.

L. C. J. She says, he writ something that was in answer to Thompson's Intelligence, to vindicate himself that he never did speak any treasonable words.

Coll. But did you hear him say any thing of these words, that he was employed in a Plot against the Protestants?

Richards. I read that, in what he writ to put in the Intelligence, that he challenged any one to appear, and charge him with treason; but, said he, I own that I was employed, or had a hand in putting the Plot upon the dissenting Protestants; and he telling my mistress he had a message from the king, offering him his pardon, I asked him why he did not accept the king's pardon? Alas! said he, you do not understand what I was to do for it; I was to do such base things, so beneath a man, that I will never do them: I had 500*l.* offered me, besides the king's pardon, to do such base things as are beneath a man to do.

Coll. What were the base things he said he was to do, and would not do?

Richards. I cannot tell, he did not say to me what they were.

Att. Gen. When was this?

Richards. It was a week before he was taken.

Att. Gen. That is two months ago.

Coll. It was since the parliament sat at Oxford: but what was that he was employed to do, did he say?

Rich. Why, he said in his answer to the Intelligence, he was one that had an hand to put the Plot upon the dissenting Protestants.

Coll. Call Mrs. Wingfield. (Who appeared.)

L. C. J. What is your Christian name?

Mrs. *Wingfield.* Mary.

L. C. J. What do you ask her?

Coll. Do you know this Bryan Haynes, pray?

Wingfield. Yes, very well.

Coll. What do you know of him?

Wingfield. I know nothing of him, but he is an honest man; he married my daughter, and always carried himself like a gentleman; he scorns the thing that is unhandsome, and never did any thing that is unhandsome in his life.

Serj. *Jeff.* Pray how came you by this witness? Have you any more of them?

Coll. I never saw her before, but I believe she hath said something else in another place. Did you ever say the contrary, pray?

Wingfield. Nobody can say so; and I had done the gentleman a great deal of wrong, if I had.

Coll. Call Mr. Whaley. (Who appeared.)

L. C. J. What is your name, Sir?

Whaley. John Whaley.

Coll. Did you know Bryan Haynes?

Att. Gen. Where do you dwell, Sir?

Whaley. At the Hermitage, beyond the Tower.

Coll. I do not know you, Sir; but what do you know of him?

Whaley. I never saw you, Sir, until to-day; but that which I think I am called for is this, though it was upon Sunday that I received this same subpœna to come down hither; but about six years ago, Bryan Haynes was a prisoner in the King's-bench, and he came down to the cellar which I had taken of the marshal to sell drink in; and coming down to drink in one of the rooms of the cellar that belonged to me, he took away a tankard, and went up with it. One of the men followed him up; so I went to the marshal to complain, and told him of it; and the marshal took him from the master's side, and put him into the common side. That is all I know of him any way, directly or indirectly.

L. C. J. Why did you not indict him of it?

Whaley. I acquainted the next justice of the

peace, who was the marshal; and he put him from the master's side, into the common side.

L. C. J. He was no good justice of the peace in the mean time.

Coll. Call Mr. John Lun. (Who appeared.) Do you know Bryan Haynes, Mr. Lun?

Lun. I have seen him twice; the first time I ever saw him was, I went into the Derby Ale-House, to enquire for one Micklethwayte, a kinsman of mine, and there this Bryan Haynes was, in a little room next the ditch, near the door that goes out there, as if he was asleep, and he roused himself up; and, as I was walking there, Sir, said he, will you take part of a tankard with me (that was his expression.) With that, said I, I do not care if I do. And the first thing he began was the king's health, then the queen's then the duke of York's, then he fell very foul against the grand jury, because they had not found the bill against Colledge, who is a gentleman that I never saw before in my life but once, as I know of: and he said, my lord Shaftesbury was a little toad, but he would do his business very suddenly. Then he railed upon the parliament, and said they were a company of rogues, they would give the king no money, but he would help him to money enough out of the fanatics estates. And he said, they would damn their souls to the devil before their Catholic cause should sink.

Serj. *Holloway.* When was this?

Lun. It was three or four days after the bill was brought in Ignoramus by the Grand Jury.

Just. *Jones.* Was he alone?

Lun. Yes, he was.

Coll. Is that all you have to say?

Lun. One thing more, my lord. On Monday last I was at Uxbridge, and a gentleman sent his man on purpose to let me know I must go to Colebrook, and stay till they came thither. When I came there, I met Bryan Haynes at the Crown kitchen window, and he was stirring a glass of brandy, and sweetening it with sugar; said he, Sir, will you drink? Here is the king's health to you: So I drank, and asked him how he did. Do you know me, Sir, said he? Yes, said I, I drank with you once. Says he, you have a good memory. So then a pint of sack was called for, and after that another, and then came down Mrs. Peacock; and being very fine, all in her flowered silks, I asked what gentlewoman that was? Said he, it is Mrs. Fitzharris. No, says I, it is not; they say she is gone. But said he, it is her maid; and Sheriff Bethel is to marry her: As I have a soul to save, I tell you nothing but what is truth. Thereupon, said I, Sheriff Bethel is able to maintain her, he hath a good estate: But, said he, it shall be the king's ere long.

Coll. So that here is a plain design against all the protestants.

Lun. So with that, my lord, if it please your honour, I clapped my groat down at the bar, and went out of the room. Nay said he, let us have one health more; and so he had his tankard, and I had mine.

Haynes. I humbly desire you to call for Mr. White, the king's messenger, who was by. I never saw the man before he was at Uxbridge; and asking Mr. White who he was? said he, his name is Lun, he was my prisoner two years.

L. C. J. What say you to the discourse he talks of at Fleet-Bridge?

Haynes. My lord, I am upon my oath, and I never saw him in my life before I saw him at Uxbridge.

Lun. I will take my Sacrament upon it, that what I have averred is true.

Serj. *Jeff.* I suppose you are both known, and then your credit will be left to the jury.

Att. Gen. There is Mr. White; pray swear him. (Which was done.)

L. C. J. Do you remember that Haynes asked who Mr. Lun was?

White. It was at the bar of the Crown-Inn at Uxbridge; and I being there, Mr. Lun came into the yard, and I knowing Mr. Lun, asked him how he did; he said he was glad to see me, and he called for a pint of sack to make me drink. Haynes stood by, and he asked who he was, and I told him; and we drank the king's health; but for any thing of those words that were spoken there, Sir, I did not hear one word of them; but he thanked me for my civility when I summoned him up to the court; and seeing Mr. Haynes by, he asked who he was?

Serj. *Jeff.* And you take it upon your oath, that he asked who Haynes was?

White. Yes, I do.

Serj. *Jeff.* Pray, did you hear any discourse that time, as if there had been a meeting upon Fleet-Bridge?

White. Not one word of that.

Lun. I will take the sacrament upon it, what I say is true.

Serj. *Jeff.* We know you, Mr. Lun; we only ask questions about you, that the jury may know you too, as well as we. We remember what once you swore about an army.

Coll. I don't know him.

Lun. I don't come here to give evidence of any thing but the truth; I was never upon my knees before the parliament for any thing.

Serj. *Jeff.* Nor I neither for much; but yet once you were, when you cried, 'Scatter them, 'good Lord.'

Coll. Call Mr. Broadgate.

L. C. J. What is your Christian name, Sir?

Broadgate. Jeremiah.

L. C. J. What do you ask him?

Broadg. My lord, I am a stranger to the prisoner at the bar; what I have to say is concerning Mr. Turbervile, whom I met one day, and he asked me how I did? Said he, I owe you a little money, but I will pay you in a short time; but if you will go to drink a glass of ale. No, said I, I am in haste, and do not care for going to drink. Said he, you shall go; so away we went, and when we were sat, said he, When did you see Turbervile, that was my lord Powis's butler; said he, he was a great

rogue to me, and when he stood up for the nation's good, he vilified my evidence, and afterwards he came to me with Dr. ——— to beg my pardon; but I would not forgive him for the whole world. And, speaking of the king's evidence, said he, the king's evidence are looked upon as nothing, as poor inconsiderable mean fellows, and their salaries are lessened; and, said he, I have had the greatest proffers from court of preferment and rewards, if I would go from what I have said, and come upon the contrary; and he repeated it, yes, upon the faith of a man, and from the highest: But said he, I have a soul and a body, a body for a time, but my soul for eternity, and I cannot go from it. He went over it again; I might have what I would, if I would go from what I have said, and come upon the contrary.

Att. Gen. But he does not go from any thing of what he hath said.

Coll. Did he say what he was offered, and by whom?

Broadg. He said, he had very great offers from the court if he would disown the plot, and go upon the contrary.

L. C. J. But he does not disown it?

Just. *Jones.* Nay, he had a soul to save, and could not go from it.

Serj. *Jeff.* You talk of the contrary, and the contrary; what did he mean by that? What plot should he disown?

Broadg. The popish plot.

L. C. J. He does not disown it, nor never did disown it.

Coll. He would make a presbyterian plot of it now, for he cannot say I am in the popish plot. Sir, do you know any thing more of him? Or did he name me? Or that he was to swear against me, or any Protestant?

Broadg. No, only he said the king's evidence were vilified, and looked upon as poor inconsiderable fellows; but it seemed, if he would go on the other side he might have great preferments and rewards.

L. C. J. You make a wrong comment upon it, Mr. Colledge; it was if he would retract his evidence, and disown the plot.

Coll. I leave it to your lordship and the jury to make the sense of it.

Broadg. I saw Mr. Turbervile since I came hither, and he asked, Are you come, Mr. Broadgate, to give evidence against me? Says I, I am come to declare truth, and nothing but the truth.

Serjeant *Jeff.* You might have staid at home for any thing material that you do evidence.

Coll. Call Mr. Zeal. (Who appeared.)

L. C. J. What is your christian name, Sir?

Zeal. John.

L. C. J. What would you ask him?

Serjeant *Holloway.* Where do you dwell, Sir?—*Zeal.* In London.

Serj. *Jeff.* Whereabouts?

Zeal. In Fettter-lane.

Serj. *Holloway.* What countryman are you Sir?—*Zeal.* Somersetshire.

Att. Gen. Whereabouts in Somersetshire were you born?

Zeal. By sir William Portman's, within six miles of him.

Serj. *Jeff.* What trade, Sir?

Zeal. No trade.

Serj. *Jeff.* Have you any estate?

Zeal. My father has. I was bred to wait upon a person of quality.

Coll. Do you know Turbervile, Sir?

Zeal. Yes, Sir, I do.

Coll. What do you know of him?

Zeal. Sir, I know nothing but what Mr. Ivy told me with his own mouth.

L. C. J. Do you know any thing of your own knowledge?

Att. Gen. Has Mr. Turbervile told you any thing?

Zeal. Not concerning Mr. Colledge he has not.

Coll. Ivy was amongst them.

Zeal. Yes, my lord, he was the first that swore this presbyterian plot.

L. C. J. We know of no presbyterian plot.

Coll. Can you say any thing of your own knowledge concerning Turbervile?

Zeal. Nothing but what Mr. Ivy told me.

Serj. *Jeff.* That is not of your own knowledge, and so it is nothing, for he is not produced in this cause.

Coll. Pray, my lord, give me leave to call Mr. Ivy.

Serj. *Jeff.* Do, if you will. (He stood up.)

Coll. What was that you heard Turbervile say of me, or of any presbyterian plot?

Ivy. I never heard him say any thing of a presbyterian plot in my life.

Coll. Did not you tell Zeal of such a thing?

Ivy. No, I never did.

Coll. Hark you, Mr. Ivy, you have sworn against me, have you not?

Ivy. What I have sworn against you or any other person, is true.

Coll. What have you sworn against me?

Ivy. I am not bound to answer you.

Coll. Did not you call me out with Macnamarra and Haynes, to the Hercules Pillars?

L. C. J. Look you, Mr. Colledge, I will tell you something for law, and to set you right; whatsoever witnesses you call, you call them as witnesses to testify the truth for you; and if you ask them any questions, you must take what they have said as truth: Therefore you must not think to ask him any questions, and afterward call another witness to disprove your own witness.

Coll. I ask him, was he the first time with us, when I was called out of the coffee-house to hear Haynes's discovery?

L. C. J. Let him answer you if he will; but you must not afterwards go to disprove him.

Coll. If he were sworn against me, I would not ask him any questions, for he is among them.

L. C. J. Ask him what you will.

Coll. I desire not if he have sworn against

me, for truly I cannot expect a good answer from him; but he was by when Haynes made his discovery.

L. C. J. Will you ask him any questions?

Coll. I ask whether he hath given any evidence against me any where?

Ivy. I am not bound to answer you.

L. C. J. Tell him if you have.

Ivy. Yes, my lord, I have.

Coll. Then I think he is no good witness for me, when he hath sworn against me.

Ivy. I have sworn against him and others. You know that you and I have had a great many intrigues about this business in hand, and how we dealt with Mr. Haynes.

L. C. J. Look you, he does not call you for a witness for him, you can testify nothing, and so you must be quiet.

Coll. Call Mr. Lewes. (Who appeared.)

L. C. J. What is your christian name?

Lewes. William.

Coll. Pray, Mr. Lewes, what do you know about Turbervile?

Lewes. I know nothing at all I assure you of him that is ill.

Coll. Do you know any thing concerning any of the evidence that hath been given here?

Lewes. If I knew any thing relating to you, I would declare it; but I know something of Mr. Ivy; it has no relation to you, as I conceive, but against my lord of Shaftesbury.

L. C. J. You would call Ivy for a witness, and now you call one against him; and that I told you, you must not do; but Ivy is not at all in this case.

Coll. Do you know any thing of the rest of them, Haynes, or Smith, or Dugdale?

Lewes. No more than what Mr Zeal told me was told him.

Coll. Do you know any thing of a presbyterian plot?

Lewes. If the court please to hear me, I will tell my knowledge of that; but I know nothing that affects him in the least, only that which concerns my lord Shaftesbury.

L. C. J. That is nothing to the purpose, call another.

Lewes. There was not, to my knowledge, a word mentioned of your name: I will do you all the justice I can; if I knew any thing concerning you, I would be sure to relate it.

Coll. I cannot say who can, or who cannot; I am a stranger to all of it.

L. C. J. Well, call your next witness.

Coll. My lord, there was a petition presented to the common council of London, wherein they set out, that they were tampered withal about a Plot against the Protestants.

L. C. J. A petition, from whom?

Coll. I cannot tell from whom; from of these witnesses.

L. C. J. Who preferred and signed it?

Coll. Mr. Turbervile was one. Pray call Dr. Oates.

L. C. J. The prisoner calls upon you, Mr. Oates. What would you ask him, Mr. Colledge?

Coll. Where is the petition to the common council, doctor?

Oates. I have it in my hand.

L. C. J. By whom was it presented?

Oates. It was given by Mr. Turbervile and Mr. Macnamarra, to Mr. Wilmore.

L. C. J. Was you present when it was delivered?

Oates. Mr. Wilmore did deliver it to me before he was apprehended; for, being to come down as a witness, he was taken up and committed to prison.

L. C. J. Whose hands are to it?

Oates. I know Mr. Turbervile's hand, he will not disown it.

Clerk reads. It is subscribed Edward Turbervile, John Macnamarra.

L. C. J. Look you, Mr. Colledge, what word is there in all this petition that is a contradiction to what they have said now?

Coll. I did not hear it, my lord.

L. C. J. They say they are constant witnesses for the king against the papists; and they have been tempted to unsay what they have said: How does that contradict what they say now?

Coll. I suppose they say they have been tempted to turn the plot upon other people, and to make a plot upon the Protestants.

L. C. J. They have been tempted, they say, by the papists, to unsay what they have said; but the jury heard it read, and will give it its due weight. Will you ask Mr. Oates any questions?

Coll. What do you know of Mr. Turbervile?

Oates. As to Turbervile, my lord, a little before the witnesses were sworn at the Old-Bailey I met with Mr. Turbervile, I was in a coach, but seeing Mr. Turbervile, I stept out of the coach and spoke with him, for, hearing that he was a witness, I did ask him, whether he was a witness or no against Colledge? Mr. Turbervile said, he would break any one's head that should say so against him; for he neither was a witness, nor could give any evidence against him. So after he came from Oxon, I met with Mr. Turbervile again; and hearing he had been there, I asked him if he had any thing against Colledge? He said, yes, he had been sworn before the grand jury. Said I, did not you tell me so and so? Why, said he, the protestant citizens have deserted us; and 'God damn him,' he would not starve.

L. C. J. Would he say so to you?

Oates. Yes, my lord, he said those very words.

Serj. Jeffries. It is Mr. Oates saying, it is Mr. Turbervile's oath.

Oates. Several times he did repeat it; but when I asked him what he had sworn, he said I am not bound to satisfy people's curiosities.

L. C. J. What say you to it, Mr. Turbervile?

Turb. My lord, the first part of the doctor's discourse in part is true; I met him just at my lodgings, and the doctor alighted out of his coach and spoke to me, and invited me to come

to my old friends; for he told me, they had some jealousy that I was not true to them: And he told me, if I would come to the King's Head club, I should be received with a great deal of kindness: And never afterwards did I speak with the doctor a tittle about any evidence.

L. C. J. He said, you said you would break any one's head, that said you were an evidence against Colledge; for you were not, nor could be.

Turb. There was no such thing said by me.

Att. Gen. Upon your oath, did you tell him so?

Turb. Upon my oath, I did not.

Serj. *Jefferies.* Did you tell him that other passage, when you swore you would not starve?

Turb. No, I did not.

Oates. Upon the word of a priest, what I say is true. My lord, I do say, as I am a minister, I speak it sincerely, in the presence of God, this gentleman did say, these words to me; which made me afraid of the man, and I went my ways, and never spake with him afterwards, nor durst I; for I thought he that would swear and curse after that rate, was not fit to be talked with.

L. C. J. It is very improbable that he should say so to you.

Turb. I always looked upon Dr. Oates as a very ill man, and never would converse much with him.

L. C. J. Will you ask him any thing more.

Coll. Do you know any thing of the rest, doctor?

Oates. I know nothing of Turbervile further, but that he did present this petition, wherein he says, he lays under great temptations to go on the other side, and accuse some Protestants. And truly till I heard he was an evidence at Oxon, after what he had said to me, I did not believe it.

Att. Gen. Dr. Oates, Mr. Turbervile hath not changed sides, you have; he is still an evidence for the king, you are against him.

Oates. Mr. Attorney, I am a witness for truth, against falsehood and subornation; and it can plainly be made to appear there is subornation against the Protestants. And, moreover my lord———

L. C. J. Mr. Oates, you would do well to explain yourself.

Serj. *Jefferies.* If there be any subornation relating to Mr. Turbervile, or any of the other witnesses that have now sworn against Colledge, make it out, doctor.

Oates. There is, my lord, and there will be made further to appear in time to come. To my own knowledge, as to Mr. Smith, Mr. Colledge and Mr. Smith had some provoking words passed betwixt them at Richard's Coffee-house, and Mr. Smith comes out and swears, 'God damn him, he would have Colledge's blood.' So, my lord, when I met him, said I, Mr. Smith you profess yourself to be a priest, and have stood at the altar, and now you intend to take upon you the ministry of the church of England, and these words do not become a minister of the gospel: His reply was, 'God damn the gospel.' This is truth, I speak it in the presence of God and man.

L. C. J. Can you say any thing of any of the other witnesses?

Oates. As for Mr. Dugdale, I was engaged for him for 50*l.* for last Lent-assizes, he wanted money to go down to the assizes, having paid some debts, and paid away all his money; and so I engaged for 50*l.* that he borrowed of Richard the coffee-man. After he came from Oxon, I called upon him to hasten to get his money of the Lords of the treasury, which, as near as I remember, was ordered him upon his petition, for so I heard. And that time, said he, Sir, I hear there is a great noise of my being an evidence: against whom, said I? against several Protestants, my lord Shaftsbury, and others: Said I, I never heard any thing of it. says he, there is nobody hath any cause to make any such report of me, for I call God to witness I know nothing against any Protestant in England. After that I met with Dugdale at Richard's coffee-house, and pressing him for the money, and he saying he had it not just then, but would pay it in a little time, Mr. Dugdale, said I, you have [illegible], I am afraid, against your conscience [illegible] against what you have declared to [illegible] Said he [illegible] all along of Colonel Warcup, for I could get no money else.

Att. [illegible] Mr. Oates [illegible] the [illegible] [illegible] [illegible]

Serj. *Jeffer*[illegible]s. And ye[illegible] Dr [illegible] alone in some matters. [illegible] of these witnesses [illegible]

Oates. I had be[illegible] [illegible]rhaps, and perhaps not; but yet Mr [illegible] I had always a better reputation [illegible] need their's to strengthen it.

Serj. *Jef*[illegible]*es.* Does any [illegible] speak of your reputation? I know nobody [illegible] meddle with it; but you are so tender!

Coll. Sir George, now [illegible] man is upon his life, I think you do not do well to affront his witnesses.

Serj. *Jefferies.* I do [illegible]; but now, my lord, pray give [illegible] to call our witnesses. Mr. Smith p[illegible] and up.

L. C. J. Mr. Smith, do you hear [illegible] Mr. Oates hath said?

Smith. N[illegible] Lord.

L. C. J. Then speak it again, Mr. Oates.

Oates. Yes, my lord, I will speak it to his face. He said coming out of Richard's Coffee-House, they having had some provoking words, as I understood when I came in, God damn that Colledge, I will have his blood: and, my Lord, when I did reprove him, and said to him, Mr Smith, you have been a priest, and stood at the altar, and intend to be a minister of the church of England; these words do not become a minister of the gospel; and he replied, God damn the gospel; and he went away.

L. C. J. What say you to it, Mr. Smith?

Smith. Not one word of this is true, upon my

oath. It is a wonderful thing you should say this of me; but I will sufficiently prove it against you, that you have confounded the gospel, and denied the divinity too.

Serj. *Jeff.* Mr. Dugdale, you heard what was said against you.

Oates. My lord, now Dugdale is come, I will tell you something more. There was a report given out by Mr. Dugdale's means, that Mr. Dugdale was poisoned; and in truth, my lord, it was but the Pox. And this sham passed throughout the kingdom in our Intelligences; and this I will make appear by the physician that cured him.

Serj. *Jefferies.* That is but by a third hand.

Oates. He did confess that he had an old clap, and yet he gave out he was poisoned; but now, my lord, as to what I said before of him, I was engaged for 50*l.* for Mr. Dugdale; do you own that?—*Dugd.* I do own it.

Oates. I did press upon you to hasten the payment of it.—*Dugd.* Yes, you did.

Oates. And did not you come to me and tell me there was a noise of your being an evidence? It was in time just before my lord Shaftesbury was taken up.

Dugd. I never spoke to you till you spake to me.

Oates. My lord, he came and said to me, there is a noise of my being an evidence; now I had not heard it then, but the day after I did hear it; and I did justify Mr. Dugdale, because he had said to me that he had nothing against any protestant in England. So I did stand up in vindication of him; but my lord, after he had swore at the Old Bailey, I met him again and pressed him for the money, and urged him with it, why he had sworn against Colledge, when he had told me so and so before; and he said it was all along of Colonel Warcup, for he could not get his money else; and colonel Warcup did promise he should have a place at the custom house.

Dugd. Upon the oath I have taken, and as I hope for salvation, it is not true.

Serj. *Jefferies.* Here is Dugdale's oath against Dr. Oates's saying.

Oates. Mr. Serjeant, you shall hear of this in another place.

Att. Gen. It is an unhappy thing that Dr. Oates should come in against these men that supported his evidence before.

Dugd. My lord, I say further, if any Doctor* will come forth, and say he cured me of a clap or any such thing, I will stand guilty of all that is imputed to me.

L. C. J. Mr. Colledge, will you call any other witnesses?

Coll. My lord, I think this is not fair dealing with a man for his life; because these men be upon their oaths, and deny the things again that my witnesses prove; therefore what they swear must needs be taken for truth: But if my witness comes and says such a thing upon the word of a minister, and in the presence of God, and which he is ready to maintain by an oath, sure it is not to stand for nothing, nor to be hooted out of court, because Mr. Dugdale denies it upon his oath; I do suppose he will not acknowledge it. But, my lord, I am the prisoner, and cannot be heard as a witness for myself: But God is my witness; he hath said a great deal more to me formerly; and he hath told me, when I have seen him with Warcup, and asked him why he kept company with Warcup, and others; said he, I know they are suspected men, but I must keep company with them to get my money; what, would you have me starve? And when I lent him money out of my pocket, and trusted him with my horse, I dun'd him for money and could not get it; said I, Will you pay me the 5*l.* I lent you? He put me off; said he, I shall have it, for the Attorney General hath made up his accounts, and is very kind to me. Why then, said I, why have you it not? said he, he is my friend, and I do not question the getting of it; but here is new work to be done, such work as my conscience will not serve me to do; there is more roguery, they will never have done plotting, and counterplotting; but they will make a thousand plots if they can destroy the real one.

L. C. J. Can you prove this now?

Coll. No, it was spoken to myself; and nobody was by but myself.

L. C. J. Then you should not speak it. But you asked the question whether a man may not be believed upon his word, as well as he that is upon his oath. Your witnesses are not upon their oaths, but they may be witnesses, and their weight is to be left with the Jury; they will consider how improbable it is, that these men should come, three men to one man, and all of them should speak that which would make themselves rogues and villains; and that one man of them, Smith, should say such vile words, as 'God damn him, he would have his blood;' and 'God damn the Gospel:' That Dugdale should confess he was wrought upon by Warcup to testify against his conscience; and that Turbervile should say to that purpose, he would not starve; they have sworn the contrary, and so there are all these three men's oaths against one man's affirmation; but it must be left to the jury.

Coll. There is his affirmation against what they three say. He charges every one of them, and 'tis but the single denial of every one of them to his charge.

L. C. J. 'Tis impossible they should own themselves such villains to him.

Oates. They must be so, if they will do what they have undertaken. I hope my word will be believed as soon as their oaths.

Coll. It is not to be thought, but when they

* Dr. Lower, the most noted physician then in London, proved it at the council board both by his bills, and by the apothecary, that he had been under cure in his hands for that disease; which was such a slur upon Dugdale's credit that he was never used as a witness more.

have sworn so against me, they will deny any such thing when they are charged with it.

L. C. J. Have you done with your witnesses? Or will you call any more?

Coll. What is said upon an honest man's word in the face of a court, is certainly to be believed as well as what is sworn.

L. C. J. 'Tis a testimony, that is most certain, and must be left to the Jury, they must weigh one against the other. But pray, Mr. Colledge, will you call your witnesses, for it begins to grow late?

Coll. There is Mr. Wilmore, that was a material witness for me, who was foreman of the Grand Jury, that would not find the bill upon this evidence. What he had to say I don't know, but I am informed it was very material for me.

L. C. J. It will be enough for him to clear himself, for he is charged with High-Treason, and by two witnesses too.

Coll. Call Alexander Blake.

L. C. J. What do you ask him?

Coll. Do you know John Smith?

Blake. Yes, Sir.

Coll. Pray will you tell the court what you know of John Smith.

Blake. I suppose you mean this gentleman, Mr. John Smith, gent. came to me one morning, and told me there was one Haynes under examination, and this Haynes had discovered very material things against some great persons: This passed, and within few days after I met Mr. Smith at the Exchange Coffee-house, and having saluted him, I desired him to drink a glass of wine, and so we went to the Sun-Tavern, and when we were there, I asked him, what his sense was of Haynes and his discovery? Said he, 'tis a Sham-Plot: I asked him, what he meant by that Sham-Plot: Said he, it is a Meal-Tub-Plot. This is all that I know.

L. C. J. Would you ask him any thing else?

Blake. I know nothing more.

Coll. Do you know any thing of Turbervile or Dugdale?

Blake. Sir, I have no acquaintance with him, nor desire it: But I was acquainted with this gentleman, Mr. Smith, I know him very well.

Serj. *Jeff.* You say well, stand down.

Coll. Call Mr. Samuel Smith.

L. C. J. What ask you him?

Coll. What he knows of Mr. Smith.

S. Smith. Mr. John Smith and I have had an intimacy and acquaintance several months, and since Mr. John Smith swore at the Old Bailey against Mr. Colledge, and was gone out of town, several people have talked with me concerning him; and asking me what I thought of him? I told them, I believed he was an honest man; however I would not believe otherwise till I knew a reason of it. They told me, that he had sworn against Mr. Colledge, that he was to seize the king at the parliament at Oxford, and that there was 1,500 barrels of powder, and it was to carry on a Presbyterian Plot: Said I, I will never believe it, and the rather because he hath said to me often, there was a Popish Plot, but he does not believe any Presbyterian or Protestant Plot; and, said I, further as to his giving any evidence with Irishmen, I believe it less for that, for I have heard him often say, they were a company of rogues that had done the Protestant interest more harm than ever they could do it good, and bid me have a care of coming into their company, and many other such things that Mr. Smith here knows to be true. Then, my lord, when Mr. Smith came home (for I was very impatient till he did come home, to hear every day such things said against him) I went to him to see him. Said I, Cousin Smith, I have had great confronts about you since you went away, but I hope you can't be that ill man you are represented to be, and truly I would be sorry it should be so: Pray, cousin, said I I have put every man off with this, that I would suspend my belief of you, till I had spoken with you yourself; what is the evidence you have given? They say you have sworn a Presbyterian Plot, or a Protestant Plot, a design of seizing the king at Oxon, and of so many barrels of gun-powder that were provided. Says my cousin, I did swear no such thing, nor never a word of any such thing as a Protestant Plot, or a Presbyterian Plot, and pray do not believe it of me. No, said I, I thought you could not swear any such thing, because you have said often to me, you believe there was no such thing. I do not believe it yet, said he; and as to whatsoever Colledge said, I did not believe it, for he did not believe it himself. And Mr. Smith told me after his return, that he did not know of any Protestant concerned in the Plot.

L. C. J. He does not say now it is a Protestant Plot.

S. Smith. So far from that, that he told me after his return, he did not know any Protestant concerned in the Plot.

L. C. J. Mr. Smith, thus I understand you: you say that he said to you, that he had not testified any thing of a Protestant Plot, nor did believe there was any Protestant Plot, for he did not believe what Colledge said himself: so by that discourse there seems he did not deny, but he had testified against Mr. Colledge; but he did not believe there was any Protestant Plot?

S. Smith. No, my lord, he did not deny but he had sworn against Colledge.

Just. *Jones.* Nor that what he had said against Colledge was true?

S. Smith. No, my lord, but he did not believe him, and he thought Colledge did not believe it himself.

Serj. *Jeff.* It seems Mr. Colledge thinks the whole Protestant interest concerned in him.

L. C. J. The question is, Mr. Colledge, what you had in your mind, not what was in the mind of all the Protestants.

S. Smith. This, I do say, I would not speak

more or less than the truth, he did not deny but he had heard College speak those words he swore, but he did not believe him, and I think Mr. Smith hath said that at another time before Mr. Gardner.

Coll. If he knew of no Protestant Plot, it was very unlikely that I should attempt such a thing myself.

S. Smith. My lord, I find Mr. Smith hath been very passionate and very inveterate of late against other men that he hath given me a very good report of before; and when I was talking of this, I was saying, if it be true that people say of you, a man goes in danger of his life to converse with you. Mr. Smith, said he, I do not care for all the men between Wapping and Charing-Cross, there is never a man that will forbear my company, but would do or say as much as Colledge hath done or said.

J. Smith. It is true, and I say so still.

Coll. It is a contradiction in itself, that there should be such a design, and none but myself to do it. God my righteous judge knows my innocency.

Just. *Jones.* You might say those words in hopes they would be of your party, and made so by your libels and poisonous pictures.

L. C. J. Come, call another witness.

Coll. Call Mr. Tho. Gardner. But my lord, how likely is it that I should say, that I would seize the king, when he, it seems, says, he did not believe there was one man to stand by me?

L. C. J. What say you to this gentleman?

Coll. I never saw him in my life.

Gardner. Nor I you, Sir.

Coll. I know not three of all that come here.

L. C. J. Well, will you ask him any thing?

Coll. Pray do you know Mr. Smith?

Gardner. Yes.

Coll. What do you know of him? Can you say any thing concerning this matter that is sworn against me of treason?

Gardner. My lord, that day-fortnight I think it was, Mr. S. Smith, the gentleman that was just now up before me, sent for me to the Rummer in Queen-Street, to drink a glass of wine, where when I came, I found him and Mr. J. Smith, that is here, whom they call Narrative Smith, talking very briskly concerning one Colledge, I suppose that is the gentleman, and the jury that acquitted him, and he said that two or three of the jurymen were rascals and villains; and, says he, they talk up and down the town, as if I did intend to sham the Popish Plot, and to make a Protestant Plot, which, said he, I vow to God, and I will justify it before God and all the world, that I know of no Protestant Plot, nor is there any Protestant concerned in a Plot to my knowledge, but this Colledge, and upon his trial I believe he will be made appear to be more a Papist than a Protestant: but, says Mr. Smith to him, now you are known to be a witness in this case, it will be a dangerous thing for a man to converse with you.

Coll. Will it be now known that I am a papist? No man could ever say so in this world.

Gardner. Says he, I care not what all the world says of me, and I do not value all the men from Wapping to Charing-Cross, but that man that will shun my company, will say and do as much to the king as Colledge hath done. But then I was saying, methinks it seems an improbable thing, that such a man as Colledge should seize upon the king, or provide 1,500 barrels of powder, and those other things. Upon my word, said he, with some passion, clapping his hand upon his breast, when Mr. Colledge did say it, I did not believe a word of it, and upon my faith I believe Colledge himself did not believe it when he told me so.

Coll. Do you know any thing more, Sir?

Gardner. No, indeed, Mr. Colledge.

Coll. Call Dr. Oates again.

L. C. J. Well, what say you to him?

Coll. Pray Dr. Oates, Mr. Smith charges me that I should speak some treasonable words that time that alderman Wilcox gave you a treat at the Crown tavern; you were there, and pray how long ago was it?

Oates. My lord, I heard Mr. Smith speaking of it at the Old Bailey, and if you please to take notice, it was thus: this summer was twelvemonth, or I am sure a great while before Christmas, the alderman had invited me several times to give me a treat, and I had not time, other business calling me off; but finding a time, I sent him word I would come and see him. He said he was a brewer, and troubled at home with customers, but he would give me a dinner at the Crown tavern without Temple-Bar, that was the place fixed upon; there was Mr. Smith the counsellor, who had been serviceable to me in several instances, I did get him to go along with me, and Mr. Colledge was with us, and I heard Smith swearing at the Old-Bailey that Mr. Colledge and he had discoursed from the Rainbow coffee-house where we met, and went together.

Coll. There I was invited by alderman Wilcox.

Oates. But my lord, I will tell my story, I am not to tell Mr. Smith's. Colledge did tell me he was invited; said I, you shall be welcome as far as I can make you welcome. So Colledge and I went together from the Rainbow coffee-house to the Crown tavern: now indeed, Colledge was very pleasant and merry, and as I think, the discourse between the Rainbow coffee-house and the tavern was betwixt Mr. Colledge and me; for Mr. Smith stayed somewhat behind, or walked before, I cannot tell which: when we came to the Crown tavern, we did, to divert ourselves till dinner came up, enter into a philosophical discourse with one Mr. Savage, who was formerly a Romish priest, but this Savage is since pardoned by the king, and is a member of the Church of England, and hath been professor of divinity and philosophy beyond sea. This, as I remember, was the discourse before we dined, till we went to dinner; it was concern-

ing the existence of God, whether that could be proved by natural demonstration, and whether or no the soul was immortal. My lord, after dinner, Smith went away, I did not hear the least discourse of any such thing as he speaks of, and Mr. Smith and Colledge had no discourse in my hearing from the coffee-house to the tavern; and when we were in the tavern, we did discourse about those two points. Counsellor Smith, my lord, will justify a great deal of this, and my brother too, who was with us. But when I heard Mr. Smith swear as he did about this matter at the Old Bailey, I did really, my lord, in my conscience, look upon him to be forsworn in that particular.

Serj. *Jeff.* And he does swear you are out in this.

L. C. J. Will you ask him any more questions?

Oates. If your lordship please, he speaks of Mr. Wilcox to be a man that contributes money to buy arms, powder and shot. I think, sir George Jefferies knows alderman Wilcox is a man of another employment.

Serj. *Jeff.* Sir George Jefferies does not intend to be an evidence, I assure you.

L. C. J. Do you ask him any more questions?

Oates. I do not desire sir George Jefferies to be an evidence for me, I had credit in parliaments, and sir George had disgrace in one of them.*

Serj. *Jeff.* Your servant, Doctor, you are a witty man, and a philosopher.

Coll. Call Mr. Tho. Smith.

L. C. J. What would you ask of him now?

Coll. Counsellor Smith, here is John Smith, or Narrative Smith, which you please to call him, hath charged me with speaking treason at our going to dinner at Mr. Wilcox's; I remember you were there, and I think you and I, and Dr. Oates and his brother, and Mr. Goodwin Wharton went together; I did tell Mr. Smith of it, but I did not stir a step out of the coffee-house with him, but went away before him. How long ago is it since we had that dinner?

T. Smith. My lord, if your lordship please, I do very well remember Mr. Alderman Wilcox, so they called him, did desire to give Dr. Oates a treat, with some other of his friends at the Crown tavern without Temple-Bar; but really, my lord, as to the certain time I do not remember it, but to my best remembrance, my lord, it was before Christmas last, and some time before Christmas last. And, my lord, I was there all the time; Mr. Smith was at that time somewhat a stranger to me, something I had heard of his name, and I did stay there all the while; I remember Mr. Alderman Wilcox was to go out of town that day; and truly, as to any matter of treason, or treasonable words, or any thing tending towards it, I am confident nothing was, or could be spoken, and the room was a very small room, and our company did fill it up, and the table was so big, that there was little more than for the servitors to go about; so that any man might easily hear from the one end of the room to the other. I remember there was some discourse betwixt Dr. Oates and Mr. Savage, who, I think, hath been a jesuit, and it was about some points of philosophy and divinity; but for treason, I do not remember the least of it, and I am confident Colledge said not any thing at that time; and my reason is this, I very well remember Mr. Colledge did set himself down upon one side of the table, and fell asleep, and unless he talked treason in his sleep, there could not be any such thing said, and if it had been said, it would have been heard.

Att. Gen. Mr. Smith, did you never hear Mr. Colledge speak an ill word of the king?

T. Smith. Never in my life. And if I were now to take the Sacrament upon it, I could say so.

Serj. *Jeff.* You used to converse with him, Mr. Smith, did he never say any thing like it to you?

T. Smith. Good Mr. Serjeant, you know I can take the Sacrament; pray, let us have no reflections.

Serj. *Jeff.* Who did reflect upon you? I did not reflect upon you.

Just. *Jones.* Mr. Smith, did he never deliver you any of those pictures?

T. Smith. No, Sir, he never did.

Coll. Good sir George, do not reflect upon my evidence. It seems Mr. Smith is mistaken in the time; for he says it was at Christmas; but Mr. Smith says it was some time before.

L. C. J. Mr. Smith does not say so, the certain time he cannot tell exactly; but your witnesses say it was then.

T. Smith. I do speak as much as if I were upon my oath; and I do know what an oath is, I thank God, and what it is to speak before a Court of judicature; and I know, and do speak truth as much as if I were upon my oath; and I do say I did not hear Colledge, or any one else that was in that company, at that time, speak any thing reflecting upon the king and government, or any thing tending towards it.

Just. *Jones.* Can you remember matter so distinctly, which Dr. Oates says was a year and half ago?

L. C. J. No, this summer was twelve-month.

Just. *Jones.* And can you tell so long ago, not only your own actions, but testify to all other men's actions too that were in the room?

T. Smith. I cannot tell what Dr. Oates's memory is as to the time; but I remember the place, the occasion, and the persons that were there.

Just. *Jones.* And you [illegible] upon you to have such a perfect memory [illegible] to the actions of all the persons that were in [illegible] room.

T. Smith. I do not speak of all that was done, but I say, I remember no such thing that was said, and I believe no such thing was said, and I have given you my reasons why.

* See 4 Cobb. Parl. Hist. p. 1216.

But, my lord, that which I say further for Mr. Colledge, is this; I do hear something pretended, as if he provided arms to go to Oxford. I have known him these three years, or thereabouts; and, my lord, I do know that he did usually ride with a case of pistols before him. And before that time I had occasion to borrow his horse of him, at the election for Westminster the last parliament that sat there, and I had it then with a case of pistols. I likewise borrowed it at Michaelmas last, the same horse and the same pistols they were, I did at the same time see a suit of silk-armour, which he told me he did provide against the papists; for he said, he did expect we should have a brush with them. Said I, do not trouble yourself for that, they dare not meddle; said he, they will do no harm. And as I remember, it was a suit of armour made of silk to wear under a coat.

Coll. It was silk-armour only for the thrust of a sword. And I assure you, my lord, I had but one gun, but one case of pistols, and but one horse. I had two before; but they did not then make a traitor of me, that was all that ever I had; but if I had ten horses, and never seen any armours, I declare it upon my salvation, I intended it for nothing but against the papists, if they should make a disturbance; and whatever I did, was with that design, and truly by the grace of God, I would not have been the last man then; but I see, whatever I provided myself with for that, they have turned it all another way, that it may be believed the Protestants were against the king and the established government.

L. C. J. Those observations may be proper for you at last. Go on now with your evidence.

Coll. My lord, I am not a man of that great memory, I may forget it, and therefore I speak it now whilst I think on it.

L. C. J. Set it down in your paper.

Coll. Smith says, I talked with him coming from Richard's Coffee-house till we came to the tavern; I do declare it, I went away before him, and went away with Dr. Oates.

L. C. J. Ask Mr. Smith that question, if you will.

Coll. Pray, sir, do you know who went together thither.

T. Smith. I dare not undertake to say that, I cannot tell whether he went from the Rainbow-Coffee-house with us, or no.

Coll. He says, after we had dined, we divided ourselves into cabals, two and two together; I do declare, it is that which is the real truth, I fell asleep behind the table; if any body was divided, it is more than I know; but, Mr. Smith, you can tell, because he says I spoke treason to him when I was in the room, he and I in one cabal.

T. Smith. My lord, I remember nothing of that, nor do believe it; for I told you the room was so little, that we could not divide ourselves: And it is impossible in such a little compass where we was so many as we were, fourteen or fifteen of us: it may be one might talk to another that was next to him, but then the company must hear; and whether they did so or no, I cannot tell, I do not remember Mr. Smith's saying any thing to any particular person; but the great engagement was between Dr. Oates and Mr. Savage, and about some questions in divinity, and that is the great matter I took notice of.

Coll. However, my lord, I declare it, that was above a twelve-month ago, and I hope your lordship and the jury do observe, that there was no new arms were found but what were provided a great while ago; all that know me, know I was never without a case of pistols and an horse, though I was but a joiner, and there is no more that you see now. And to what Smith said about going into cabals, that you hear Mr. Smith denies.

L. C. J. Will you call any other witnesses?

Coll. Yes, if it please your lordship. Do you know no more, Sir?

T. Smith. I know no other thing, if I did, I would declare it.

Coll. Call Dr. Oates's brother, Mr. Samuel Oates. My lord, thus, you see Smith's testimony is false.

L. C. J. I do not see this contradicts his oath, for he speaks of several times that he did speak with you; one was at Wilcox's, which is this they speak of.

Coll. Mr. Smith says, there was only that great discourse going on in the room, and there was no such thing as cabals which he speaks of.

L. C. J. What do you say to this witness?

Coll. Do you know Narrative Smith?

S. Oates. Yes, Sir.

Coll. What do you know of him? Were you at the dinner which Mr. Wilcox gave your brother?

S. Oates. Yes, yes, I was at that dinner.

Coll. Were you at the Coffee-house when I went along with your brother?

S. Oates. Yes, we went with you.

Coll. Did Mr. Smith go with us?

S. Oates. Yes, Mr. Smith followed us.

Coll. Did you hear any treasonable discourse between us?

S. Oates. Not the least of a little word.

Coll. Did we go into cabals two and two together there?

S. Oates. There was nothing at all of cabals that I saw, from the time of going to dinner; for we came just as dinner was going into the room, as I remember.

Serj. *Jefferies.* What do you mean by cabals?

S. Oates. That is, as I discern by Mr. Colledge, as if there had been cabals amongst the company.

Just. *Jones.* That is going by couples?

S. Oates. Yes, yes.

Serj. *Jefferies.* What did they talk of?

S. Oates. There was nothing at all spoken of.

Serj. *Jefferies.* What, did they say nothing all the while?

S. Oates. Nothing but matter of common discourse, matters of eating and drinking and talk-

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ing of country affairs; there were several that had lands in the country, and they were talking of those things.

Just. Jones. Were you there all the while?

S. Oates. Yes.

Serj. Jefferies. Hark you, sir, were there no disputations in divinity?

S. Oates. Not at all.

Serj. Jefferies. Nor of philosophy?

S. Oates. No.

Serj. Jefferies. Why, pray sir, did not Dr. Oates and Mr. Savage talk very pleasantly of two great questions in divinity, the being of God, and the immortality of the soul?

S. Oates. There was not a word of that, but only common discourse.

Serj. Jefferies. Are you sure there such thing.

S. Oates. Not that I know of, in the least, I sat at table with them.

Serj. Jefferies. Was it such a little room that you could hear all was said?

S. Oates. There was room enough.

L. C. J. People cannot give a perfect account of all things that have passed so long ago

Coll. I did not hear that discourse myself, because I was asleep behind the table; and perhaps Mr. Oates cannot remember it.

Sol. Gen. Was it before dinner, or after dinner that Colledge fell asleep behind the table?

S. Oates. He was not asleep to my remembrance all the while.

Serj. Jeff. Recollect yourself pray, was Mr. Colledge asleep there?

S. Oates. I do not remember he was.

L. C. J. It is impossible to give an account; and therefore witnesses in negatives are of little value.

Coll. Did Mr. Smith and you and I go together?—*S Oates.* Mr. Smith followed us.

L. C. J. How do you know that?

S. Oates. For you and I, and my brother went together; you were a saying, when we came out of the coffee-house, in a jocose way, Come, doctor, I will go along with you, and be one of your guard. You spoke it in a jesting way. So you may, if you please, said my brother. And so he went by my brother's side, and I went by Mr. Colledge's side.

Coll. Do you remember how long ago that was?

S. Oates. It was the last summer; but to say exactly what month I cannot.

Sol. Gen. Mr. Oates, answer me this question, pray, Sir.—*S. Oates.* Yes, Sir.

Sol. Gen. From what place did you go?

S. Oates. From Richard's coffee-house.

Sol. Gen. Who went along with Colledge?

S. Oates. He came along with my brother and me; for he said to my brother, I will be one of your guard.

Sol. Gen. Who went along with Mr. Smith?

S. Oates. I do not know, I took very little notice of things.

Serj. Jeff. It is sufficient that he can tell who went with Colledge.

S. Oates. I remember one thing: Mr. Smith would fain have persuaded me into something that my brother should talk, but I heard nothing; said I, do not examine me upon such things, for I took little notice of any thing; but this I can say, whereas he doth charge Mr. Wilcox, the gentleman did not speak five words all the time he was there.

Serj. Jeff. He does not use to be so melancholy, I assure you.

S. Oates. I did wonder at it myself, but he was not long with us; for I do not think he was there a quarter of the time; it seems he had a son sick in the country, and he was going thither.

Coll. Have you any thing against Macnamarra?

L. C. J. He is no witness here.

Coll. Do you know any thing against Mr. Dugdale?—*S. Oates.* No, not I.

Coll. Then I can say no more to you.

L. C. J. Call another witness.

Coll. Call Bolron.

L. C. J. What do you ask him?

Coll. Do you know John Smith?

Bolron. Yes.

Coll. What do you say against him?

Bolron. May it please your lordship, the last 25th of July, Mr. Smith, and Mr. Mowbray, were travelling from York towards London. We lay the 24th at ——, and the 25th we were travelling towards London: Mr. Smith did ask me if I did remember what discourse there was betwixt sir John Brooks and I at Ferry-bridge when we were coming up before to London? I desired him to tell me what discourse, and I would tell him if I did remember it or no. So, my lord, he did say, the discourse was, that sir John Brooks did say, there would be cutting of throats at Oxford, and that the parliament did go provided some with eight, some with six, some with four men, and they were to meet at Grantham, and go together. This discourse I did remember, that sir John Brooks said, they went with horse and arms to secure them from highway-men; and sir John Brooks did then further declare, that the discourse was, there would be cutting of throats, at Oxford, which made them go with arms to defend themselves. Mr. Smith did further, upon the 25th, 26th, 27th and 28th of July (and it was our frequent discourse) tell me, that he had given his majesty an account of it, which occasioned the dissolving of the parliament: that discourse that was made to the king, was, that sir John Brooks should say, that there would be cutting of throats at Oxford, and that the parliament-men went provided with four, or five, six, or ten men apiece; and he did tell me, that he had given a further account, that there was to be a consult at Grantham, wherein it was resolved, that it was better to seize the king, than to let him go on. Now, this I knew nothing of, but he would have persuaded me to have given in this evidence against sir John Brooks, as to this discourse. But I declare, I did never hear it,

and Mr. Smith was the first man that ever I heard it from, I never heard it before in my life.

Coll. Would he have had you been an evidence, and swore it?

Bolron. Yes, he said, he had given an account of it to the king, and if I did manage it rightly against my lord Shaftesbury and Colledge, he would make me for ever; those two persons were mentioned all along. But I do declare it, I did never hear him speak treason against the king in my life. And he did further tell me, that I must say so and so; for if we did not agree, it would signify nothing. But, my lord, I know nothing of the matter, I never heard any one speak of it but Mr. Smith. My lord, this is true, Mr. Mowbray was the man that was by when it was discoursed.

Just. *Jones.* He would have had you sworn it, would he?

Bolron. I discovered it to my lord-mayor.

Att. Gen. When did you discover it?

Bolron. Soon after I came to town.

Att. Gen. When was it?

Bolron. Some time last week.

Att. Gen. Was it on Sunday last?

Bolron. It was the beginning of the week.

Serj. *Jeff.* Thou art such a discoverer.

Bolron. My lord, it is very true what I say. If I had known any such thing, I would have discovered it.

Serj. *Jeff.* Thou wouldest have discovered it before that time, of my conscience.

Coll. My lord, he hath been an evidence against the Papists as well as Mr. Smith; and therefore, pray, sir George, do not make your flourishes upon him.

Serj. *Jeff.* He was an evidence, but had the misfortune never to be believed.

Att. Gen. Do you know of any pictures of Mr. Colledge's making? Have you seen Rary Shew?—*Bolron.* Never in my life.

Att. Gen. Did not you shew it in Oxford?

Bolron. No, never in my life.

Serj. *Holloway.* Did you never declare to any gentleman at Oxford, that Colledge made this picture?

Bolron. I have seen the Character of a Popish Successor, but I never saw Rary Shew.

Serj. *Holl.* Here is the very gentleman that will make oath of it.

Bolron. He was supposed to make them, I did not know that he did.

Serj. *Jeff.* I do only desire one thing, I do not say that ever you had Rary Shew, but did you ever tell any body that Colledge made any of these pictures?

Bol. I have heard of such a paper, but I did never see it in my life.

Serj. *Jeff.* Do you know that gentleman, Mr. Bolron?—*Bolron.* I know him not.

Serj. *Jeff.* I would ask you, whether you ever had any discourse with that gentleman?—*Bolron.* Never in my life.

Then the Gentleman was sworn, being a Master of Arts.

Serj. *Jeff.* What is the gentleman's name?

Serj. *Holl.* Mr. Charlett, of Trinity College.

Serj. *Jeff.* Pray, Sir, do you know that person there?

Charlett. My lord, in the new Coffee-house that was by the schools, that was set up in the parliament time, there was a gentleman that is in the court, I think, one Mr. Dashwood, and one Mr. Box, were there, together to drink a dish of coffee, and hearing that some of the evidence were there, we desired their company up, and that gentleman was one; and among other discourse, they were speaking of some pictures, and they shewed us the picture of the Tantivies.

Serj. *Jeff.* Did this man shew it you?

Charlett. This very man. It was the pictures of the Tantivies and the Towzer, and he told me they were made by Colledge, he was a very ingenious man.

Bolron. I know nothing of it; the Character of a Popish Successor I have seen, but never the other, I never shewed him any such thing.

Then the Pictures were shewn him.

Char. It was something like this, but I cannot say for any of the other.

Bolron. The Character of a Popish Successor, I say, I have seen, and Colledge himself hath told me he made the Character of a Popish Successor, I do not deny that I have seen that.

L. C. J. Would you ask him any more questions?

Bolron. My lord, I have something to say concerning Mr. Bryan Haynes; in January, February, and April last, several times I was in his company, and I heard him say, he knew nothing of a popish plot, nor of a presbyterian plot neither; but if he were to be an evidence he did not care what he swore, but would swear and say any thing to get money.

Just. *Jones.* Did he tell you so?

Bolron. Yes, I did hear him say, To day he would be a papist, to-morrow a presbyterian, he did not care for religion, he would never die for religion, he would be of that religion that had the strongest party. My lord, he told me so at my own house in Fleet street.

Coll. He would say any thing for money: pray, my lord, take notice of that, for so I find he does.

Bolron. Then there is Dennis Macnamarra, and John Macnamarra.

Serj. *Jeff.* We have nothing to say to them.

Coll. They have been evidences against me; though you do not now produce them, they are all in a string, but they are not now brought, because my witnesses are prepared to answer them.

L. C. J. Will you call your next witness?

Coll. Mr. Mowbray, pray, Sir, do you know Narrative Smith as he calls himself?

Mowbray. Yes, my lord.

Coll. What do you know of it?

Mowbray. I came up from York with him when I returned, after I was commanded down

upon the king's account to give in evidence against sir Miles Stapleton, he came to me the 3d of August, and called at my house in Yorkshire, and was very importunate for me to come up to London with him; for he said, he had a letter come to him which commanded his presence at London very suddenly, and he produced that letter which he said came from a gentleman of the court, or some court-dependant; so he read the letter in Mr. Bolron's hearing. We set forward on Sunday, and upon our journey to London he told me he had something of importance to impart to me; so upon the road he began to discourse of the parliament and of the illegal proceedings and arbitrary power of the two last parliaments; he said their proceedings were very illegal and arbitrary, and he began to open some of the votes, as that which they voted, that those that should lend the king money upon the crown lands, should be enemies to the king and kingdom, and those that counselled the king to dissolve the parliament; and he repeated many votes, and, said he, these are signs of arbitrary power, and certainly they design to take off the king; so he proceeded further to ask me, what was the discourse of sir John Brooks, when he came up before, and he did much importune me to say, that sir John Brooks did affirm there would be cutting of throats at Oxford, and that the king was to be seized there; I told him I could have no plausible pretence, because I had no acquaintance with sir John Brooks, nor did I come up with him; upon which he applied himself to Bolron, and importuned him for the same; he asked me who I came up with? I told him, I came up with three members of parliament, my lord Fairfax, sir John Hewley, and Mr. Stern; he asked me what discourse we had upon the road? And he asked, whether they had any discourse that tended to justify their former votes? For he said, if they did think to justify any of these votes, or if they would not allow the king money, and stood upon the bill of exclusion, he said, that was pretence enough for any man to swear that there was a design against the king, and that the king was to be seized at Oxford.

Coll. An excellent pretence indeed, and like the rest.

Mowb. He would have tempted me to swear against my lord of Shaftesbury the same. And he said, it would be well if I did appear on Colledge's trial at Oxon, for it was a thing of great consequence; the popish plot was thrown out of doors, and no man was looked upon that did speak of it.

Just. Jones. Was all this in the presence of Mr. Bolron?

Mowb. No, my lord. When he was discoursing about sir John Brooks, Mr. Bolron rid up to us, and he applied himself to him, because I told him I had no plausible pretence to swear against him, having no acquaintance with him.

Serj. *Jeff.* Pray, Sir, let me ask you one question, When came you from York?

Mowb. We set forward the 3d day of August from Wentbridge.

Serj. *Jeff.* Pray, who came with you in the company?—*Mowb.* Mr. Bolron.

Serj. *Jeff.* That was a Sunday, as I take it.

Mowb. Yes.

Serj. *Jeff.* Then pray, how long did you continue before you came to London?

Mowb. I think we came in on the Thursday after.

Serj. *Jeff.* When was the first time Mr. Smith came into your company?

Mowb. Upon the road on Sunday.

Serj. *Jeff.* Was that the first time?

Mowb. Yes. He had been at York, and went farther, and afterwards came to us.

Serj. *Jeff.* When did you come from York?

Mowb. About the Thursday before, if I be not mistaken.

Serj. *Jeff.* Was it in a week before?

Mowb. Yes, within a week it was.

Serj. *Jeff.* And you and Mr. Bolron came together?—*Mowb.* Yes.

Serj. *Jeff.* And you left Mr. Smith behind?

Mowb. Yes.

Serj. *Jeff.* And he overtook you upon the road?

Mowb. Yes, he was to go further into the north as soon as the trial of sir Miles Stapleton was over, and therefore he did very much importune me to stay in the country till he came to go up with me.

Serj. *Jeff.* What day was the trial of sir Miles Stapleton?

Mowb. On the Monday before.

Serj. *Jeff.* You are sure of that, and that Mr. Smith went further into the north?

Mowb. I see him take horse.

Serj. *Jeff.* But he did not come into the company of you and Mr. Bolron till the Sunday after that.

Mowb. 'See ye, Sir, he did desire me to stay in the country till he came, for he had a business of great concernment to impart to me, but it would be a week or a fortnight, ere he came, but yet he came in a shorter time, for he said he had received a letter that brought him up.

Serj. *Jeff.* You are sure of this?

Mowb. Yes.

Serj. *Jeff.* And you did not see him from the Monday before, till that Sunday?

Mowb. No, no.

Serj. *Jeff.* Now then, I ask you, where was that place he met with you?

Mowb. At Wentbridge.

Serj. *Jeff.* And then you came from thence toward London the next day?

Mowb. Yes.

Serj. *Jeff.* Now would I desire to know of you, for I perceive he did attack you to say something against sir John Brooks, and finding that you could not do it, because you had no acquaintance, he applied himself to Bolron. I would know, was it between that place and London?—*Mowb.* Yes, it was.

Serj. *Jeff.* And after the third of August?

Mowb. Yes, it was after he set out.

Serj. *Jeff.* I thought it had been the 24th of July that you set out, and continued your journey the 25th, 26th, 27th, 28th, and 29th. Alas, we have lost a great deal of time between Mr. Bolron and Mr. Mowbray. Bolron said, it was the 25th they lay at such a place, and you are gotten to the 3d of August; you are mistaken certainly, as to point of time.

Mowb. See, Sir, I will look in my almanack, it is all set down there.

Serj. *Jeff.* Let us see now if your Oxford journey be as well set down, as your journey to London is.

Mowb. Here is my almanack, Sir.

Just. *Jones.* Here, look upon his almanack.

Serj. *Jeff.* Mr. Jones, I don't care for his almanack, I had rather Mr. Mowbray and Mr. Bolron could bring their almanacks together, and I would have them compared, to see whether the 3d of August in one be the 25th of July in the other. Did you discourse with him upon the road the 3d of August, and not before, and Bolron, that came up with you, discoursed with him the 25th of July?

Mowb. I am mistaken, I find.

Serj. *Jeff.* Ay, that you are, one of you, most grossly.

Mowb. See, Sir, here is my almanack, whereby I find that it is my mistake; but pray, see Sir, here it is set down, the day we came out, was the 24th, the day we came up to London was the 27th.

Serj. *Jeff.* How didst thou set out the 3d of August from that place, and yet come to London the 27th of July?

Mowb. I will refer myself to Mr. Smith, as to the time we came up, and here is my almanack.

Serj. *Jeff.* I will believe thy almanack to speak truth, though it have never so many errors about the changes of the weather, sooner than I will believe thee.

Coll. I perceive the man is mistaken in the month and the times; but pray, my lord, will you please to see, for justice sake, if the almanack be new writ.

L. C. J. Look you, here is the matter, Mr. Colledge, he was asked again and again, what day it was, and he was positive to the 3d of August.

Coll. He was mistaken, but his almanack is right.

L. C. J. He speaks rashly, that is the best can be said.

Mowb. It was a mistake of mine, sir George, but my almanack is right.

Serj. *Jeff.* Nay, Mr. Mowbray, don't enter into dialogues with me, I only make a little observation upon your almanack

Mowb. It was only my mistake.

L. C. J. You are a rash man to affirm so; if you had an almanack, you should have consulted it, or referred to it.

Serj. *Jeff.* Nay, we have lost a day even by your almanack; for your's says, it was the 27th you came to town, Bolron the 28th.

Mowb. I refer myself to Mr. Smith, he cannot deny but he came up with us at that time.

Serj. *Jeff.* You were examined at sir Miles Stapleton's trial, was you not, Mr. Mowbray?

Mowb. I was an evidence there.

Serj. *Jeff.* Did the jury believe you?

Mowb. They did acquit sir Miles Stapleton.

Coll. That is nothing to the purpose, so was Mr. Smith too.

L. C. J. Would you ask any thing further?

Coll. Call Mrs. Bolron.

L. C. J. If you have any more witnesses, pray call them.

Just. *Jones.* Mr. Mowbray, was Mr. Bolron's wife by when this discourse was?

Mowbray No, she was in town, she did not go down with him at all.

L. C. J. Are you Mr. Bolron's wife?

Mrs. *Bolron.* Yes.

L. C. J. Well, what do you ask her?

Coll. Mrs. Bolron, pray do you know Mr. John Smith?

Mrs. *Bolron.* Yes, I do know him.

Coll. What can you say of him?

Mrs. *Bolron.* He sent several times for my husband and Mr. Mowbray to my house, something he would have them be concerned in, some business he had in hand.

L. C. J. When was that?

Mrs. *Bolron.* Within these three weeks, since he came up from York assizes.

Coll You may see there was an understanding between them then.

Just. *Jones.* Did they go accordingly?

Mrs. *Bolron.* Now and then they have gone to him, but they knew his business, because they had discourse with him, as they said, upon the road, and they would not go.

L. C. J. Would you ask her any thing else? What do you know more?

Mrs. *Bolron.* Nothing, for I am not one that stirs much abroad.

Coll. Call Mr. Everard.

L. C. J. What do you ask him?

Coll. As for Mr. Everard, I need not ask him whether he knows him, for they know one another well enough. But Mr. Everard, that I would ask you is this, What do you know of Mr. Smith, and of this contrivance against me?

Everard. Mr. Smith I have been to see of late, and he told me, he knew of no presbyterian or protestant plot, and when my lord Howard was tried, that is, the bill brought against him, he said, he wondered how my lord Howard could be guilty, and that both himself and I were joined as evidence, to that jury, only to put a gloss upon the evidence; for, says he, I have nothing material to say.

Coll. Mr. Everard, do you know any thing more concerning him, what he hath said at other times concerning me?

Everard. I have told you already, what I have heard him say, that he thought there was no Protestant or Presbyterian plot, and that now of late within this little while.

Coll. Pray, Sir, was there not some discourse betwixt justice Warcup and you in Lincoln's-Inn walks?

Everard. Is justice Warcup an evidence here?—*L. C. J.* No, no.

Coll. It is but the evidence of a presbyterian plot; therefore pray, Sir, what was the discourse between justice Warcup and you? What would he have had you done?

L. C. J. I think it is not material, there is nothing of Mr. Warcup in this trial.

Everard. If the court does allow of it, I will freely tell it.

Coll. My lord, the papists design is to make a protestant plot to turn off their own, and they begin with me; but if I should go, they would not be satisfied with me, they would be at others.

L. C. J. There is nothing concerning a presbyterian or protestant plot in the case.

Coll. My lord, if there be no presbyterian or protestant plot and others to join in it, how could I do it myself? it is impossible. I should have such a design of seizing the king, and improbable I should speak it. Now, my lord, this man was solicited to come in for an evidence of such a plot.

Everard That is true.

L. C. J. I tell you it is not material, Mr. Warcup is not concerned in your trial.

Everard. Justice Warcup would have persuaded me to have sworn against some Lords a presbyterian plot; but I deny that I know any such thing of them.

Coll. The papists aim is not at me only, but at others.

Serj. *Jeffries.* We have nothing to do with what you and justice Warcup talked of. For example's sake, my lord, let us have no discourses that concern third persons brought in here.

L. C. J. Would he have persuaded you to say any thing that was not true?

Everard. He did not say positively those words; but this he said, I knew several Lords——

Just. *Jones.* Now here is Mr. Justice Warcup's fame traduced behind his back, in the face of the country, and it is nothing to this cause before us.

Coll. My lord, I desire to know what he knows of these things, and that he may speak it out; it is a material thing for me and others: here is a design of the papists to turn a plot upon the protestants; they begin with me, and if they have my blood, who may feel the effects of it next I cannot tell.

L. C. J. Truly I think it not material to your case, and indeed it is of ill consequences to have any man traduced behind his back, as Mr. Warcup is.

Coll. My lord, Macnamarra told me, that that man would have seduced him to have retracted his evidence; upon my salvation it is true.

L. C. J. We meddle not with Macnamarra neither, he is no evidence against you.

Coll. Macnamarra hath sworn against me at the Old-Bailey, and at the finding the bill; but they have laid him by upon some trick or other. I desire Mr. Everard may tell what he knows.

Everard. I would not reflect upon any person, nor will I answer it, if the court do not think fit.

Coll. My lord, this is foul play, if I die myself for my country's sake, I can do it freely, and the will of God be done; I would have the truth out for the sake of the protestants.

Everard. I am very willing to tell the truth if the court think fit.

L. C. J. I see not that he says Mr. Warcup would have had him swear that which was not true.

Everard. But this he said, if the court will allow me to speak it, justice Warcup said, that certainly there was a presbyterian plot, and such things; and that some Lords, some of the protestant protesting Lords must be guilty of it; and said he, certainly, you know much of it, you know such and such things, therefore you may safely swear it, since you know it; so by argument he would prove first there was a plot and combination among those Lords, and then said he, this you may safely swear.

Just. *Jones.* What is this to your purpose, Mr. Colledge? only Mr. Warcup's name is brought upon the stage when he is not here to vindicate himself.

L. C. J. Would you ask him any thing else?

Coll. If he does know any thing more of any of them, I desire he would speak it.

Ever. Concerning Mr. Haynes, he told me it was necessity that drove him to speak any thing against the Protestants, and the hard P. and the gratitude he did receive from the citizens.

[Then Mr. Jones acquainted the Court, that Mr. Warcup was just come in, and desired to vindicate himself. But the King's other counsel waved it, saying, there was no weight in it.]

L. C. J. Where did he tell you this?

Ever. In the fields near Gray's-Inn.

L. C. J. How long since?

Ever. About three weeks ago. I asked him, Mr. Haynes, said I, I would not draw you from your testimony in any thing, but how can this be congruous to what you have said formerly, that you knew nothing by them? The truth is, said he, I will not say much to excuse myself, but my wife was reduced to that necessity, that she begged at Rouse's door, and craved some salary, and Mr. Rouse would not give her any; and said he, mere necessity drove me to it.

Coll. He found better pay in another place.

Ever. And, says he, it is self-preservation in the next place; for I was brought in Guilty when I was taken up, and therefore I was obliged to do some things to save my life.

Coll. Pray, my lord, and gentlemen, observe what this gentleman says, Haynes takes this course to destroy innocent persons for his own preservation.

Ever. Besides, he told me there is a judgment impending upon the nation, said he, either upon the king, or upon the people, I know not which; but these Irishmen's swearing against them, is justly fallen upon them for their injustice against the Irish in outing them of their estates.

Coll. So he did it then by way of revenge; for his countrymen; I have nothing of their estates, I am sure; therefore they had no cause to swear against me. But, Mr. Everard, have you any more to say concerning any of them?

Ever. No more concerning those persons that have sworn against you; I can say no more.

Coll. As to Dugdale or Turbervile?

Ever. No, indeed.

Coll. As to the Presbyterian Plot, Sir?

Ever. If the Court does allow concerning other persons; but I would not intrude any thing but what the Court shall think fit.

Coll. I know not but they may come in against me; therefore pray tell what you know. Mr. Everard, do you know any thing more? Pray let me know what you know.

Ever. Nothing of any person that has appeared against you as yet, but what I have told you.—*Coll.* They may do so, Sir.

L. C. J. And then we may properly hear him to them, and not before.

Coll. I desire to know who they are; pray let me know their names?—*Ever.* Fitz-gerald.

L. C. J. He hath been no witness here.

Coll. Call Thomas Parkhurst.

L. C. J. What do you ask him now he is here?

Coll. What do you know concerning Mr. Dugdale?

Parkhurst. Sir, the latter end of the last November, when the parlia[illegible] Westminster, several times Mr. Dugdale having promised me his further Narrative to publish, which he printed, I met him several times; one time I met him at Richard's coffee-house, and it was towards the evening before we went away; he told me and Mr. Symonds, that he was to speak with Dr. Tongue; and he told us, that this Dr. Tongue did lie at Mr. Colledge's; and he having spoke the day before, and several times, of the danger he was in of his being assassinated by the papists, Mr. Symonds and I offered to go with him, and we took a coach; for we did not know where Mr. Colledge lived: he had then a rheum in his eyes, and was not well; so we accompanied him to Mr. Colledge's to speak to Dr. Tongue. It was the evening when we went; and whilst we took a pipe of tobacco, in our discourse we were speaking of the times, and the danger of the papists; so Colledge took down a steel-hat, that hung up there, which he said he had, and he said he had a quilted coat of defensive armour, and he said he had a blunderbuss in his house, and two pistols. But I little thought of any thing of this, neither did I know well what I was subpoenaed down for: but these arms I saw in his house, and it was only in discourse that he was provided against the papists; so I put the steel hat upon my head, and pulled it off again, and so did Mr. Symonds.

Coll. Did I say any thing, Sir, who I had those arms against?

Park. At that time there was no discourse in the world, but of the danger of the papists; and he said he was provided for them, if they did come to make any disturbance.

L. C. J. When was it, Sir?

Park. It was about the latter end of November, I have the Narrative that I printed, which was the 23d or 24th, and I have no directions but that to remember the exact time. So we carried Mr. Dugdale home again in a coach, and gave him a pint of wine at his lodgings.

L. C. J. This does not contradict Mr. Dugdale at all.

Park. Mr. Dugdale does own this for a truth.

Serj. *Jeff.* So may any body own it.

Coll. Where is Mr. Symonds? Pray, Sir, what do you know of Dugdale?

Symonds. What about, Sir?

Coll. I have your name here, Sir, but I know not for what.

Symonds. I can say the same that Mr. Parkhurst did; that I suppose is the business. All I know of it is this; I was with Mr. Parkhurst and Mr. Dugdale at Richard's coffee-house some time in November, I think it was about the printing Mr. Dugdale's further information; and Mr. Dugdale was saying, Dr. Tongue had sent for him, but spoke as if he was fearful of some danger in going along; so we proffered to go along with him, and we took a coach at the coffee-house door, and went with him to Dr. Tongue, who lodged at Mr. Colledge's. When we came into the room, Mr. Parkhurst and I thought fit we should in civility withdraw, which we did; and Mr. Colledge brought us down into another room, where we sat and took a pipe of tobacco, and talking about the common discourse of the times, about the papists, and the danger from them, there hung up in Mr. Colledge's room some arms; what they were, I dare not charge my memory with to swear particularly; but I do think there was a silk coat of mail, and there was a cap of steel, and as I take it, it was covered with cloth, or some such thing, what else I cannot well say; I think there was a blunderbuss and a case of pistols. And all the discourse that I remember then, was only this, speaking of the papists, and some fears as if there would be an insurrection amongst them, said he, let the papist rogues begin when they will, I am ready to defend myself for one. This is all I know.

Coll. Pray, Sir, how long ago was this? Dr. Tongue died before Christmas at my house.

Sym. I cannot tell exactly when it was; but during the session of parliament I am sure it was, and, as I take it, in November, the latter end.

Coll. So then, pray, my lord, see that these

arms they charged me withal, were provided before Christmas.

L. C. J. But there is nothing that contradicts Dugdale's testimony in all this.

Coll. It does sufficiently contradict him.

L. C. J. I do not see that this does at all contradict what he hath said; but do you observe what you will upon it, when you come to make your defence.

Stranger. A gentleman below desires you to call Mr. Yates.

Coll. Pray, Sir, what do you know concerning Dugdale?

Yates. I know that Mr. Dugdale sent for me to a coffee-house to bespeak a pistol for you, and told me, that when I had made the pistol, I should deliver it to Mr. Colledge, and Mr. Dugdale promised to pay for it when I had done it. Now some time after I did some small matter for Mr. Dugdale, cleaned his pistols, or some small business, and Mr. Dugdale asked me, if I would have a pint of wine, which I agreed to; and being at the tavern, Mr. Dugdale asked me, if Mr. Colledge's pistol was done. I told him, no, it was not, as yet. So I asked Mr. Dugdale, because he had promised to give Mr. Colledge a pistol, what obligation there was betwixt Colledge and him, that he should give him a pistol? To which he answered, that Mr. Colledge had been serviceable to him, in lending him a pair of pistols to ride withal sometimes: so he gave him a pistol to satisfy him for the wearing of his pistols now and then. I thought, said I, Mr. Colledge did impose upon your good nature too much, not but that I believe Mr. Colledge is a very honest man, and stands up for the good of the king and the government. Yes, said Mr. Dugdale, I believe he does, and I know nothing to the contrary.

Att. Gen. When was this?

Yates. A little after the parliament sat at Oxford; for I never knew Mr. Colledge before Mr. Dugdale set me at work for him.

Coll. Mr. Yates, pray, was there nothing in the coffee-house about one that he asked to go with him, when he said he knew nothing against me?

Yates. I heard one say——

Serj. *Jeff.* You must speak your own knowledge, you must not tell a tale of a tub of what you heard one say.

Yates. I heard it affirmed——

Serj. *Jeff.* By whom?

Yates. By a person in the coffee-house.

Serj. *Jeff.* Who was that person?

Yates. By one of the servants of the house.

L. C. J. This is no evidence at all; if you know any thing of your own knowledge, speak it.

Serj. *Jeff.* Is he here?

Yates. No, I think not.

Just. *Jones.* How long do you think must we sit here to hear other people's stories?

L. C. J. If you know any thing of your own knowledge, I say, speak it.

Att. Gen. Pray let me ask you that question again; when was this that he said he believed he was an honest man?

Yates. It was about three weeks after the parliament at Oxford.

Coll. Then he does me wrong now; for if I were an honest man then, it cannot be true that he says of me.

L. C. J. Who do you call next?

Coll. Pray, my lord, who hath been sworn against me?

L. C. J. There is Stephen Dugdale, John Smith, Bryan Haynes, Edward Turbervile, sir William Jennings, and Mr. Masters.

Coll. Call Mr. Clayton. My lord, at his house it was I lay in Oxford, and that Dugdale says I spake some of the treasonable words. Pray, Sir, do you know what time I came to Oxford?

Clayton. I remember it very well, it was at the time the parliament sat at Oxford, about two or three days after it began.

Coll. Pray what arms did I bring to your house, Sir?

Clayton. As to the matter of arms, there was no other but a sword and a pair of pistols, a pair of pistols in his holsters, and his sword by his side.

Att. Gen. Was there no silk armour?

Clayton. I saw none, if it please you; such a thing might be.

Coll. My lord, I continued at his house from my coming in to my ge[illegible] and that was till after the parliament [illegible]as dissolved; and I came after they were sat. But hark you, Mr. Clayton, Mr. Dugdale says, he was with me at your house, did you ever see him there?

Clayton. I remember I have seen Dugdale at my house, but never in your company.

Coll. Did you sell any mum?

Clayton. No, I never did sell any in my life.

Coll. Because he says, we had mum there.

Clayton. I never saw him there with you, nor changed a word with him as I know of.

L. C. J. Was he never in the company of Colledge at your house?

Clayton. Not that I saw.

Just. *Jones.* You do not know all the companies that come into your house?

Coll. My lord, I am told there are some that came from the town where I was born, that know me, and have known me for 24 or 25 years together; if you think that material for me to prove whether I am a protestant or no.

L. C. J. If you will make that out, you may: But it is your loyalty that is in question. If you will produce any that can make it appear, that you used to honour the king in your discourses, or so, that is something.

Coll. If I am a protestant, then the design is plain, these men swear to make a protestant plot, and turn the plot off the papists.

Serj. *Jeff.* What church do you frequent in London, to hear divine service?

Coll. I have received the Sacrament several times, sir George.

Serj. *Jeff.* When were you last at the public church?

Coll. I hope I may be a protestant if I have not gone thither; but however I do use to go to church.

L. C. J. Well, call whom you will.

Coll. Is Thomas Deacon there?

Deacon. Yes.

Coll. He lives, my lord, in the parish where I was born. If you please, Mr. Deacon, to give my lord an account what you know of me from my childhood.

Deacon. I have known Mr. Colledge ever since he was a youth; he was born in the town where I live.

L. C. J. Where is that?

Deacon. At Watford, a town in Hertfordshire. There he lived till he was a man, and married a neighbour's daughter of mine, and lived there while he had two children; I never knew but that he was a very honest man, frequented and kept to the church of England all along, and paid every man his own.

Att. Gen. How long is it ago since he left that place?

Deacon. I cannot directly tell how long it is, truly, but I think it is 18 years since you left Watford.—*Coll.* It is 14 years ago.

Just. *Jones.* You say fourteen and they say eighteen.

Deacon. I say I cannot exactly tell.

Coll. But Mr. Deacon, I have been in your country lately.

Deacon. He used to come there once or twice a year generally to see his friends. I have heard him declare himself against the popish church always very much.

L. C. J. Did you never hear him talk against the government?

Deacon. No, never in my life.

Serj. *Jeff.* Nor against the king?

Deacon. Nor against the king.

Just. *Jones.* Was he in your country the last Easter?

Deacon. I think it was about Easter he was there.

Just. *Jones.* Was he at church there then, and received the Sacrament?

Deacon. I know not whether he was there on the Lord's day or no: He did quarter at another town, at Busby, where he has a brother-in-law.

L. C. J. Well, call another.

Coll. Mr. Whitaker.

L. C. J. What is your Christian name?

Whit. William.

L. C. J. What do you ask of him?

Coll. Whether he knows me and my education?

Whit. Sir, I have known him this 26 years: I know his mother, she lives now at Watford: I have known his behaviour to be very civil and good; a very good churchman he was when he lived with us; and I have enquired, and find he has the same reputation in the parish where he last lived in Black-Friers: He was no jesuit nor papist, I dare aver; he hath flouted them and mocked them with their wooden gods, and the like; for he could never endure that persuasion.

L. C. J. He is not questioned for that, but for treason.

Coll. Did you ever hear me speak any thing against the government?

Whit. I never knew any ill behaviour of him in my life.

Coll. But did you ever hear me say any thing against his majesty or the government?

Whit. Never, that I know of: I knew him a soldier for his majesty, in which service he got a fit of sickness, which had like to have cost him his life; he lay many months ill, to his great charge.

Serj. *Jeff.* Where was it he was in his majesty's service?

Whit. At Chatham business.

Coll. It was under my lord Rochester. But, my lord, I have a testimonial under the hands of 70 people of Watford, to give an account of my good behaviour.

Just. *Jones.* He hath been gone thence these 18 years.

Whit. He hath come there almost every half year, sometimes three or four times in a year, because his mother lives there now, and he came to pay his respects to her. His children lived and went to school with us.

L. C. J. Come, who do you call else?

Coll. Mr. Neale.

Neale. I can say no more than the other men before me. I know the man, he was bred and born at Watford, he lived there several years, he married a wife out of the neighbourhood, frequented the public worship.

L. C. J. How long ago is this?

Neale. Sixteen or seventeen years ago. But then he used to come once or twice a year into the country.

Coll. Did you ever hear me speak any thing against the king or the government?

Neale. No, never in my life.

Coll. How long is it ago since you were in my company last?

Neale. When you were in town last, I never heard you say any thing that was ill.

Coll. How long ago is it since we were at the White-Hart together?

Neale. It was about spring.

Coll. I said right, my lord, I was there about Easter. Pray, did you ever hear me speak for the king?

Neale. Truly, the discourse we had I never used to keep in my mind; but I never heard him speak any thing against the king or the government.

L. C. J. Were you much conversant with him?

Neale. When he came down to give his mother a visit, and see his neighbours, we used always to see one another.

Coll. Pray, will you call Mr. Tanner and Mr. Remington.

Mr. *Remington* stood up.

Remington. I say, I have known Stephen Colledge these 40 years, and I have known that he always was an honest man. He was

a soldier some time, but he always went to church, was no conventicler; and used to visit his neighbours when he came down to see mother, and was always looked upon to be a very good man.

Serj. *Jeff.* You say, you knew him a soldier, pray when was that?

Remington. About the time of Harwich business. That is all I can say.

Then Mr. *Tanner* stood up.

L. C. J. Come, what say you? What do you ask him, Mr Colledge?

Tanner. I have known Stephen Colledge from a child, 40 years, he was born at Watford, his father worked with my father, and great intimate acquaintance we had with him, and saw him very often; I never knew any fault in him, and I never heard a bad report of him in all the town of Watford.

Serj. *Jeff.* Have you seen him at church lately?—*Tanner.* No, I have not.

Att. Gen. I would fain know whether this man hath been at church himself: he looks as if he had not.

Coll. I know not whether he hath been at the church you mean, or no; but he may be an honest man and a Protestant for all that.

L. C. J. Call another.

Coll. Mr. Peter Norreys.

L. C. J. What do you ask him, Mr. Colledge? here he is.

Coll. Do you know any thing concerning Mr. Smith?

Norreys. I was once in the Hercules Pillars, where was sir William Waller, Macnamarra, Mr. Ivy, and five or six of us together: and Mr. Smith was there, and we were talking concerning the parliament approaching at Oxon.

Serj. *Jeff.* Tell the names of the rest.

Norreys. Sir William Waller, Macnamarra, Mr. Ivy, Lewes, Macnamarra's brother, and I, and Mr. Smith.

Serj. *Jeff.* Well said; we do not meddle with any of these, but Mr. Smith.

L. C. J. Was John Smith there?

Norreys. He was there.

L. C. J. Well, go on then.

Norreys. We were talking of the parliament at Oxon: Says sir William Waller, most of the parliament-men are afraid to go up to the parliament. Truly, said Mr. Smith, I hope they will be provided to go, if they do go. Says sir William Waller, I shall be provided with the rest of my friends: and Mr. Colledge said, I will go up with the rest of the parliament-men; I shall be provided too, says most of the evidence: says sir William Waller, will you go along with me, and I will provide you with an horse? Said he, I have a horse of my own, and if it please God I will have nothing else to do, but to go with the parliament, and I will not neglect it. This was all the discourse of the company for that night.

Coll. Did you hear Mr. Smith say any thing against me?

Norreys. No, not a word at all.

Coll. But this were a material evidence against others of the confederates, if they had been examined.

Norreys. My lord, I was at the Amsterdam coffee-house the 23d of June last, and there was Mr. Dennis Macnamarra; said he, will you go, and I will give you a pot of ale.

L. C. J. There is nothing of Dennis Macnamarra in question before us. If you have any thing to say against any of the witnesses that have been sworn, go on with your evidence, we must not hear stories of other people.

Coll. He would speak against some men that have sworn against me, but are left out, for some reasons I know not. Pray call Mr. Thomas Norreys.

L. C. J. What do you ask him?

Coll. My lord, he knew me in this country some 15 or 16 years ago.

T. Norreys. My lord, I have been acquainted with Mr. Colledge about 16 or 18 years, and he hath always carried himself very civilly and well, and he kept to the church for a considerable time, as duly as any parishioner did.

L. C. J. How long have you known him?

T. Norreys. This 16 years.

L. C. J. You live in this country; don't you.

T. Norreys. Yes, at Aylworth.

Coll. I was at Astrop-Wells last year. I believe Mr. Justice Levinz saw me there.

T. Norreys. Yes, I was there with you.

Coll. We did discourse commonly then concerning the Papists. Pray, Sir, did you find me inclined to the Popish interest?

T. Norreys. You spoke very much against them.

Coll. Did you ever hear me speak against the king or the government?

T. Norreys. No, I never heard it; for if he were my brother, I should have discovered it.

L. C. J. How often have you seen him?

T. Norreys. Very often, and conversed much with him.

Coll. My lord, as to the papers charged upon me that they were mine, I declare I know not of them. Dugdale says, I owned them, and the letter and several prints; but truly, my lord, I had done myself a great injury if I had done or owned those things he hath charged me withal. I never could make a picture, nor never did draw a picture in my life; and that very person that he says I owned I got it to be printed by, hath denied it before the king and council; for he there testified, that he did not know the person that caused it to be printed.

L. C. J. How came you to have so many seized in your house?

Coll. My lord, here is Elizabeth Hunt, the maid by whom they were taken in, and who can give you an account of it. I cannot deny but that they were in my house; but that I was the author, or did take them in, is as great a mistake as ever was made. Call Elizabeth Hunt. I do not know whether Curtis be in

town; but this I am confident, he was examined before the king and council, and he and his wife denied it.

L. C. J. He shall be called if he be here.

Coll. I know nothing of the printing them, nor was I the author of them.

L. C. J. They were dispersed by you up and down.

Coll. That they were in my house, I believe, my lord; and this woman will tell you how, my lord. Pray tell the court how these papers that are called the Rary Shew came to be in my house.

El. Hunt. A porter brought three bundles to our house, and asked, whether my master was not within. I told him, no, he was not. Said he, These papers are to be left here; said I, Who do they come from; said he, 'tis all one for that, you must pay me, and I must leave them here; so I gave him six-pence, and he left the papers, but I never saw the man since nor before. And, my lord, I never read them what they were, but I saw they were such sort of prints as those.

L. C. J. How long was it before they were seized?

El. Hunt. A matter of 7 or 8 weeks.

Coll. My lord, it seems they were put in a box and left in my compting-house: I never touched them, but there they staid, for ought I know, till they were taken.

L. C. J. You were Colledge's servant, were you not?

El. Hunt. Yes, my lord.

Coll. My lord, I never knew the printer nor the author; but I heard a man was in trouble about them, upon a bye law in the Stationers company.

Att. Gen. How came you by that original?

Coll. Have you it there? I know of none was produced: But if I were a person concerned, it were no treason, and, my lord, I hope you will do me that justice, to let the jury know they are not treason, none of these papers. And I do declare I know nothing of the original, the printer, nor the author.

L. C. J. You spend time in making observations out of order of time: When you have given your evidence, then make your observations.

Coll. I confess, I may err, as to matter of order, for I never was in this capacity before. But pray, do you tell the court how the papers came there, and all the transactions. For I was a prisoner when they came and searched.

L. C. J. No, it was 8 weeks before you were taken they were left there.

Serj. *Jeff.* Did you not tell your master soon after they were left there?

El. Hunt. No.

Serj. *Jeff.* Within what time did you tell him?

El. Hunt. I believe it was a week or a fortnight.

Att. Gen. Where was your master all that time?

El. Hunt. He was in the country.

Coll. My lord, I did see them there, I must confess, I do not deny but I saw them there, but I knew not whence they came, nor whose they were. Nor did I ever intend to meddle with them, nor concern myself about them. What have you to say more?

El. Hunt. Concerning Mr. Dugdale, if I may speak.

L. C. J. Ay, go on.

El. Hunt. I went to receive the money of Mr. Dugdale that he owed my master, and asking him for it, he said, he would pay me such a time to-morrow morning, if I would come for it; but when I came, he had not the money ready for me. Sir, said I, I think it is very hard that you should keep my master's money from him, and yet you go and swear against his life too: What do you think we shall do at home in the family, if you keep my master's money and he be in prison? Said he, There is a great deal of do about my swearing against your master, more than needs; but as I hope for salvation, I do not believe Mr. Colledge had any more hand in any conspiracy against his majesty, than the child unborn. Here is Dugdale, let him deny it if he can.

Dugd. As I hope for salvation I did not say so.

El. Hunt. Upon my salvation it is true what I say.

Stevens. This was the maid that hid her master's papers when they were searched for.

Serj. *Jeff.* Be quiet; art thou got into dialogues with the maid now?

Coll. Mr. Stevens, it is well known what a man you are to propagate witnesses. My lord, she gave me an account of this in the Tower, before I came away, that Dugdale desired to speak with Mr. Smith, and told her, that nothing that he had to say would touch my life.

El. Hunt. As I am alive it is true.

L. C. J. Mr. Dugdale denies it now.

El. Hunt. He is not a right man if he denies it, for he told me it twice.

Coll. I told Mr. Smith of it, when he had leave to come to me: I told him what the maid said he had to say to her, and this was three weeks ago; said he, I will speak with him with all my heart, if he has a mind to speak with me; for he hath said that he hath nothing against her master that he can touch an hair of his head, nor nothing that can touch his life, that he knew nothing of a plot or contrivance against the king; and if I could help it, I had as lieve have given a hundred pounds I had never spoken what I have. Thus he said to her.

L. C. J. You tell her what to say.

El. Hunt. Sir, he does not tell me; for Mr. Dugdale said those very things to me.

Coll. This is an account I had when I was prisoner; I could not direct her.

L. C. J. Do you deny what they say to be true, Mr. Dugdale?

Dugd. My lord, she came to me for money;

I told her I had it not ready, but would pay her: And in the shop, before the apprentice-boy, she desired of me that I would write two or three words what I would say against her master; and I told Mr. Graham of it. So said I, I cannot tell, I have not the papers, nor what informations I have given against him. So she came again the next morning, and she was at me to write down what I said. I wonder, said I, your master will send you! had not he as good send Mr. Smith, who is his counsel? And this was all the words we had.

El. Hunt. My lord, I do solemnly assure you, he said he would write down what he said against my master, and would fain speak with Mr. Smith; for there was more ado made about it than needs.

Dugdale. Mr. Graham can tell what it was; for I came and told him immediately.

L. C. J. Did you tell her you had nothing to say against her master that would touch his life?

Dugd. I could not say that I had said nothing against her master; for she asked me that I would write down what I had said; but I told her I knew not what was treason, that must be referred to the court?

Just. *Jones.* Did he speak it openly or privately to you?

El. Hunt. He did not speak it loud; nobody heard him but myself.

Dugd. It was in the shop, and the apprentice-boy was by.

Just. *Levinz.* Was this after he had been at the Old Bailey, or before?

El. Hunt. Yes, it was after he had been at the Old Bailey, and after he had been at Oxon too.

Just. *Levinz.* Then it was before the court, what could be made of it?

Coll. She hath gone forty times for the money I lent him out of my pocket; and I lent him that when I had little more myself.

El. Hunt. I did tell him, Mr. Dugdale, if you cannot let me have my master's money, if you please to tell me what you have made oath against my master. Said he, I cannot let thee have it now; but thou shalt have what I have to say against him: I will draw it up in writing, and thou shalt have it to-morrow morning. —The next morning I came to him again, and said I, I am come again; what must I do? said he, I have no money; such an one hath not helped me to it. Sir, then said I, I hope you will be as good as your word, to let me know what you have made oath against my master. Said he, I was about it yesterday, but could not do it: But, sweetheart, said he, and took me by the hand, I will give you a copy of it to-day at ten of the clock; and if I do not, I will tell it thee by word of mouth. So I came to the house at ten, and staid till eleven, but did not see him.

Just. *Jones.* You had a great mind to be tampering.

El. Hunt. The first time, he asked me who was his counsel; I told him Mr. Smith; then, said he, I have a great desire to speak with him. So I told my master of it.

Coll. My lord, you see it is but black and white, all this whole contrivance upon me. She hath proved I knew nothing of the papers; and indeed I did not.

L. C. J. Do you call any more witnesses?

Coll. There is my brother-in-law that received those papers. Call George Spur and Sarah Goodwin, [Mrs. Goodwin appeared.]

Coll. Do you know any thing of the papers that were carried to my brother George Spur's?

Mrs. *Goodwin.* Yes, I do. The Saturday after my brother's confinement, about eight of the clock in the morning. I having heard of it, came into the house, and in a quarter of an hour's time in comes a waterman, and desires an handful or two of shavings. I knowing not who he was, nor what he desired them for, told him, he should have them; so he went up to the working-shop to gather them, for he pretended that to be his business.

L. C. J. Whose waterman was it?

Mrs. *Goodwin.* A waterman, I suppose, that belonged to his majesty, for he had a coat marked with R. C.

Coll. This is after I was in custody?

Mrs. *Goodwin.* Yes, it was the Saturday after. So no sooner had he the shavings, but he goes out of the shop, and comes in again with three of his majesty's messengers; and they made enquiry after papers, and I being innocent of concealing any papers, or any thing, said, I know of none; so they came to one box that had the tools for the men to work with, and they demanded the keys. I told him I knew not where the keys were. So they went to the next, and found it open, but nothing did they find there; there was a bed wherein formerly my brother's servants did lie: said one to the other, Look well whether there be not something hid in that bed; said I, I suppose there is no such thing as you enquire for: if you please, you may take off the clothes, and gave them free toleration to look; but for the chest, I would not deliver the keys, because the man was not there that owned it. In their searching, they flung down the wainscot, and did a great deal of damage to his goods. Gentlemen, said I, I suppose you have order to search, but none to spoil, a man's goods. When they were gone, having found none, they threatened, God damn them they would have them, for there they were. But I being ignorant of the concealment of the papers, I requested the maid, and my brother's son, whether they knew of any papers, and they satisfied me they knew of some prints that were brought by a porter, to be left at my brother's, but they knew not whence they came, nor what they were: and the same answer gave my brother's son, that he did not know whose the papers were. But since his father's confinement they were laid up sure and safe, for they knew not what they concerned. Upon this, my lord, my brother in-law, George Spur, he comes into the house,

and if it please your honour, I requested him to carry them into the country to his house, to secure them till we knew what they did concern and who they did belong to. Whereupon he replied, my lord, that he was fearful to carry any thing out of the house; said I, if you will please to take them of me, I will carry them out of the house for your security, because his wife looked every hour (being with child) when she should be delivered, and he was fearful of troubling her. So I carried them out of the house, and delivered them to him.

L. C. J. To whom?

Mrs. *Goodwin.* To my brother-in-law, Mr. George Spur. So at my going out, after I had delivered them to him, in my way back again I found a small paper-book, and a small parcel of writings; who dropped them, or who laid them there, I cannot tell. But taking them up unadvisedly, I put them among the prints which I carried out, I delivered them to my brother-in-law. This is all I have to say as to the papers.

Stevens. Three parts of what she hath said is false.

Serj. *Jefferies.* Well, hold you your tongue.

Stevens. Mr. Atterbury is here, my lord, that searched the house.

Atterbury. Be pleased to give me my oath, I will tell you what passed.

Att. Gen. We don't think it material, but you were sworn before, stand up.

L. C. J. Tell the manner of finding the papers. This woman gives us an account of a waterman that came in, pretending to fetch shavings.

Atterbury. Upon my oath it was not so. The waterman was a waterman that brought me and two more of my fellows, and the waterman followed us into the yard, but came after us: and being ordered to look for papers, I did search the house; for I had intelligence that there were papers there, but I did not find them there. But upon finding the first papers, I made the more diligent search, but could not find the rest I most chiefly sought after.

Serj. *Jefferies.* Did the king's waterman take any shavings by himself?

Atterbury. We were all together, we did not move out of any one room, but together; this gentlewoman was in the house when I came, and there was a little child, a girl, and this maid was there.

Serj. *Jefferies.* Did you come for shavings there, pray, Mr. Atterbury?

Atterbury. No, I did not.

Mrs. *Goodwin.* The waterman did though first.

Coll. Call George Spur. (But he did not appear.) But, Mr. Atterbury, before you go down, pray tell the court, did you take any of these papers at my house, or at my brother-in-law Spur's house?

Sewel. My lord, I took the papers, and I took them at Busby, at Spur's house. And this woman carried out one half to Spur, and the maid carried out the other.

L. C. J. When did he carry them?

Mrs. *Goodwin.* The same day they searched for them, for my brother came in at the same time.

L. C. J. How do you know Spur carried any away?

Mrs. *Goodwin.* He carried none out of the house, I carried them out of the house, and delivered them to him.

L. C. J. Then they were in your house?

Mrs. *Goodwin.* They were in the counting-house.

Coll. My lord, if they were in any other place, I know not how they came there, for this was all done after I was a prisoner; and Sewel says, they were removed when I was a prisoner. Where is George Spur?

Serj. *Jefferies.* It is admitted they were at your house, and taken thence, and afterwards carried to Spur's.

Coll. They carried them abroad, and handed them from one to another, and took them into the country, I know not what they did with them. but my lord, I neither know the printer nor the author, I declare it upon my life.

L. C. J. Have you any more witnesses?

Coll. No, my lord, I have not.

L. C. J. Will you that are of counsel for the king call any more?

Att. Gen. One or two, if you please, my lord. Call John Shirland. And it is to this purpose; it seems very lately Mr. Bolron would have tempted him to have forsworn himself.

Coll. My lord, I hope, if they bring in any persons of new evidence, I may have leave to contradict them.

L. C. J. You need not fear but you shall be heard to them.

Att. Gen. We shall prove Bolron to be a suborner of witnesses; and that the jury may know what he is, he and Mowbray have gone to give evidence at several trials, and the jury would never believe* them when they were on their oaths.

Serj. *Jefferies.* I think it needs not, time hath been spent enough already.

Coll. No whispering, good my lord.

Serj. *Jefferies.* Good Mr. Colledge, you are not to tell me my duty here.

Just. *Jones.* Is it not lawful for the king's counsel to confer together?

Coll. Not to whisper, my lord; all ought to be spoken out.

L. C. J. Nothing ought to be said to the jury indeed privately.

Att. Gen. But shall not we talk among ourselves.

Coll. No, I hope not, of any thing that concerns my trial.

* "What the Attorney here says, and the Solicitor, in summing up the evidence, repeated after him, is notoriously false: for at the Summer-Assizes at York the year before Thomas Thwing was convicted solely upon the testimony of these very men in their own country, as was afterwards executed." Orig. Edit.

Just. *Jones*. You are deceived in that.

Coll. I think it is a law, that all ought to be public; I beg your pardon, if I am in the wrong.

Att. Gen. Swear John Shirland. (Which was done.) Pray give the court and the jury an account of Bolron, what you know of him.

Shirland. Bolron, my lord, last Whitsun-Tuesday would have given me ten pounds and a horse to go down and swear against sir Miles Stapleton. I was to swear I was suborned by his friends, and several other persons, which I have discovered upon my oath.

L. C. J. Is this man sworn?

Att. Gen. Yes.

L. C. J. Now call Bolron to confront him.

Coll. He offered you an horse, as much as I offered Turbervile an horse, and I never offered him an horse in the world. [Then Bolron appeared.]

L. C. J. Is this the man, Shirland?

Att. Gen. Did he give you ten pounds to swear?

Shirland. He bid me ten pounds and an horse to swear against sir Miles Stapleton.

Just. *Jones*. Did you ever see him, Bolron?

Bolron. Yes, my lord, he was to have been a witness against sir Miles Stapleton, and he pretended that he was suborned by sir Miles or some of his friends.

Coll. What are you, Sir? Mr. Bolron, what is Mr. Shirland?

Bolron. He is a man that lives by his shifts: He hath been whipt in Bridewell.

Coll. Do you know him, Sir, what is he?

Bolron. Even an idle man.

Shirland. You, once when you saw me, drew your sword on me, because I would not do as you would have me.

Bolron. I profess, my lord, it is not so.

Att. Gen. Here is Mr. Smith, hear what he says against Mr. Bolron.

Smith. As we were coming up along, he was speaking to me of Colledge, and told me, he had as much to say against him as any body, and if I would speak for him, he would evidence against sir John Brooks for a discourse at Ferry-bridge.

Bolron. I never did hear any such thing.

Smith. No man in your own country will believe you.

Coll. They believed you no more, it seems, neither.

L. C. J. Do you call any more witnesses, gentlemen?

Serj. *Jefferies*. No, I think we need not.

L. C. J. Look you, Mr. Colledge, as I understand it, the king's counsel will produce no more witnesses. You may make what observations you will upon the evidence to the court, and then must let them make what observations they will to the court; and then we will give the charge to the jury.

Coll. My lord, I have only innocence to plead; I have no flourishes to set off my defence. I cannot take the jury nor the court with an oratory; I am unhappy in those things. But, my lord, I do declare, as to my own particular, in the presence of God Almighty, that as to whatsoever is sworn against me, as to the seizing his majesty, providing arms, or having any design either at Oxford or London, or any other place in the world, to seize upon the person of the king, or to rebel against the government established; I vow to God Almighty I never had such a thought in me: It is a truth, my lord. My lord, they have sworn desperately against me, and it hath appeared, I think by very credible persons, that they have contradicted one another. It hath been proved that this was a design; that they were tampered withal; that they complained they were in poverty, that they wanted maintenance; and they did confess they were tempted to come over to swear against Protestants: And now the Lord knows, they have closed with it, and they begin with me. I hope the jury have taken notice, that I have contradicted them sufficiently in what they have sworn; and that it is not possible, if I had a gram of sense, for me to discover myself to be such an one to Haynes, that was an Irishman, and should speak all the treason that he hath gallopped through at first sight, that as soon as ever I saw him, that I should speak so to him; I hope you will consider whether it consists with common reason, when there would be no probability of making any use of him in the world. My lord, all my witnesses that I have brought, your lordship can, and I hope you will sum them up better than I can; for I declare it, I have been so concerned, that I have not been able to write half of it down. But I think there is never a man that hath sworn against me, but hath been sufficiently confuted by persons of integrity and honesty, men of principles, and men of religion; they are such, my lord, that make conscience of what they say: They are persons altogether unknown to me, most of them, as to what they had to say, it was what they offered voluntarily; and I am certain they had nothing but their bare charges, if they had that, for their pains, in coming hither; and, my lord, there is no probability that they should come and attest any thing that is false, for me who am a stranger, for nothing: No man is a knave for nothing, as I believe these men are not. My lord, I do declare it, I was bred a Protestant, and have lived so; I am so to this very day; I have been a lover of the church of England, and of all the fundamental points of doctrine believed in it: I own the same God, the same Saviour, the same gospel, and the same faith; I never had a prejudice against any man in the church in my life but such as have made it their business to promote the interest of the papists, and such I must beg leave to say there are amongst them; For there is no society in the world without some bad men; and these do promote the interest of the papists, by dividing the Protestants, and allowing none to be true Protestants but those that are within the church of England established by law; which is a notion so wide I

could never close with that. I never had a prejudice against any man but a knave in my life. I have heard, I confess, some of the dissenters, and I have found very honest, just, pious, godly men among them; Men free from oaths and all debauchery; men that make a conscience of what they say; Not like some persons that say they are of the church of England, that carry themselves in their lives and actions so as that no credit can be gained to the church by them. My lord, I have been an hearty man against the papists; I have been an hearty man as any person of my condition, for parliaments, which I look upon to be my birth-right, and under God Almighty, the bulwark of our liberty; and I am sorry if any man should be an instrument to create a misunderstanding betwixt the king and the parliament; for I always thought I served my country, when I served the parliament, and I served my king when I served my country. I never made any difference between them, because I thought them both one. I had the honour to be entrusted by them before, and upon that account I came voluntarily down hither. I rid my own horse, I spent my own money, and eat my own bread; I was not beholding to any man for the value of 6*d*. all the while I was here. My lord, I have ever since the Plot hath been discovered, endeavoured with all my heart, and all my power, to detect and come at the very bottom of it: I have spared for no time nor pains, what lay fairly in my way, in every thing to encourage those that discovered the villainies of the Popish Plot against the life of the king, and for the subversion of the religion and government established by law. Now certainly it is not strange to the world; for I think all Christendom is aware how plain the Popish Plot hath been proved. These men that swear against me, were they that used to follow me sometimes; they would say, it was they that had come to save our lives, and yet we let them want bread. That argument, my lord, was so fair, that I thought it unreasonable to see them starve: and I have said sometimes to some honest considerable men, that it was hard they should have this to say of us, that they should want bread to eat that were the king's evidence, to detect a Popish Plot wherein we ourselves were concerned; and that when they had saved our blood in our veins, they should be suffered to starve. And one time, I think, some three or four gentlemen of the city did give me 42*s*. or 40*s*. and 18*d*. or thereabouts; which I did distribute amongst them: and they never came to me in my life, but to seek relief, they knowing that I had a general acquaintance. And sometimes they thought it might be fit to petition the common-council of the city of London to take care of them: sometimes they would speak to me to speak to particular men, that care should be taken of them. At other times indeed it was not this sort of discourse they had with me; but they would pretend they had something to discover of the Popish Plot, and so they would apply to me as a man of some acquaintance. And the first time I saw Haynes, was upon such an account, the beginning of March last, and it was thus: I was at Richard's coffee-house at Temple-Bar, where Macnamarra did desire me to go out, and I should hear such a piece of roguery I never did hear in my life, against my lord Shaftesbury. So I did go out with them, and I called captain Brown, who is since dead, to go with me; and we went to the Hercules-Pillars, and Haynes there discovered what I told your lordship before, a design to destroy the parliament at Oxford; an army that was to land in the North, and another in Ireland, and the duke of York was to be at the head of them. My lord, after I had heard all out, he did desire us all to conceal what he had said till the parliament sat, and then he would not only discover this, but much more. He at the same time told us, that there was a design of Fitz-gerald's against my lord Shaftesbury to take away his life, and he was employed to come to his cousin Macnamarra to get him over to join in the design, and he should never want for money, if he would but come over and do as they would have him. After he had discovered himself, Sir, said I, you are a stranger to me; and I never saw him before in my days, if he had seen me I cannot tell: but, Sir, said I, either this is true, or this is false. If it be true, said he, It is all true, and much more. So he up and told us much of Coleman, and of the reconciliation between the duke of Ormande and the duke of York, and how he came to be lord lieutenant of Ireland, and how Plunket came to be primate, and by means of whom, and the letters that passed, and how so much a year was given to Plunket for carrying on the correspondence; and he told us so much, that I did wonder to hear any man talk after that rate. After I had heard what he had to say, I told him, Sir, said I, this is either true or false that you have said: if it be true, my lord Shaftesbury shall know it to night; for I will not conceal such a thing concerning a peer of the realm: and if it were a colour, he should know of it. And I did send him word that night; and, said I, Sir, you ought to go, for your own security and our's too, to swear it before a magistrate. Said he, if I should, I should be discovered. Said I, I cannot think you would be discovered. If you swore it before sir George Treby or sir Robert Clayton, they will not discover you. So he agreed he would swear before sir George Treby; and he did go accordingly: but he being out of town, I cannot have the affidavit to produce it. There was a letter sent last Saturday night to sir George to Bristol, and I hoped he might have been here to day. This was the first acquaintance I ever had with Haynes. The next time I heard of him, was upon this occasion. Ivy comes to me in Richard's coffee-house, and, said he, yonder is the man that made that discovery, which I told you before that Haynes, had said to me; it was about a month or three weeks before the

parliament was at Oxford. After the parliament was dissolved at Oxford, Ivy comes to me, and I think it was betwixt the two terms wherein Fitzharris was arraigned and tried: I know not the names of them; but he comes to me, and tells me he had been with my lord Shaftesbury, and that there was a friend of his that would confirm all that Fitzharris had discovered concerning the murder of sir Edmundbury Godfrey; and, says he, my lord of Shaftesbury hath sent me to you to acquaint you with it. Where is your friend? said I. He is without, said he. So we went out of the coffee-house; and when we came out of doors, there was this Haynes: we went to the Crown tavern without Temple-Bar; it was in the forenoon. When we came there into the room, he examined all the corners and cupboards, and places about the room, to see that no body was there. When he thought all was secure, he began to tell me he had been to acquaint my lord Shaftesbury that there was a friend of his that would discover the whole intrigue of the murder of sir E. Godfrey, all that Fitzharris had said, and much more: and he desired me that I would intreat my lord Shaftesbury to be instrumental to get his pardon before he discovered particularly. Then I told him, I think it is convenient, said I, that you discover something in writing, and under your hand, what you can say. He was not willing to do that. Can you believe, said I, that my lord of Shaftesbury will betray you? Says he, I will not trust any body; I shall be assassinated. Said I, if you will not give it to any body else, will you give it to Mr. Michael Godfrey, sir E. Godfrey's brother? You can have no jealousy of him that he will ever discover you. Said he, if my lord Shaftesbury will engage to get me a pardon, I will tell the whole truth. Said I, I will go to my lord, and acquaint him: so I went to both my lord and Mr. Godfrey; and sir E. Godfrey's two brothers both met me at my lord of Shaftesbury's house. Thus is the thing that he tells me; he would have me get my lord's protection and a pardon for treason; but the real truth is, he sent me upon this errand. So I came to my lord Shaftesbury, and the two Mr. Godfreys were in the room; and after I had told my lord what discourse I had with him, says my lord, Colledge, these Irishmen have confounded all our business; and thou and I must have a care they do not put a trick upon us: this must be a trick of the papists to ruin us; and if they have such a design, if they will not put it upon you and I, they are fools. Upon your lordship, said I, they may; but I am a poor inconsiderable fellow. Says my lord, I will tell you, Mr. Godfrey, Mr. Colledge hath not only been an honest man, but an useful and an active man for the Protestant interest. So I told my lord how far I had gone with him, and that I desired it might be put in writing. Says my lord Shaftesbury, if he will put it in writing, I will go once again; for I have been since I saw the fellow with my lord Macclesfield, and my lord chief justice Pemberton, and my lord Chancellor, and I have told them that there is such a person in general, but I knew not the man; as indeed my lord did not, for only Ivy was the person between them that my lord knew: and I told them, says my lord, that he can confirm all that Fitzharris has said concerning the death of sir E. Godfrey, and that he would prove my lord of Danby was in it, if he might have his pardon; and my lord said, they promised to speak to his majesty that it might be granted. But some time the latter end of the week I heard it would not be granted; and both of these men followed me to know what they should do. Said I, my lord Shaftesbury knows not but that it may be a trick; and said I to Ivy, I wonder why he should conceal it all this while, being a necessitous man, and 500*l.* proffered by the king in his proclamation. Why, says Ivy, do you think there is no truth in it? Says Ivy, it is not my judgment, but my lord Shaftesbury's and Mr. Godfrey's judgment too. He answered me again, Fitzharris hath desired he may have a pardon granted for himself and a Frenchman; and if so be there were nothing in it, do you think he would move for a pardon? Says I, did Mr. Fitzharris move for Haynes's pardon? How do I know that, says Ivy again: Fitzharris's wife told me so. Says I, let me speak with Fitzharris's wife, let me hear her say so, and I will believe you. The next day he did bring her to me to my house: and this was the time and the occasion that brought Fitzharris's wife, and Haynes, and Ivy, and Mr. Fitzharris's maid to my house; and I never saw Fitzharris in my days, till his trial, nor had any communication with him But, my lord, she did talk with Haynes, and confirmed it to me, that her husband had desired a pardon for him: why then, said I, he would do well to discover what he knows to my lord Shaftesbury; for I was with my lord, and he says he will meddle no more, unless he will give it under his hand what he has to say. And he did confess to me in my own yard (for there we were together) that he saw my lord of Danby come into the chapel at Somerset House, when the body of sir E. Godfrey lay under the altar.

L. C. J. Here hath been nothing of this made appear by proof.

Coll. My lord, I only tell you which way they introduced themselves into my acquaintance.

L. C. J. You may observe what you will upon the evidence, as we told you; but you ramble from the matter you are to speak to. And as we told Mr. Attorney, that what he said should go for nothing, unless he made it out by proof; so must we say to you, what you say goes for nothing, further than you have proved it. Now you have quitted the proof quite, and not spoke to that, but run into other stories. I would have you keep yourself to your proofs, and make your observations upon them.

Coll. It is, as I humbly conceive it, to my purpose, but I hope my ignorance may excuse me if I err. I tell you the truth of things, thus it was.

L. C. J. Truth! Why if yours or any other man's word in your case should go for truth, no man that stands at a bar, could be convicted: For every man will say he is an honest man, and all the plausible things in the world. Make you your observations upon the proof, that is proper for you to do; and urge it as well as you can, and to the best purpose you can: But to tell us long stories of passages between you and others that are not a whit proved, that is not usual, nor pertinent.

Coll. I thought it had been to the point, when this man pretends to have a familiarity with me, to shew how his acquaintance begun.

Just. *Jones.* Why do you think it is an answer to him in what he proves upon his oath? Have you proved one jot of it? Not that I have heard. It is your part to sum up the evidence on your own side, and to answer that which is proved upon you, if you can. Do that, and we will hear you speak to it as long as you can. But to tell stories to amuse the jury with that are not proved, and to run out into rambling discourses to no purpose, that is not to be allowed, nor ever was in any court of justice.

Just. *Raymond.* Not one of your witnesses have mentioned any thing that you say.

Just. *Levinz.* I wonder Mr. Colledge, you should forget yourself so much: For you found fault with Mr. Attorney at the beginning for opening the evidence, and you were told, and the jury were told at your request, that what he said, and did not prove, passed for nothing. But I must tell you, it is much worse in your case: For Mr. Attorney only opened what he might prove afterwards, but your observations are upon what hath been proved already; and yet you run out into stories of what hath not been proved at all, after our proof is past.

Coll. Sir, I could not prove this otherwise than by Ivy, who hath been sworn against me.

Just. *Jones.* Would you have the jury to believe you upon your word?

Coll. There is no more than his oath against me; and why my oath, being an Englishman and a protestant, should not be taken as well as his that is an Irishman, and hath been a papist, I know not.

L. C. J. You go upon that ground that your word is to be taken, as appears by your defence; but I must tell you, all the course of justice were destroyed, and no justice against malefactors were to be had if the word of him that is accused should pass for proof to acquit him.

Coll. My lord, I have given your lordship an account of these fellows conversations; and what other proofs to make I know not: For I knew not what they would swear against me, and I had not witnesses in my pockets to confront them.

Just. *Levinz.* Well, the jury have heard it over and over again, first upon your request, that nothing is to be taken notice of that is not proved.

Coll. Pray, my lord, then as to Haynes. My lord, I do observe that there was a witness for me that did prove, he owned he was one that was employed to make a protestant plot, and another that did hear him swear, damn him, he would swear any thing against any body for money, for it was his trade.

Just. *Levinz.* Now you are right; speak as much as you will as to your proofs.

Coll. My lord, I think Turbervile and Dugdale swear as to the tenth of March in Oxon; I desire it may be proved I was in Oxford the 10th of March.

Just. *Jones.* You yourself came down the middle of March.

L. C. J. I do not remember that they said the 10th of March.

Coll. Did not the Indictment say so?

Att. Gen. It is only in the Indictment.

L. C. J. As to the time mentioned in the Indictment, it is not material; that is the constant rule in trials upon indictments; as if an horse be laid to be stole the 10th, if it be proved the prisoner stole it another day, it will be sufficient, the time is not material; the question is, whether the indictment be true in substance. Mr. Colledge, my brothers will all tell you that the law is so.

Just. *Levinz.* Though it is laid the 10th of March, yet if it be proved the 1st or 20th before or after, it is all one; so the thing be proved they are not bound to a day.

Coll. My lord the punctilios of law I know not, but it was the 24th or 25th ere I came down.

L. C. J. Well, go on, Sir.

Coll. Dugdale says I meant by the word Rowley, the king.

Just. *Jones.* He does so.

Coll. How does he come to know, that by that word I meant the king?

L. C. J. That we did ask him, and he says, you used so to expound it.

Just. *Jones.* Why, look you, he said you and he used to have frequent communication concerning the king, and you did most frequently speak of the king by the name of Rowley.

Coll. But, I say, my lord, I never spake of the king by the name of Rowley in my life.

Just *Jones.* You say it, and he swears the contrary.

Coll. I do not remember that he says, I declare it so; but he said, I meant it; for if I had declared it, then it had been the same thing for me to have named the king downright.

Just. *Levinz.* Look you, Mr. Colledge, as to that, when any witness had done his evidence, you had liberty to cross examine him.

L. C. J. Would you have him called up again to clear this?

Coll. Yes, if you please.

L. C. J. Stand up, Mr. Dugdale. I understood by your testimony, when Mr. Colledge

and you discoursed of the king, you sometimes discoursed of him by the name of Rowley, and that he explained that name to be the king.

Dugdale. The first time I ever heard what Rowley meant, was from him; for I asked him what he meant by the name Rowley; I heard it before, but I did not understand it.

L. C. J. Where was it?

Dugd. At Richard's coffee-house.

Just. *Jones.* What was the answer he made you?—*Dugd.* He said it was the king.

Coll. Upon what occasion did I explain it to you?

Dugd. Upon the account of the pictures.

Coll. I know not which of the pictures has the name of Rowley in it.

Dugd. It was then we were talking of one of the pictures you brought in Rowley and Mac, and Mac was the duke of York, and Rowley was the king.

Coll. Upon what picture was it, that I took occasion to explain the name Rowley to you?

Dugd. I am not certain.

Coll. Remember, you have an account to give as well as I.

Dugd. You have so many pictures, that I cannot remember them; you have shewed me more than have been produced in court.

Coll. Where had you that picture from me they call the Rary Shew?

Dugd. Truly I received of them twice at Richard's Coffee-house.

Coll. Twice do you say?

Dugd. Yes, two of them at two several times; for you having promised me one, you brought it according to your word.

Coll. When was that?

Dugd. I did not keep an account of the day of the month; and another I do remember, at Green Dragon Tavern you thrust into my pocket, and Mr. Baldwin was by at that time. And said he, Mr. Colledge, you will be so open that you will come to be discovered at last.

Coll. Then will I be willing to die for it, if he and I and Mr. Baldwin were at the Green Dragon Tavern together. When was it that I gave you any pictures there? Was it since the parliament at Oxon?

Dugd. Do I charge you since the parliament?

Coll. I never saw the Rary Show before the parliament at Oxford.

Dugd. I do not say it was that; you gave me one of the others.

Coll. It is strange you will stick to nothing; When was it we were at the Green Dragon Tavern?

Dugd. We were there before the parliament sat at Oxon; it was since Christmas.

Coll. What picture was it I gave you there?

Dugd. It may be, I can't remember which of them it was, it was not Rary Shew; I suppose you gave me one of them concerning the bishops, where you put bishop Mew kissing the pope's toe; for it was a bishop with a patch on, and that you told me was bishop Mew.

Coll. I put it, did I make it?

Dugd. You said you were the author.

Just. *Jones.* Mr. Colledge, will you consider upon what Mr. Dugdale was called up about, the exposition of the name Rowley?

Coll. I did examine him, and he hath contradicted himself: for he hath said at the Green Dragon Tavern I gave him a picture of Rary Shew.

Just. *Jones.* He said no such thing; he said he did not know which it was.

Coll. I am certain he meant that then when he spake it; for he named it before, that he had two from me at Richard's Coffee-house, and one I thrust into his pocket at the tavern; and I say, I never was at the Green Dragon Tavern with Mr. Dugdale and Mr. Baldwin, nor in the tavern these three quarters of a year.

Just. *Levinz.* Mr. Colledge, you were in the right way just now to manage your evidence in opposition to the other evidence; go on in that way.

Coll. My lord, I don't know well what was said, for I could not hear half, nor write a quarter of it; but, my lord, I hope your lordship hath taken notes of it, and will remember it for me. You are my counsel as well as my judges.

L. C. J. In matter of fact we are.

Coll. My life and your souls lie at stake to do me justice; therefore I hope you will take notice of what I have not had the opportunity to write down. I have observed that every one of my witnesses have spoken materially to contradict what they have said, to prove that this was done for money, and that there hath been confessions from every man of them that they were hired to do it; that they did it for a livelihood; and one of them said, it was a good trade, damn him, he would do any thing for money: and I hope then you will consider the improbability, that I should speak to an Irishman whom I had never seen before in my life; and that I should at the first dash utter that treason that he gives in evidence, I think it cannot consist with any man's understanding to believe me so mad or so weak.

Just. *Levinz.* That is as to Haynes only.

Coll. As to Smith now, I suppose, it does not come within the reach of the statute; for the dinner that was made by alderman Wilcox, was made before last July was twelve-month; all the witnesses do say it was before Christmas, and Dr. Oates says, it was in the summer; I know it by a very good observation; because I went to Astrop waters after that; and I saw sir Creswell Levinz at the Wells: now, Sir, you were there before this time twelve-month. So then whatever he says I said to him there I cannot be charged withal by the statute, more or less, if I had never a witness against him; but I have witnesses that have contradicted him sufficiently that he is forsworn in that; and if so, he is not be believed in any thing else; for he says, he and I went to the coffee-house together, and we discoursed such and such things, which is not above half a bow's shot, and he made it, I say, a quarter of a mile's discourse;

if I had had all the talk, the discourse could not be so long, though he had said never a word; so you see what a kind of witness he is. And Dr. Oates's brother did say, That I did go along with Dr. Oates, and offered to be one of his guard, and I did say so, and went along with them; but Mr. Smith he came after. And as to what he says, he is sufficiently confuted; that is, about the going into cabals after dinner; for it is proved, that I fell asleep behind the table, and Dr. Oates was discoursing with Mr. Savage upon points of divinity; but I take no notice of it, neither did I see Smith any more; but he went away, and so did the rest of the company. But, my lord, when Haynes was taken, Smith came to me that day to my house at the ditch-side, and sends in a man for me, his man; I was writing in my parlour, and drawing the design for wainscotting Allhallow's church, a platform for it; this man told me, his master would speak with me, and Haynes was taken that morning: but, as I understand since, it was by agreement and his own consent, though he hath pretended otherwise. You hear, says he, Haynes is taken? Yes, says I, I do. He hath been ever since nine o'clock before the secretary upon examination, and he was till five o'clock at night examining, said he: I believe he confesses a great deal, said I. Of what, said he? Of some design of the protestants, said I, What against the government? I do not know what they may affright him into; he is a great rogue, if it be true all that he hath said of himself: he says, he was concerned in the Fire of London, and knew of a design to destroy the protestants then; of a rebellion that was to be in Ireland; of Plunket's being made Primate, and a great many of those things: so that if he speaks truth he hath been a great rogue, and as he hath pretended also, he was a great coward. So then, I believe, he may say any thing to excuse himself: says Mr. Smith, I wish you are safe: This was the very night before I was taken.

Just. *Jones.* Have you proved any thing of this?

Coll. My lord, pray give me leave to tell you what is proof.

Just. *Jones.* You are not to repeat this, unless you prove it, Sir.

Coll He spake cautiously to me, as if he would have intimated to me, he would have had me run away. Said he, I believe you are not safe, I would have you take care of yourself: For you were concerned with him. Now, my lord, if I had been a guilty person, I had time enough to get away; and to prove this, I can only say, this was betwixt him and I. But, my lord, you hear, Dr. Oates says, that this very Smith did swear he would have my blood, and that was upon this occasion of my vindicating Sampson, whom he had struck and abused; and I asked, why he did it? Said he, I value no man's life, if he affront me, if it is any man in England, I value him not. My lord, upon this occasion the words rose between us; and when he came out of doors, and was going away, Dr. Oates said, he swore he would have my blood, and that was the occasion of his speaking that blasphemy.

L. C. J. Dr. Oates did say so.

Just. *Levinz.* Well, you are right now, if you will go in that way.

Coll. My lord, this is for Smith and Haynes, that Haynes should say it was a good trade, and damn him he would swear any thing for money, and that Smith should swear damn him, he would have my blood. I cannot sum up the rest of them, for I have not them here.

Just. *Jones.* There is Turbervile, and Dugdale, and Smith; we will help you as to the persons.

Just. *Levinz.* Pray keep to the business, and do not run out.

Coll. Pray, my lord, I have one thing to say about Smith; he says, I shewed him my arms, which I have had for any time almost these three years, ever since the plot brake out. I have been armed ready to oppose the papists, and I did my duty in the city in person in the trained-bands; but Smith says, these arms were to destroy the king's guards; but he does not prove that I was confederate with any other person; but instead of that, there were other persons that say, with his own mouth, that he did not believe there was any protestant plot; nay, he did believe I said it only in wantonness. This is all; then how probable was it, that I myself should seize the king, or destroy his guards?

Just. *Jones.* You remember captain Brown, captain Clinton, and Don Lewes, Mr. Colledge.

Coll. Did he swear they were all in my company at Oxon?

Just. *Jones.* Yes, Dugdale did.

Coll. My lord, captain Brown and Lewes were friends to my lord Howard, with whom and other company I came down to Oxon, and they lay with me at the Chequer, and they were in my company, because they were guests in the house, and we came along together; but he does not say they were either of them armed more than myself, nor was he ever in company with us; how then does he know we were in a conspiracy?

Just. *Jones.* Because you told him at London first that they were such persons.

Coll. I never saw Lewes in my days, till I saw him that morning I came down from Oxon; and Brown I was not acquainted with a fortnight before. This is a truth; but however, they have sworn a plot upon me at Oxon, and then come and prove I declared these were the men, and spoke such and such words at London; I desire your lordship's judgment in this matter of law, whether what be done at London can be sufficient matter of proof in law to maintain in an indictment against me at Oxon? And if not, they do not prove legally that I have spoken such words. Besides, I conceive it is not a good proof, because there is but one witness.

L. C. J. Yes, look you, there are two witnesses, Dugdale and Turbervile, as to what you said at Oxon, and two witnesses as to what you said at London, Haynes and Smith, who testify what you said you would do at Oxon. Now in case you came to Oxon with any such intention, that coming to Oxford is an overt-act, and the witnesses that speak what you said in London, is evidence to maintain the indictment here, and to prove what your intention was.

Coll. Does that become an overt-act, if I go to Oxon upon an honest occasion, any other occasion, though I had said those words before?

L. C. J. If you came with that intent to join with others, and with a real purpose to seize the king, that is the overt-act, and the words before prove the intention.

Just. *Jones.* He declared it himself by his words.

Coll. Smith says, that about a week after Wilcox's dinner, I discoursed with him at the ditch-side, that comes not within the compass of the statutes. Then there is twice of the three times he speaks of; the last day, I do not remember when it was.

L. C. J. All was in London that Smith speaks of you.

Coll. How comes that to be proof here? Then nothing he says is to go for any thing.

Just. *Jones.* Nothing will serve your turn, we have declared our opinions once already, that if the witnesses swear true, here are two witnesses; nay, if one were of what was done at London, and the other of what was done at Oxon, if they be to the same treason, they are two witnesses in law.

Coll. My lord, I observe one thing upon Turbervile's evidence; he swears there was a discourse in the room when Brown was upon the bed; but afterwards, if your lordship minds it, he says, I discoursed with him as he and I lay upon the bed. Before he said, when Brown lay upon the bed, and in the room, and afterwards when we lay upon the bed.

Just. *Jones.* Both the one and the other.

Coll. But he first said one way, and then the other.

Just. *Jones.* Whilst Brown lay upon the bed, and when he was gone, whilst you both lay upon the bed.

L. C. J. We will do you no wrong; therefore if you will, Turbervile shall stand up and clear it.

Coll. My lord, I believe those that have taken the passages, can prove he contradicted himself in that.

L. C. J. He said both. But the jury have taken notes of the evidence, and will take notice of it.

Coll. As to Mr. Masters, the evidence he gives was, he says, that he and I should discourse of the parliament in 1610.

Just. *Jones.* And the justifiableness of the late king's death, that they had done nothing but what they had just cause to do.

Coll. He swears that I did say to him, that the late parliament did not cut off the king's head.

Just. *Jones.* And you said the last parliament that sat at Westminster, was of the same opinion with that in 1640.

Coll. I dare appeal to esquire Charleton, in whose shop the discourse was. I did not know that Mr. Masters was to be an evidence against me; and truly they have taken that course with me, by which any man may be destroyed with half this evidence, were they of good credit, let his innocence be what it will. I have been used so barbarously in the Tower, kept from all conversation, and so in an utter ignorance of what was sworn against me; for else I could easily have disproved Mr. Masters, if I had been in London, and had liberty to provide for my defence; but they have taken a course to prevent that, and brought me hither, because it is impossible I should here defend myself.

L. C. J. You have not offered any witness to impeach Mr. Masters's credit.

Coll. Mr. Masters's discourse he speaks of was in Mr. Charleton's shop, I durst have appealed to him about it; for I knew if he were here he would do me right. Mr. Masters did say, the parliament cut off the late king's head. We held a dispute upon that, which I was not willing to enter into; I said, they did not, and we did then dispute whether they began the war against his majesty: I said, they did not that I knew of, neither were they the persons but the papists that began that war, and that broke the treaty at Uxbridge, and that the papists carried it on to that sad issue, and put it upon the Protestants, that they had the odium of it but, it was another sort of men that carried it on. I said, that I did always understand that parliament to be an honest parliament, that minded the true interest of the nation, and much of the same opinion with the parliament that sat last Westminster. But before I said this, I said they were persons altogether innocent of the king's murder, and raising the war against the king; I did always understand that so the parliament in 1610 were.

L. C. J. But they were guilty of a rebellion, and are declared so by act of parliament since his majesty came in.

Coll. My lord, I am unacquainted with the law, I speak only my sense of it. And, my lord, I did excuse them as to the murder of the king, and the beginning of the war, that according to my understanding they were not guilty of it; and from thence I did maintain they were an honest good parliament, and much of opinion with the parliament that sat last at Westminster, which was for the true interest of the nation.

L. C. J. And was that the true interest of the nation to cut off the king's head?

Coll. I did argue that with him some time, and did tell him that it was the papists that did all the mischief.

Just. *Jones.* But he says no, upon his oath,

that when he had said the parliament begun the rebellion, and the parliament did cut off the king's head, you said, the parliament did nothing but what they had just cause for, and the parliament that sat at Westminster was of the same mind.

L. C. J. Those were his words.

Coll. Pray let him be called again.

L. C. J. Let Mr. Masters stand up again.

Coll. Pray, Sir, relate the whole discourse that passed between you and I, whether I did not argue with you it was not the parliament cut off the king's head, nor begun the war, but the papists.

Masters. No, you did not say any such thing. We had a great deal of discourse in the shop, and under the arch, and the thing that was said, Mr. Colledge, was this: You did say to me, that you did justify the late long parliament of 1640, and their proceedings; and you said, they were a parliament that did nothing but what they had just cause for. Said I, How can you be so impudent to say so, when they raised the rebellion against the king, and cut off his head? Said he again, They did nothing but what they had just cause for, and the parliament that sat last at Westminster were of the same opinion.

Just. *Jones.* I did you no wrong in repeating the evidence, you see, Mr. Colledge.

Coll. Did I not first dispute with you that they did not begin the war, nor cut off the king, but the papists did it.

Masters. Look you, Mr Colledge, you would have had it the king began the war.

Coll. Don't you say so; for I said the papists began the war. Sir, say no more to me than what you will answer to God Almighty; for I always said the papists did all the mischief in the late times; and I wonder, Sir, you would not be so just to his majesty, as to detect me for what I said then, if you apprehended it to be as you now say! but I am sure you do not, nor could not.

Masters. Mr. Colledge, it was so far from that, that I was afraid it was of dangerous consequence, and I gave some persons of honour an account of it: and I was sent to but on Friday last, to know what it was was said, and I was desired and commanded to come down hither.

Coll. Pray, Mr. Masters, you are upon your oath, do me but justice, and speak upon your own conscience; look you to it that you speak the truth.

Masters. I will do you all the right I can in the world.

Coll. Then before the court do you declare, whether we did not discourse at that time as I said, for this discourse was at Mr. Charlton's shop at the further end.

Masters. No it was at the entrance into the shop, Mr. Colledge; and did not we go into the arch, and talk there?

Serj. *Jefferies.* Mr. Masters, don't trouble yourself, your reputation is not upon the level with that gentleman's.

Coll. I desire he may speak the very truth, and nothing but the truth.

Masters. I do, as near as I can, and do you no wrong; you did in your discourse say the parliament did not begin the war, nor cut off the king's head.

Coll. You did say to me, they did cut off the king's head; and I told you no, the Papists did.

Masters. I think you did say that the Papists had an hand in it; but, Sir, you have left out the most material part of our discourse, which was, that you said they did nothing but what they had just cause for.

Coll. I do say, and it was my sense always, that parliament did not cut off the king's head; for they were ut of doors before that came to pass, and unhappy war was begun.

L. C. J. The war was a rebellion on the parliament's part, let us not mince the matter, and so it was declared by act of parliament; and if you argued after that rate, it shews your temper, and that you are a very ill man; for they that justify such things, as to the time past, would lead us to the same things again if they could. Therefore don't go about to palliate it, *ad faciendum Populum;* here it is nothing to the matter, but only to shew your principles, and the jury have heard what Mr. Masters says.

Coll. I was then a child, and do not know all the passages, but I speak my sense.

L. C. J. You should not have justified such things.

Just. *Jones.* Who appointed the high-court of justice that tried the king, and condemned him, but the parliament?

Just. *Levinz.* It was the garbage of that parliament, I am sure, that is the Rump; but they called themselves the parliament of England, and the parliament it was that begun the war.

Coll. My lord, I did not know, nor don't know, that it is proved yet, that the parliament were those that did cut off the king's head. I don't know, Mr. Masters is pleased to say this of me; but I thought no evil, nor did he understand it so. I believe, at that time, for he did not seem to take advantage of my discourse. I know he talked violently and [illegible] with me, as he used to do; and for Mr. Masters to say this of me now, is a great unkindness; for I thought he was so much a gentleman, that if I had spoken any thing that had not become me, he would have taken notice of it then.

Serj. *Jeff.* He did then, he tells you.

Coll. Had I known of it, I am sure Mr. Charlton would have done me justice, and set things right; but this I say, I did first excuse the parliament from being concerned in the murder of the king, or that they did begin the war, but the Papists did it: If it were otherwise, it was more than I understood: And after that I said, I thought that the parliament that sat last at Westminster did stand up for the people rights, after the same manner that the parliament in 1640 did.

Just. *Jones.* What, just after the same manner, in raising war and rebellion against the king?

Coll. After I had discoursed it thus, my lord, as I told you, it could not be understood that I thought that parliament would cut off the king's head: And therefore you that are my jury, pray consider, and take it all together, there could be no such meaning made of my words; for I did not conceive that that parliament were concerned in those things, but were a parliament tha[illegible]d up for the rights of the people: Now, if it were so, then the parliament at Westminster were of the same opinion.

L. C. J. I tell you, the Long Parliament's levying war, is declared rebellion by act of parliament.

Coll. My lord, if there hath been an act since, that says they were guilty of rebellion, I declare 'tis more than ever I knew before. This is the first time that ever I heard of it.

Serj. *Jeff.* Y[illegible]re a mighty learned gentleman, to talk of those points indeed!

Coll. My lord, I desire to know whether any words that were spoken six months before they gave their depositions, can be a sufficient evidence in law against me now?

L. C. J. 'Tis upon the act of the 13th of this king you speak.

Coll. Yes, my lord, I take it upon that statute.

L. C. J. I tell you, as to that part of the statute which concerns misdemeanors, there is a particular clause for prosecution by order of king and council; But as to that part of the statute that concerns treason, it must be prosecuted within six months, and the indictment within three months after.

Coll. What statute is this indictment grounded upon?

Just. *Jones.* All statutes that concern treason.

L. C. J. Upon the statute of the 25th of Edw. 3. which declares the common law, and the statute of the 13th of this king, which when you have done, I will have read to the jury.

Coll. Then, pray, my lord, let me ask you one question, Whether the statute of 25 Edw. 3. does not say, that there shall be two positive witnesses to treason?

Just. *Jones.* No, but there is another that does.

Coll. I am ignorant of the law, therefore I ask the question.

L. C. J. Well, I will tell you, there must be two witnesses in the case, but one witness to one fact at one time, and another witness to another fact at another time, will be sufficient evidence to maintain an indictment of treason; this was told you in the morning.

Just. *Jones.* And it was told you withal, That it was the resolution of all the judges in the case of my lord Stafford, when he was tried in parliament.

Coll. They proved fact in that case, writing of letters, and offering money to kill the king; but nothing of fact is proved against me, but riding in the country with arms that I had three years before.

L. C. J. We will read the statute of the 13th, wherein words are declared to be treason.

Coll. I pray it may be read, if you please. (Which was done.)

L. C. J. Look you here, To compass or imagine the imprisonment of the king, and to express it by malicious and advised speaking, when proved by two lawful witnesses, is treason by this act

Coll. Now whether you will distinguish, that there must be two witnesses to distinct places or times, or whether the statute intends two witnesses to every particular fact and words.

L. C. J. We told you our opinion before, That one witness to one fact, and another to another of the same treason, was sufficient. We are upon our oaths in it, and speak not our own opinions, but what hath received public resolution in cases of the like consequence

Coll. What lies before these gentlemen of the jury, as done at Oxon, 'tis but upon a single testimony.

Just. *Levin.* Nay, Mr. Dugdale and Mr. Turbervile both swear the same thing, your design to seize the king at Oxon. And it would be the difficultest thing in the world to prove treason against any man, if the law were not so, and a man might commit all sorts of treason securely; for to be sure he would never say the same things before two witnesses in one time, and the king would be in no sort safe; for there would never be two witnesses to one and the same thing: But that hath been resolved often and often, over and over again, particularly in my lord Stafford's case, as you have been told.

Coll. My lord, you say the king is not safe upon those terms, and no private man is safe in the other way.

Just. *Levinz.* We say, that the law is so, and there is good reason for it.

Just. *Jones.* We must not alter nor depart from the allowed received law.

L. C. J. I say, the thing hath been considered in other cases, and the law hath been adjudged and settled. It was so resolved in my lord Stafford's case, when the judges, by the command of the parliament, did deliver their opinion upon that point moved by him.

Coll. There is nothing of fact proved against me, but a pair of pistols, a sword, and an horse.

L. C. J. We have told you the law, and answered your question.

Coll. But as the case stands, if that be the law, all society and conversation must be ruined by it.

Just. *Jones.* Pray go on, when do you think we shall have done else?

Coll. However I do not insist upon that so much, as that the testimonies and oaths of these men are altogether invalidated, by substantial persons that have here testified against them.

I do declare upon my salvation (I have nothing else to say) I am wholly innocent, and the jury are my judges, and I beseech them, as they will answer it at the great day of judgment, where they must appear as sure as I stand at this bar now, that they do me right. and go according to their own consciences; for if a man shall be sworn against by such fellows as these are, no man is safe.

Serj. *Jeff.* The worse, the better to be trusted by you.

Coll. I am sure it cannot be thought by men of common reason, that I should speak treason at that rate that they have sworn, and to such men, men of their profession, Irishmen, and Papists, traitors that have declared they have been in all manner of rogueries, murders, plots and treasons. Therefore, my lord, I cannot do any more for myself, because I have no notes, and cannot recite what hath been said for me or against me; but I do depend upon your lordship, and I hope you will inform the jury rightly, and do me justice; and I do pray the jury, that they will let their conscience be satisfied, as they are Englishmen, and as they are Christians, to consider how the case lies with me, whether there has not been more occasion of talking of late, and whether a slip of the tongue may be called a premeditated, malicious, advised speaking. I mean, my discourse with Mr. Masters. He talked with me as hot as fire, he was so violent, and I did discourse him at that rate I have told you, and that is truth, as I have a soul to be saved: I did excuse the parliament, that as I understood it, they had no hand in the beginning of the war, or the murder of the king. My lord, as for the rest that have sworn against me so desperately, I must say, that if the jury did not as well consider my evidence as their's, yet they might well consider, whether it consists with common sense and reason, that I should speak to these men after this rate, when I could lay no obligation upon them, nor have any confidence in them; necessitous persons, that could not assist me one mite, men that were beholding to me to borrow money of me, and that eat of my cost, that I had always been obliging to, and not they to me. But I hope I need insist upon this no further; the whole nation is sensible what is doing, and what this does signify: they have begun with me in order to the making of a Presbyterian Plot, which they would carry on to stifle the noise of the Popish Plot; and this is not the 1st, the 2d, nor the 10th time that they have been at this game; how many shams have they endeavoured to raise———

Att. Gen. Who do you mean by they?

Coll. The Papists.

Att. Gen. There is nothing of Popery in the case; they are all Protestants.

Just. *Jones.* They are all persons that have lately received the Sacrament.

Coll. They were all Papists, and I believe are so still; for Mr. Dugdale did justify to me the Church of Rome in several things: and when I told him that they were all knaves and fools that were of that religion, he told me, that many of their priests were holy good men.

Just. *Jones.* Have you proved that?

Coll. I cannot prove it, it was betwixt him and me, my lord.

Just. *Jones.* Then I hope you have done.

Coll. If I had sworn against him, he had stood in my place.

L. C. J. Have you done, Mr. Colledge?

Coll. My lord, I only desire the jury to take all into their serious consideration; I expect a storm of thunder from the learned counsel to fall upon me, who have liberty to speak, and being learned in the law, understand these things better than I, who must defend myself without counsel. I know not whether it be the practice in any nation; but certainly it is hard measure, that I being illiterate and ignorant in the law, must stand here all day, they being many, and taking all advantages against me, and I a single person, and not able to use one means or another either of writing or speaking. But, gentlemen, I do declare and protest, as I shall answer it at the day of judgment, that as to what these people have sworn against me either as to words, or as to any manner of treason against the king, the government, the laws established, I take God to witness I am as innocent as any person upon earth. And therefore I must beseech you, be not frightened nor flattered; do according to your judgments and your consciences; you are to be my judges both in law and fact; you are to acquit me or condemn me, and my blood will be required at your hands. And whatever is said to you by others, you are my true judges, you must give an account of the verdict you give; and therefore you must see that you do justice, as you will answer it at another bar, where you must all certainly appear, and the Lord Almighty direct you that you do me true justice, and I ask no more.

Sol. Gen. May it please your lordship, and you gentlemen of the jury. Here hath been a great deal of time spent, and truly I think for no other reason but to divert you from the matter that is before you, and that you might forget the evidence that hath been given. And therefore I will briefly repeat it to you, that I may refresh your memories about what hath been sworn. Gentlemen, the crime charged upon Mr. Colledge is high treason in imagining and compassing the death of the king; the proof of that hath been by a conspiracy to seize the king here at Oxon, which conspiracy he declared he was in, by shewing arms prepared for that purpose, and by coming down to Oxon with that intent, that is the proof of his design to kill the king.

Coll. Is the conspiracy proved of that, Mr. Solicitor?

L. C. J. Mr. Colledge, we have had a great deal of patience with you, you have spent a great deal of time, you must contain yourself now, and let them go on.

Coll. Do not let him do me wrong, my lord.

Sol. Gen. I will do you no wrong, Mr. Colledge.

Coll. Sir, there is no conspiracy proved.

L. C. J. Look you, Mr. Colledge, you have taken up a great deal of time, and we have had much patience, because we consider your condition, and had rather hear too much, than be hard upon you, and because the evidence was long and difficult to repeat; now we have heard you, you must have patience to hear what the king's counsel repeat and observe upon it.

Sol. Gen. As I was saying, the fact that is charged upon him, is a design to kill the king, the manifestation of that design is by preparing arms to that purpose, and by coming down to Oxon to seize the king here; and that this was his manifest intent to [illegible] the king, the proof of it hath been by witnesses, that I think by and by you will have no objections against. These witnesses were Dugdale, Turbervile, Smith, and Haynes, these are the most material witnesses to the treason, there are two other witnesses indeed, but they are to other circumstantial matters that I will take notice of to you by and by, and make my observations upon them in their proper place.—Mr. Dugdale was the first that was produced, and his evidence is very full, he proves that Mr. Colledge declared to him at the coffee-house here, that he was come down with an intent to seize the king, that he had an expectation something would be done, that he was armed, and that he did advise Mr. Dugdale to be armed too, for he was provided for the rooting out of Popery, which he explained himself what he meant by it, that was the Church of England, and the king and all his adherents. He came hither armed for that purpose, gentlemen, and did advise Mr. Dugdale to arm himself too, that he did declare to him the king was a Papist, and all his family were Papists, he [illegible] deep in the plot, and as guilty of the murder of sir Edmudbury Godfrey, as any body else. This was what he declared to Dugdale here, and this he swore to you when he gave his evidence.—The next witness is Mr. Turbervile, and he is positive to the matter that is laid in the indictment, and swears to you expressly, that he did declare it to him at the Chequer-Inn, that they came down here in expectation of some sport, that something would be done, that they did expect the king would begin with them: but if he did not, they would begin with him, and they would secure him till they had brought him to compliance. He shewed him his arms, that he was ready to engage in that design, and advised Turbervile to be ready too. And rather than Turbervile should not be ready, he offered to procure him an horse.

Coll. Every man had the same arms as I had, and I had had them long before that time.

Sol. Gen. But every one had them not with the same intent. But, gentlemen, because Mr. Colledge interrupts me with an objection, I will take notice of it now by the way. He says, those arms he had before, and therefore they were not provided for this purpose. Gentlemen, we do not pretend to prove when this traiterous intent first began, and how long this design hath been hatching; but such a design there was, and such a design he manifested to be in himself when he made the declaration to Turbervile, and advised him to arm himself; whether he prepared them against that time or no, is not material, if he had them before; and if he had them first innocently, yet if he afterwards designed them for such a purpose, and shewed them in a readiness for it, that is a sufficient evidence to prove this treason. So here are two witnesses, you observe, against the prisoner of this matter that is laid against him in the indictment, an intent to kill the king, they both prove it positively upon him at Oxon. Mr. Dugdale speaks to matters precedent to [illegible] for he tells you, his discourse before they came down, that they would come down for that purpose, that they had an expectation something would be done, and therefore he came down in an equipage not suitable to his profession; for you see he was by trade a carpenter or a joiner, but armed on horseback with a case of pistols, things that do not become such men to travel with, and he did declare to Mr. Dugdale for what purpose he came down. The next witness is Mr. Smith, and Mr. Smith is as positive and full to this matter of treason as any of the rest.

Coll. There is scarce a carpenter or a joiner in London but hath pistols when he rides.

L. C. J. Mr. Colledge, we must not suffer this, we had so much patience with you that we expect you should be quiet now, and not interrupt the counsel.

Coll. My lord, let me not be overborn upon, there is scarce a poulterer in London, but what hath pistols.

Sol. Gen. We had great patience with you, Mr. Colledge, and did not interrupt you, I am sure, but let you say what you would. I think I do you no wrong, if I do, I am under the correction of the Court, they will reprove if I do that which does not become me.

Just. *Jones.* Did not you ramble I do not know how, and yet you were suffered to go on?

Sol. Gen. He tells you of a discourse as he came from the coffee-house to go to a dinner whither he was invited by alderman Wilcox; and the discourse was, that the king was as great a papist as the duke, and much more to that purpose, vilifying the king. That alderman Wilcox was a man that gave money to buy arms to bring the king to submission. He objects against this, and says it is impossible such a discourse should be, and that all this should be talked in so little a time, as in passing from the coffee-house to the Crown tavern without Temple-Bar.

Coll. Pray remember whose company it was proved I went in, Mr. Solicitor.

Sol. Gen. But, gentlemen, when you consider, how busy a man he was, and how ready at talking of treason, you will not think, but

that this man might talk much more than this; but this I mention to do him right, it being one of the arguments he used; and, to give an answer to it, though when you consider it, I believe you will think it not to need an answer. But I would do him all the right I can, and now you have heard it, you will consider the weight of it.

Gentlemen, he tells you of another discourse afterwards, that does relate to his being here at Oxon, he tells you he had arms in his house, and was ready upon all occasions, and shewed Mr. Smith his arms, and told him, these were the things that were to destroy Rowley's guards, as he said, which by the evidence is made to appear he meant the king by that name, his arms he said were for that purpose. That he would go down to Oxon, and there he expected some sport. I know not what sport he thinks there is in rebellion; you see what principles he is of, that does maintain and justify the greatest and horridest rebellion that ever was in England, and says they did nothing but what they had good cause for. He tells Smith, that he thought the king would seize upon some members, and with that expectation he came down, but yet was as ready as the king, and would be one in the securing of him, if he meddled with any of the members. This proof Mr. Smith made; and that after the parliament was dissolved, he said, that the king ran away, and was very much afraid. This is proved by Smith likewise, and this Colledge did declare after he came to town. Smith proves further that he did wonder the king did not consider how easily his father's head was brought to the block; and for Mr. Colledge's part he did declare, that he did believe this king would be served so shortly. And this does confirm what his other witnesses have spoken of his words at Oxon. Thus then there are three witnesses, though two are enough to convict a man, if they be positive to the treason.

Mr. Haynes is the fourth witness, and he is as full as any of them. I do but repeat it in short; you have had it so often canvassed by Colledge, that I believe you will easily remember it. He did advise Haynes that he should not value the king at all, for the king should be called to account for all his actions; he said he would seize the king, and bring him to the block, as they did his father, with an indecent expression of that blessed king, not fit to be repeated. And he said, they did intend, when they had cut off him, never any more of his race should reign. This it was Haynes says, though there are other matters. I would take notice of one thing more, and I need not but mention it, you will remember it, and that is about the libel of Fitzharris. Haynes tells you upon discourse of that libel, he said, that every word of it was true, as sure as God was in Heaven. Now that was a libel made by a papist, an Irish papist, who had been tried, convicted, and executed for it, and the horridest libel it was that ever was writ. And this is the libel which this gentleman, who is so very conversant in libels, and books of that sort, avers to be as true as God is in Heaven. This is the substance, gentlemen, of that proof which hath been made to you, we have other circumstances to prove, that as he came down with that intent to seize the king, and as he expected, what he calls, some sport, so he did endeavour to begin the sport, he did quarrel in the lobby of the House of Lords with Fitzgerald, some blows passed, and sir William Jennings telling him his nose bled, he did declare, I have lost the first blood in the cause, but it will not be long before there be more lost. Thus, after he had come down, he endeavoured to begin a commotion; for from little matters great things do sometimes arise; and when all men were possest with an expectation, such as he himself did declare, he and others came down with an expectation that the parliament should be attacked; a little matter might have begun such a commotion, which no man knows what end it would have had.

Gentlemen, this hath been our proof. Now the objection made to this proof by Mr. Colledge, that this is a popish design to raise a new Plot, and cast it upon the Protestants, and that these witnesses are now to deny all the evidence they have given of the Popish Plot, and throw all upon the Protestants. This is that he would persuade you to believe, but which I think when you do consider a little of it, it will be impossible for you in the least to have such a thought. For what are the evidence that have proved this? Who are they? Men of credit, that have been evidences against the Popish Plotters, and against men that have suffered for that Plot, men that still stand to the evidence they have given, and affirm it every word to be true, and one of the very men that he brought, says, that they still stand to it; for Turbervile, who was one of the witnesses against my lord Stafford, was tempted by some persons to deny the evidence he had given against the Papists; but his answer was, No, I can never depart from it, I have a soul to save, that was true which I said, I cannot deny it. If then the witnesses which he would have you to believe to be guilty of denying the Popish Plot, do confirm what they have said as to that discovery, that objection is taken off, and they do stand still to it, that every part of it was true, and aver the same thing; and yet forsooth these men are going about to stifle this Plot.

Gentlemen, these are the men the whole nation have given credit to, the parliament having impeached my lord Stafford, upon the credit of them (for it was upon the credit of Dugdale and Turbervile that they impeached him, for there was not two witnesses till Turbervile came in and made a second, and upon their credit) after so solemn a trial, where all the objections that could possibly be made was made, the House of Lords thought fit to find my lord Stafford Guilty, and my lord Stafford suffered for it, and died upon the credit of these

men. These are the witnesses, gentlemen, that this man thinks ought to be blown off with that frivolous objection, that they are persons he would have you believe, who are guilty of a design to throw the Plot upon the Protestants. But because he hath desired to save himself in an herd, by numbering himself among the Protestants, I must a little observe to you what a sort of Protestant he is, a man, he would have you to believe, so popular for his religion, that he has obtained the name of the Protestant Joiner. But when you have considered what his actions are, I believe you will a little suspect his religion. If the Protestant religion allow any man to vilify the king, to arraign the government, and to throw off all manner of allegiance, then this man is a Protestant. But if this be to act the part of a papist, and if the papists could wish that such an infamy might be put upon the Protestant religion, that it should justify such a rebellion as the late horrid one was, and own such a principle that it is lawful for any subject to asperse and vilify the king, and this man by those many scurrilous libels seems to do: if they could wish this nation overturned, and the government in confusion, and the Church of England destroyed, the best bulwark now in the world against popery, and the best only refuge at this day left for the poor afflicted Protestants abroad; then whilst Mr. Colledge does thus act the art of a papist, he does very ill to call himself a Protestant. Gentlemen, I cannot but observe one thing to you, and it was the evidence of Dr. Oates, when he did first discover the Plot, and without his evidence you would easily believe the thing. He told you, there were two ways they had to accomplish their design, by direct murdering of the king, or if that failed, by putting all things into confusion here, and raising rebellion and disturbance amongst us; and the way to effect that rebellion, it was by having emissaries sent among us, to work us into a dislike of the Church, and by that means into a rebellion against the state. That some men were sent abroad for that purpose to preach at conventicles, some whereof were catched, and some did suffer. Now without this evidence it would not be hard to believe, that such there are, and have been; for all that know the history of our reformation, do know that it was an early practice among them, to raise sects amongst us, to bring confusion first into the church, and then in the state. And we have already found the sad effects of it.

Now, gentlemen, if Colledge has all this while under the name of a protestant acted the part of a papist, though I cannot say he is a papist, nor that he is one of those emissaries, yet I may say, he is not that good protestant he pretends to be. Gentlemen, I must now, to do him right, come to repeat the evidence that he hath given against our witnesses: for Mr. Haynes he hath produced several witnesses, one is Mr. Hickman, who says he overheard Haynes say to one that was his tenant, that it was his trade to swear, and he must get money by it. This he overheard him standing and listening at a door. You have another man, Lun, that is the next witness, and he says, that at the Fleet-ditch where he saw him, there he declared the same thing to him, that he would swear any thing for money, and damn his soul rather than the catholic cause should sink; and now he comes to prove a plot upon him that is a protestant, and in his person upon all the protestants of England; and this man would fain throw off the credit of the popish plot, and turn it upon the protestants. But, gentlemen, it is strange, that Mr. Haynes should have this discourse with Lun, the first time that ever he saw him; for I am sure his own witness Lun says it was the first time, and that he should immediately talk to him at this rate is somewhat strange: But for an answer to it, this Lun we have confronted with the evidence of White the messenger, who swears, that afterwards meeting him at Uxbridge, Lun asked him what gentleman that was, and did not know Mr. Haynes, and yet he takes upon him to prove, that he had spoke such words to him before. I think there is never another material witness against Haynes, except Whaley, who was an under officer in the King's-bench; and he says, that Haynes, while he was a prisoner there, ran away with a silver tankard, but he never was indicted or prosecuted for it, though he remained afterwards in the house, and this was five or six years ago.

Now, gentlemen, I think the nature of this evidence hath not that weight, as to take off the credit of what this man hath said upon his oath, especially when this man's evidence is so backed with the evidence of other men, that I think there is no objection at all against it. For the other witnesses, Dugdale, Smith, and Turbervile, are men whose credit has not been impeached, and they have confirmed in substance what the evidence of Haynes is; so that he does not stand alone in what he here swears, but it is confirmed with concurrent evidence with it.

Then, gentlemen, for the objection against Dugdale, Turbervile, and Smith, they have produced Dr. Oates to you, and he must vilify the credit of those men, whose testimony as to what he gave at first in discovering the popish plot, received credit by being seconded by these men. And I cannot but observe it as a strange thing, that this man comes now to vilify the testimony of those, who have given evidence, and been credited by the whole kingdom; that he should come here upon the word of a priest to declare, that Mr. Dugdale was a man of very lewd conversation, and was a person that had a foul disease on him, when he pretended he was poisoned. I remember, this was an objection that hath been made by the papists to him, and I believe you have heard it often out of their mouths; but it is the first time that ever I heard it from any one that is a witness of the popish plot, and pretends to stand up for the protestant religion. Gentlemen, if any

such thing as this could have been made out against him, it had been made out ere now, the papists would have taken advantage of it, and when the wit of all that party was bent against him, he could not have escaped the having it proved. If it had been true, yet Dr. Oates takes upon him now to vilify his credit, and takes up those arguments the papists have maliciously suggested, but yet were never able to make out. This looks as if the doctor were again returning to St. Omers, that he is thus going about to disparage the evidence of Mr. Dugdale, which in great measure verified the truth of that discovery himself first made of the popish plot.

Against Turbervile, gentlemen, I think there hath been very little at all objected that can have weight with you. Mr. Broadgate, as I suppose you observe, has said enough to confirm Turbervile's credit; for he hath proved to you, that when he was tempted to renounce his evidence against the papists, he refused to do it, he had more conscience than to do it, he knew well enough what he had said was true, and as he had a soul to save, he could not go from it. This is the evidence that he gives, and which certainly serves much to confirm the truth of Turbervile, besides the strict examination he hath been under, and beyond any thing that Dr. Oates, I think, has been able to contradict him in.

Dr. Oates contradicts Smith about his coming from the coffee-house to Wilcox's dinner. He says, he did not come along with Mr. Colledge, but Colledge came along with Dr. Oates, and Smith followed them. But, gentlemen, you hear what Smith hath declared upon his oath, That they came both together out of the coffee-house; and you hear what his witness Mr. Smith the counsellor says: He does not positively remember that circumstance, yet one would think he should; for Oates says, Mr. Smith the lawyer walked just before them, and Colledge followed. Mr. Smith, that is the witness for the king, he swears he came along with Colledge, but Mr. Smith the lawyer being asked that question, he does not remember that. Then another thing is, Dr. Oates says, when they were there, Colledge was so far from discoursing of any treasonable matters, that he was very merry in the company, and talking innocently; but Mr. Smith says, he was so far from being merry, or talking treason, that he fell asleep, and slept behind the table. Gentlemen, these objections you see what the weight of them is, and how little the evidence agrees one with another; but there is nothing that does contradict Mr. Smith in his main evidence. It is possible they may not remember particular circumstances, whether Mr. Colledge and Mr. Smith came together; so they might come together for aught they know, and they may not remember any circumstance about their retiring, but they cannot take upon them to swear it is not so, and their not remembering it does not prove it was so, and the circumstance itself is so trivial, that there was no necessity they should remember it. So then no evidence that comes from Dr. Oates can take off that that is given by Smith; though if Mr. Smith were out of the case, and Mr. Haynes too, yet there is evidence sufficient from Mr. Dugdale and Mr. Turbervile, who are not impeached, and are both of them positive both to the fact and to the place.

There are two witnesses more that I must mention, and they are Bolron and Mowbray; they swear that Smith travelling upon the road with them, would have suborned them to swear against John Brooks, about a discourse at some place; but it happened, gentlemen, they differ in point of time in their testimony; the one said it was the 25th of July, the other was positive it was the 3d of August. But I think I need say no more to these men, but only to desire you to weigh their credit. Bolron and Mowbray, I confess, have been evidence against several men that have been accused of the Popish Plot, but they have been so unfortunate as never to gain credit with any jury. Mr. Smith hath been believed by the whole court of parliament: But if there were no more in the case, these are two men that never were yet believed, men that have been sworn and their own jury have rejected the credit of their testimony: But besides that, comparing the testimonies and the difference that was between them, is a sufficient evidence to confront all that they have said.

I think, gentlemen, this is the substance of what hath been offered by his witnesses, against the witnesses produced for the king, except that of Mr. Everard, who says something against Haynes, that Haynes should say, he swore for self preservation. And against Mr. Smith he says, that he heard him say, he did not know of any Presbyterian Plot. I believe that may be true, and yet it does not contradict Smith's evidence against Colledge; for Mr. Smith does not tell you, that he was privy to any such design of the Presbyterians, that he knows of any consultations that they held, or the ways and means by which they would arrive at the treason charged upon the prisoner at the bar; but his evidence is, That this man declared there was such a design, that there was a party would do it, and that he would be sure to be one, and armed himself for that purpose: But his not being privy to any plot, or knowing the particulars, is no contradiction to what he said.

This is that he hath produced for his defence, and by these things he hath endeavoured to take off the credit of our witnesses, and he would have you believe that he is a very good Protestant, though he does that which no Protestant would do, and which is the Papists work; he hath produced you witnesses, that he has gone to church, but I do not see he hath produced any witness at all that are now conversant with him, his own parishioners in London; but if he brought never so many witnesses of his going to church, and of his conformableness to the church, yet if he were

guilty of these practices, he must give me leave to suspect the truth of his profession; and I think it a great piece of arrogance for him to take upon him the title of a Protestant, when he hath abused that title by such unsuitable practices: And, Gentlemen, if such practices as these are, which we have fully proved, are such as all good men must abhor, I cannot but reflect upon the condition of this man, whose only hope is, that you should now forget yourselves, and become as ill as he is. But as that cannot be presumed, so I shall not need to say any more to you; you are men of that consideration, that can judge between things, and the appearances of them, and you know very well how to give the due weight to the evidence we have given to you, as well as the objections made by the prisoner; and so, gentlemen, I shall leave it to you.

Serj. *Jeff.* May it please your lordship, and you gentlemen of the jury, it hath been a long time that hath been spent in the course of this evidence; whether there has been any art or design in protracting the time, on purpose to obtrude upon the patience of the court, or that you, gentlemen, should forget the force of the evidence that hath been given against the prisoner at the bar, when there hath been so much time taken up unnecessarily, when there was no occasion, as I must needs say, there was not for such a tedious defence, I leave it to you to determine: But which was truly intimated by the court at the beginning of the trial, must in the end of this cause be repeated, and indeed go through it all, that what we of the king's counsel, and what the prisoner has affirmed, that has not been given in proof, signifying nothing, and is not to be any guide at all to you. You are upon your oaths, and by the oath you have taken, you are bound in conscience to give a verdict according to the evidence that has been given to you, and that is your guide; so that what we opened and have not proved, is no more to be believed, than what the prisoner has said for himself in his own defence; and whatsoever he says, if he make not good proof of it, is no more to be regarded, than what we do who are for the king, have alledged, and not made out.

So then this being in the first place premised, I shall take care as near as I can to save the time of the court, and not to trespass on your patience, gentlemen, unnecessarily, in a case whereupon as great a concern does depend as perhaps ever came to trial at any bar: For, I say, 'tis a case wherein the life and the liberty of the king is concerned, and that is the great concern of the nation; then the religion of the nation is concerned; I would be understood aright, I mean the Protestant religion established by law; for I know of no other religion men ought to sacrifice their lives and fortunes for, but the Protestant religion established by law; and when these things are concerned, 'tis a case of great consequence: God forbid any person, Protestant or other, should attempt the life of the king, and the subversion of our religion, and by stiling themselves by the name of Protestants, should excuse themselves from any such crimes.

For the evidence that has been given, I shall not enumerate the particulars against the prisoner at the bar, other than such as have been omitted, (if I mistake not) by Mr. Solicitor.

In the first place, there are the things that happened at Oxon, for you have had it already sufficiently told by my lords the judges who are upon the bench, and who (under Mr. Colledge's favour) are the prisoner's judges in the point of law, as you are his judges in point of fact. They have (I say) already told you what the law is in relation to treasons; that in case the treason be in two counties, if the witnesses speak to the self same treason, though to different facts that will be two witnesses to prove high-treason; and that there hath been such a case, the prisoner at the bar, who says he is a Protestant (for his own soul's sake I wish he were a good one) must take notice, that Gavan, the great priest who was tried at Newgate, and convicted, by what evidence? By one of them that is a witness now against the prisoner at the bar, that is, Dugdale; his treason was committed part in London, part in the county, of which part Dugdale gave evidence; but being both to the self same purpose, by the greater part of the judges, who were in the commission, and present at the trial, they were reckoned a sufficient testimony to prove him guilty of high treason: And I hope we do not live to that age, that any Protestant whatsoever should come to trip up the heels of the Popish Plot; by saying, that any of them who suffered for it, did the contrary to law, or without sufficient proof: For if Mr. Dugdale was not a person fit to be believed; or if the rest of the judges who tried Gavan were out in the law, then that man died wrongfully; for he had as much right to have been tried according to the law, as any other person whatsoever. Therefore, gentlemen, as to that matter, we must submit it to my lords the judges who are to give you an account what the law [illegible] all particulars before you; but as to the fact whereof you are judges, that is the great matter we shall apply ourselves to, and for that it stands thus.

Here is Dugdale that does give you an account what his design was in coming to Oxford how he came to be armed as an index, gentlemen, of his mind. And pray give me leave to put you in mind of one thing. You have first a libel produced and read to you; a pretended letter, wherein there are Queries that have been taken notice of, and which seem to back the evidence given by Mr. Masters: for there is a vindication in those Queries of the proceeding of the parliament of 1641, which he has confidence enough now at the bar to justify too. But, gentlemen, you were told by the court, and you know it, that that parliament was guilty of high rebellion; and even in those Queries he *asperses not only the government

but every man that has any concern in it; for it takes notice not only of the king, but of all his council. Never a judge nor an officer in the nation but is traduced by it; and which is the most material, it was the foundation of that libel which has been mentioned to you, and which Fitzharris was so justly condemned and executed for; that most traiterous and infamous libel in part of it has these Queries, and a great paragraph of this libel makes up part of that libel of Fitzharris, which our witnesses say, Mr. Colledge was pleased to affirm was as true as God is in heaven. Another thing is this, this gentleman, whose proper business it had been to manage his employment at London for a joiner, is best seen in his proper place, using his proper tools of his trade. I think it had been much more proper for him, and I believe you will think so too, than to come with pistols and those accoutrements about him, to be regulating of the government; what have such people to do to interfere with the business of the government? God be thanked, we have a wise prince, and God be thanked he hath wise counsellors about him, and he and they know well enough how to do their own business, and not to need the advice of a joiner, though he calls himself the Protestant Joiner. What had he to do to engage himself, before his advice was required? How comes he to concern himself, so much that after he had writ this libel, wherein he is pleased to take notice of tyrants, afterwards should go to make a print, I mean the Rary Shew? And when Dugdale comes to enquire of him, what do you mean by such a thing, the tyrant shall go down? Says he, I mean by that, the king. And what do you mean by having them to go to Breda? Why, there he explains it, that he puts all the government, the lords and the bishops upon the king's back, and being asked what he meant to have done with them, Why, the bishops and the king, and all were to go to Breda. These are the things that himself did acknowledge he was the author of, and these prints he did cause to be made, and he is the person that gives you an account, that it was but the conception and imagination of Dugdale, that Rowley meant the king; but Dugdale being called again, he tells you after some time, that he was under some difficulty to know the meaning of it; and then Colledge tells him it was meant the king and some expounded it to him. And so Smith tells you of the same name of Old Rowley again. Gentlemen, thus I tell what hath been omitted. The evidence hath been long, and therefore we must be pardoned, if we can't exactly repeat it. This is the evidence that was done at Oxon, the next is Mr. Smith, who speaks of what was done in London, and he is an evidence both as to the word Rowley, as to the coming with arms, and as to the declaring to what end he came, and what he had done. Mr. Haynes, he tells you, both before and after the same, and that I must take notice of to you, Mr. Smith does particularly say he used those words which I hope every honest man, and every good man that desires to preserve the government according to law, will hear with the greatest detestation and abhorrence; he talked of the taking away the life of the late king of blessed memory at such an impudent rate, that every true protestant's blood would curdle at the hearing of it. And this he said not only to Mr. Masters, but he justified it to Mr. Smith too.

In the next place you have Turbervile, who gives you all the reasons, how he did not only tell of these things himself, but encouraged him to prepare himself accordingly, and he gave him a mark, a ribbon with 'No Popery, no Slavery.' These were marks whereby they were to be known, and they were to be one and all, as they call it, that when such a blow was struck, they would be ready to fall in. There is one thing more that I take notice of, that is what was said by a gentleman, sir William Jennings, which is a confirmation of all the other evidence, that gentleman who hath appeared to you to be a man of honour, even by the confession of Mr. Colledge himself, and by his own words; for he said like an honest man, and like a loyal man too, that he would rather engage himself in three dangers for the service of the king at sea, than come in cold blood to give evidence against a man for his life at the bar. And yet this man who tells you of this himself, and that very person whom Colledge himself calls a worthy person, hath given you this account, that when he told him his nose bled, he answered him "It was the first blood lost in the cause, but it would not be long ere there was more lost:" an excellent cause for a man to venture his blood in. When he was told of this, he began to put it off, and to use his own words had a great mind to sham off the business, but in truth there was no answer given to it. Gentlemen, the objection that hath been made against the evidence that have not been taken notice of, I desire to take notice of. I think against three of them there has been only Mr. Oates, and Mr. Oates, I confess, has said, 'in verbo sacerdotis,' strange things against Dugdale, Smith, and Turbervile: I have only the affirmation of Mr. Oates, and as ill men may become good men, so many good men become ill men; or otherwise I know not what would become of some part of Mr. Oates's testimony. And in the next place, if these men have not sworn true, I am sure Mr. Oates must stand alone in the greatest point, in which all the evidence agree, that is, the popish plot.

But, gentleman, I must take notice to you, that it is strange to me, that ever you, upon your consciences, should perjure three men, who positively upon their oaths deny any such discourses as Mr. Oates speaks of against them, I do put that upon your consciences, whether you, upon the bare affirmation of Mr. Oates, in this place, will convict three men, upon whose testimony the lives of so many as have suffered have been taken away, and, as we protestants do believe, justly. I say, whether you will do it upon the bare affirmation of Mr. Oates, against their oaths.

In the next place, gentlemen, I must tell you, besides the positive evidence of these gentlemen there is circumstance of improbability in the very words he speaks of. Will any man tell me, that after such time as men have given their oaths, as Smith had given his that he was concerned, and so had Dugdale and Turbervile too, that these men should come and voluntarily tell Mr. Oates they were all forsworn, are these men such great coxcombs as he would have us to believe? Is it so probable a thing, that any men of common knowledge would do it? Do you think a man of that knowledge and consideration, as Smith is, an allowed scholar and a man of known learning; and Mr. Dugdale, who has been reckoned by all men to be a good evidence; do you take these men to be such absolute novices, that they must seek an occasion to tell him they were bribed off, and were forsworn? If you can think this, and if a bare affirmation against these positive oaths can prevail; gentlemen, upon your consciences be it.

In the next place, it is a strange sort of thing to believe Mr. Smith should come out of a coffee-house, where a quarrel is pretended to have been between him and Colledge; but Mr. Smith does, upon his oath, say, he never had any such quarrel with him, and that he should fall a damning and sinking against Colledge, and against the Gospel, that there should be such impudence in the world in any man as to desire or wish such a thing: Gentlemen, these are strange sorts of apprehensions, and men must have very strange thoughts, that can strain themselves up to the belief of them.

In the next place, here it is said by the prisoner, Good Lord! What a condition we shall be in! Here is a plot upon the protestants! I hope in God there is no protestant plot, but I also hope the whole interest of the protestant religion is not involved in the prisoner at the bar, and all will be destroyed, if Mr. Colledge dies for treasons. Gentlemen, the question is not, whether there be a presbyterian or a protestant plot, we declare we know of none; but whether the prisoner at the bar have spoken such words, and done such things as are sworn against him. And I would fain know what all the discourses we have had about Irish witnesses and papists signify, when in all the course of our evidence, there has been but one Irish, and never a papist: But here have been great discourses about Macnamarra, and Denis, and what it hath been for, but to make a noise and raise a dust, I cannot tell, for in this case there has not been one Irishman besides Haynes, and never a papist throughout the whole evidence: So that it is easy, if men think it will take with the auditory, for a person to cry out, O Lord! We are all like to be undone, here are Irish witnesses brought against us. And yet, after all this stir, there is but one Irish witness, and never a papist. And as for him, truly, gentlemen, I must take notice, that even Colledge himself, till such time as he was taken, reckoned him an honest man.

Colledge. Never in my

Serj. Jefferies. It was so said. But I do say, gentlemen, suppose (which I do not admit) that the Irishman he speaks of be out of the case; not that the country is an objection against any man's testimony, God forbid it should be so affirmed; for truth is not confined to places, nor to persons neither, but applied to all honest men, be they Irishmen or others; but I say, set Mr. Haynes out of the case: Suppose there was no such man as Haynes in this case; yet I must tell you, gentlemen, you have as great a proof as possibly can be.

In the next place, I must take notice to you of some account that hath been given of him by himself: It is wonderful strange, when there was that kindness of intimation given by the court, that he should do well to prove his loyalty, as well as his religion, but he did not produce some of his later acquaintance. If this man that makes himself a protestant, would have it believed he is such, I wish he would have brought some of these men that knew him at London, to give you some account of him, and not to stretch backwards 10 years to prove his birth and education; that is not the best account sure a man can give of himself, to say, after he hath been talking at this disloyal rate, that he is a good protestant, because he was thought so eighteen years ago.

Again, in the next place, here is an account of the libel given by the old woman that is his sister; truly she would have it, and that is another libel at the bar, as though the man in the red coat, with R. C. upon it, had dropped this kind of libel in his house, and so he, or somebody else, put a trick upon him; and because she would inveigle you in such an interpretation, she says, that they stand behind till the man in the red coat had fetched away the shavings, and so here is a new sham plot to be put upon the prisoner, by dropping papers in his house; a pretty kind of insinuation. But, gentlemen, against the evidence of this woman, you have the very person that was there, the officer, who swears, that he and his fellows came before the waterman into the house: But I suppose, you observe how that notable talking maid and she do agree; for the maid tells you, there came a strange fellow seven weeks before, delivered these things into her hands, her master was abroad, and she was not to enquire whence they came, or what they were, but paid him sixpence for bringing those things. Now it is very strange that the maid should pay for the bringing of those things, and yet after all should imagine that somebody else should put them there.

But now, gentlemen, in the next place, I must tell you another thing, which I would beg you to take notice of: Here are two gentlemen, Mr. Bolron and Mr. Mowbray, and they have given you an account, that they have been evidence against the papists; they did well in it; but it hath been their misfortune, hitherto they have not been believed; but whe-

ther they have been believed or not before, is no guidance to you at this time: But that which is to guide you is, whether or not they have given you now a testimony that you in your consciences can believe. Now, can you believe what they have said? Nay, can you believe it without any circumstance to confirm it, against those express objections that arise *from themselves*, and against the oath of the person, when the one tells you so exactly of the 25th, 26th, 27th, and 28th of July; and the other tells you, that Smith took post, and yet overtook them not till the Sunday after, which was the 3d of August; and when the Almanack is produced, it was so far from making out what they spake of to be the same time, that whereas one said he came to London the 28th, the other's Almanack says it was the 27th? Then pray now do these persons agree, when the one says, that Mr. Smith talked with him upon the road the 28th, and the other says, that they came to London the 27th? These are circumstances, gentlemen, that you must weigh; and you may bring the north and south together, as soon as their two testimonies, they are so far asunder. Besides, gentlemen, I hope you take notice of a person that was sworn, a person of some quality, a scholar in the university here, that says Bolron, though he denied it, did shew him one of these pictures, and did discover they were Mr. College's; and Bolron himself, his own witness, tells you, that he did acknowledge one of those pictures was his. It appears then how busy he was, and concerned himself in what belongs not to his profession.

So that, upon the whole matter, after this long evidence that hath been given, I must wholly appeal to your lordships and the jury; as to the law, to your lordship and the court; and as to the fact, to the jury. For I do not desire any sort of evidence should be strained against a prisoner at the bar, who there is to be tried for his life. God forbid, if he be innocent but he should be acquitted; but, on the other side, consider the murder of that great king of ever blessed memory is before you, and remember that base reflection which the witnesses tell you of upon that horrid action; and as a great evil remember that seeming vindication of it at the bar, which certainly no Englishman, no Protestant, according to the church of England, can hear without having his blood stirred in him. And these things are not only testified by Dugdale and Smith, but by gentlemen of known reputation and quality; and he hath a little discovered himself by that defence he hath made against their testimony. But know, gentlemen, that the king is concerned, your religion is concerned, that plot that is so much agreed to by all Protestants is concerned; for if Dugdale, Smith, and Turberville be not to be believed, you trip up the heels of all the evidence and discovery of that plot. Then I will conclude to you, gentlemen, and appeal to your consciences; for according to the oath that has been given to you, you are bound in your consciences to go according to your evidence, and are neither to be inveigled by us beyond our proof, nor to be guided by your commiseration to the prisoner at the bar against the proof: for as God will call you to an account, if you do an injury to him, so will the same God call you to account, if you do it to your king, to your religion, and to your own souls.

Lord Chief Justice. Gentlemen, I shall detain you but a little, and shall be as short as I can, for your patience has been much exercised already: It is a burden, and a necessary one, that lies upon us all, for there is nothing more necessary, than that such trials as these should be intire and public, intire for the dispatch of them, and public for the satisfaction of the world, that it may appear no man receives his condemnation without evidence, and that no man is acquitted against evidence.

Gentlemen, there are these two considerations in all cases of this nature; the one is, the force of the evidence; the other is, the truth of the evidence. As to the force of the evidence, that is a point of law that belongs to the court and wherein the court is to direct you; as to the truth of the evidence, that is a question in fact arising from the witnesses, and must be left upon them, whereof you are the proper judges.

As to the force of the evidence in this case, it must be considered what the charge is; it is the compassing the death of the king, and conspiring to seize the person of the king, which is the same thing in effect; for even by the common law, or upon the interpretation of the statute of the 25th of Edw. 3. that means compassing the death of the king to be treason, it hath always been resolved, that whosoever shall imagine to depose the king, or imprison the king, are guilty of imagining the death of the king; for they are things that depend upon one another; and never was any king deposed or imprisoned, but with an intention to be put to death; they are in consequences the same thing.

Now, gentlemen, in cases of treason the law is so tender of the life of the king, that the very imagination of the heart is treason, if there be any thought concerning any such thing; but then it must be manifested by some Overt act, upon the statute of the 25th Edw. 3. but upon the statute of the 13th of this king, made for the preservation of the king's person, if it be manifested, be malicious and advised speaking, it is sufficient. This is as to the charge, and as to the law concerning that charge, I must tell you, there must be two witnesses in the case.

Now then, for the force of the evidence, the question will arise here, whether this evidence, admitting it to be true, is sufficient to maintain the indictment; so that if there be two witnesses, you must find him guilty. Now as to this, gentlemen, the prisoner has before-hand called upon the court, and had their resolution; and I hope you will remember what hath been

said, and I shall have occasion to trouble you the less. There have been six witnesses produced for the king; there are two of them, sir William Jennings and Mr. Masters, that are some way applicable to the case, though they do not go to the treason, they are only to infer the probability of the treason. This of sir William Jennings, was upon the occasion of the bleeding of the prisoner's nose, after his quarrel with Fitzgerald, when he said, He had lost the first blood, and it would not be long ere there would be more lost; which shews there were some extraordinary thoughts in his heart, concerning some divisions, quarrels, and fighting that he expected should be. That which Mr. Masters has said, besides what he offered concerning his principles in justifying the long parliament, was this, That when he called him colonel, Marry mock not, said he, I may be colonel in time; that shews some extraordinary thoughts were in his heart.

Colledge. Will not that bear a more favourable interpretation, my lord? Must that necessarily follow upon my saying, I might be a colonel in time; and that more blood would be lost? if I had expressed it so.

L. C. J. I say, you had some extraordinary thoughts in your heart.

Colledge. I am, sure, fittest to explain my own thoughts.

L. C. J. You would have done well to have explained it which way you expected to be a colonel.

Colledge. It was not in expectation, for a may be may not be; my word was, mocking is catching; I thought he had called me cousin.

L. C. J. Well, gentlemen, these are witnesses I say, that go not to the treason but only relate and reflect somewhat, to shew there were thoughts in his heart; but nobody could tell what they were, or know what he meant by them.

Colledge. Then they are always to be taken in the best sense.

L. C. J. For the other witnesses, Stephen Dugdale, John Smith, Bryan Haynes, and Edward Turbervile, they are all of them, taking what they say to be true, very full witnesses. The prisoner hath objected as to two of them, because they speak to nothing that was done in Oxfordshire; but Turbervile and Dugdale they speak to what was said in Oxfordshire. Now for that I must tell you, if you believe any of these witnesses, as to what was said in Oxford, and any of them as to what was said in London, relating to the same fact of treason, they will be two good witnesses to maintain the indictment, though the one is in the one county, and the other in another; for if a treason be committed in two counties, it is the king's election where he will exhibit the indictment, and the evidence from both counties is good evidence; that I take for law; and these four witnesses, with that consideration that they are true, as I think, are full witnesses to maintain this indictment.

Why then, the next head is concerning the truth of this evidence, of which you are to be judges, and you are the proper judges whether the witnesses speak true or no; therefore you must have your own consciences to direct you in that case, and what I shall say about them, shall be only for your assistance.

Gentlemen, I shall not take upon me to repeat the evidence to you, it has been long; and for me to speak out of memory, I had rather you should recur to your own memories, and your own notes; only I shall say something in general to contract your consideration of it.

And, as I told you at first, you must mind nothing of what the king's counsel said, for nothing must have impression upon you, but what they proved; so you are not to consider any thing of the facts the prisoner speaks of, that are not proved neither; for common justice is concerned in it, and no justice can be done at that rate, if the prisoner's own affirmations or purgation should be taken. No man ever can be accused but he will be ready to say he is innocent, and say as flourishing and popular things as ever he can for himself. And therefore these things must not weigh with you further than as was said, argues upon the proofs you have had. And you are to consider upon the proofs what the prisoner has produced, not what he says; on the other side, for the proofs you have heard a great many witnesses in general produced by him, that say he was bred a protestant, and has been an honest man, that they knew no ill by him; that will be of little weight in a case of this consideration; for unless he was a man that had committed treason to the knowledge of all the world, there is no man but can produce witnesses that know no ill of him, nor any treason nor harm in him: wherefore the question will lie upon the credit of the witnesses produced for the king barely, and that will be the consideration you are only to have, and you are to weigh them in the balance against the witnesses produced against them.

Now, gentlemen, for these witnesses, I shall not repeat them to you; but only this I shall observe in general, that Dugdale and Turbervile, that are the two most material witnesses relating to what was spoken in Oxfordshire, have the least said against them. I do not remember, I profess to you, I do not (but your own notes must guide you) that there was any very material thing said against them, except what is said against them by Dr. Oates; and Dr. Oates does say against Smith, that he came out of the coffee-house and swore damn him he would have Colledge's blood, and when he reproved him, he said it was not fit for a minster of the gospel to use such expressions, he said, God damn the gospel; if that be true it is a reflection upon the credit of Smith. He says as to Dugdale that when he was expostulating with him about his evidence, he excused himself, that he was in want of money, and was pressed to it, and being asked, he did say, he was pressed to swear against his conscience, and said yes; and much

of the same kind he says as to Turbervile, that he said he was deserted, and would not starve. Now all these three witnesses being called upon their oaths, deny that which Dr. Oates testifies. Now if it were in an indifferent and probable matter to have three men condemned, and set aside by the testimony of one, is not equal unless the man were of mighty extraordinary credit, and his testimony of more than ordinary weight. But then I must tell you, this matter is very improbable, that after witnesses had sworn a thing, they should voluntarily acknowledge themselves to be forsworn, and that without any provocation, they should at several times come to this one man, and declare themselves rogues and villains; but if it were probable, here are three men's oaths against one man's affirmation; this I say, as to what concerns Dugdale and Turbervile, I do not see any thing material against them; besides, now if you believe them, they are two witnesses to the full matter of the indictment, and two witnesses to what was done in Oxfordshire, and that satisfies all the considerations of the law.

As to the rest of the witnesses, Bryan Haynes and John Smith, you have had many witnesses produced against them; I shall not undertake to repeat the evidence, it is your place and duty to weigh their testimony, and I shall leave it to your consideration.

Just. *Jones.* I shall add nothing to what my lord hath said, nor indeed can.

Coll. My lord, I wish you would look upon your notes, you would then find there was much more evidence, that you have not repeated, against Turbervile and Dugdale, besides what your lordship urged.

L. C. J. If there be, I refer it to the memory of the jury, I can remember no more.

Coll. I desire nothing but justice, and true justice.

L. C. J. I am sure I design nothing else, you are a stranger to me; I believe I have seen your face, but I never knew you by name till now. Look you, if the jury be like to stay, they may take something to refresh themselves at the bar before they go.

Coll. My lord, I did see when the bill was brought against my lord Howard, Mr. Attorney General and Mr. Solicitor were an hour and half with the Grand-jury.

Serj. *Jeff.* You must say nothing now.

Coll. Let me have justice done me, my lord, that is all I crave, that nobody may be with the jury.

L. C. J. Look you, Mr. Colledge, they might be with the Grand-jury, but as to the petty jury, there shall be a bailiff sworn, and neither Mr. Attorney, nor Mr Solicitor, nor nobody else shall come to them till they be agreed of their verdict.

Just. *Jones.* If that be the thing you ask, you shall have it according to the law.

Coll. And any friend of mine may be by.

L. C. J. There shall be an officer sworn to keep them.

Then the court called for two bottles of sack, which the jury divided among themselves at the Bar, for their refreshment, in the presence of the Prisoner.

After which a Bailiff was sworn, and the jury withdrawing to consider of their verdict, the Court adjourned for half an hour, and when they returned, Proclamation being made for attendance, the Court sent to see whether the jury were agreed, who immediately came into Court.

Cl. of Cr. Gentlemen, are you agreed of your verdict —*Om.* Yes.

Cl. of Cr. Who shall say for you?

Om. Foreman.

Cl. of Cr. Stephen Colledge, hold up thy hand. Look upon him, you of the jury: how say you, is he Guilty of the high treason, whereof he stands indicted, or Not Guilty?

Foreman. Guilty.

Cl. of Cr. Look to him, gaoler, he is found Guilty of high treason; what goods, &c.

[At which there was a great shout given; at which the Court being offended, one person who was observed by the Crier to be particularly concerned in the shout, was committed to gaol for that night, but the next morning having received a public reproof, was discharged without fees.]

Then, it being about three o'clock in the morning, the Court adjourned to ten. At which hour, the Court being sat, and first Mr. Aaron Smith having entered into a recognizance of 500*l.* to appear the first day of the next term, at the Court of King's-bench.

L. C. J. Where is the prisoner, Stephen Colledge?

Cl. of Cr. Set up Stephen Colledge.

Then the Prisoner was brought to the bar.

Cl. of Cr. Hearken to the Court, and hold up thy hand: thou hast been indicted and arraigned of high treason, and for thy trial hast put thyself upon thy country, and they have found thee Guilty; what canst thou say for thyself, why the Court should not give judgment on thee to die according to the law?

Coll. My lord, I have nothing more to offer, but only that I am innocent of what is laid to my charge; I think it was severe against me, now contrary to what was sworn at London: they swear now, I was to seize the king at Oxon, in London they swore I would pluck the king out of Whitehall, but it is altered since, and now it is to seize the king at Oxon; but be it either one or the other (for the one is as true as the other) I am wholly innocent of either, I never had such a thought in my life, God forgive them that have sworn against me; I have no more to say, my lord.

L. C. J. Look you, Mr. Colledge, it is too late to profess your innocence, you have been tried, and found Guilty; but because you say so now, it is necessary for me to say something in vindication of the verdict, which I

think the Court were all very well satisfied with: there were sufficient proofs to warrant it, and the jury did according to justice and right. I thought it was a case, that as you made your own defence, small proof would serve the turn to make any one believe you Guilty. For as you would defend yourself by pretending to be a Protestant, I did wonder, I must confess, when you called so many witnesses to your religion and reputation, that none of them gave an account that they saw you receive the Sacrament within these many years, or any of them particularly had seen you at church in many years, or what kind of Protestant you were. If we look to your words and actions, it is true, they did prove this, that you were mighty violent and zealous in crying out against popery and the papists; but if we look to your actions, they favoured rather to promote the papists ends. For I must tell you, the papists are best extirpated, and suppressed by a steady prosecution of the laws against them, not by violent cryings-out, and putting the people into fervent heats and confusions, for that is the thing the papists aim at; they have no hopes any other way to creep into the kingdom, but by confusion, and after the church is destroyed, that is under God the best bulwark against them. But you that cried so loud against the papists it was proved here, who you called papists. You had the boldness to say that the king was a papist, the bishops were papists, and the Church of England were papists. If these be the papists you cry out against, what a kind of Protestant you are, I know not, I am sure you can be no good one. But of that thing, when you called so many witnesses to that purpose, and if we look to your politics, what opinion you had of the king, it was proved by your discourse, and by witnesses, that you could have no exception to their testimony, that you did justify the late horrid rebellion, and the consequence of that was the murder of the best king in the world, that you should go to justify the proceedings of that parliament, and affirm that they did nothing but what they had just cause to do. I say, he that will justify such a thing, if there were the same circumstances, would do the same thing again.

Then if we look upon another part of your defence, as to your arms, it was objected, you went armed to Oxon, and that was made the evidence of the Overt-act when you said by words your intentions what you would do, that you would make one to seize the king; that you did go armed, you did confess; I expected you should have said, you only wore those things for your own defence upon the road as a gentleman travelling, or went with your friends to accompany them out of town, and defend them from robbery; but you said, you went to guard the parliament. I did not understand what you meant by it. I do not believe the parliament sent for any guard, or intended to have any guard. I do not believe that any of them in their hearts thought they needed a guard; for I believe there was not a man that had any thing that looked like that, or any thing of that nature. For we saw, that when the king by the necessity of his affairs, when the two houses differed so much, was pleased to dismiss them; they all departed quietly, not a man was seen to be disturbed; there was no appearance of any such thing; and how it should come into your head, that were but a private man, to go to guard the parliament, I much wonder. Suppose all men of your condition should have gone to have guarded the parliament, what an assembly had there been? what a bustle might they have made, and what confusion might have been on a sudden? And though you say you are no man of quality, nor likely to be able to do any thing upon the king's guards, or the king's person, yet if all of your quality had gone upon the same design that you did, what ill consequences might have been of it? We see what has been done by Massianello. a mean man in another country, what by Wat Tyler and Jack Straw in this kingdom. I confess, I know not what you meant by it, but very ill things might have happened upon it.

So that these things, when I look upon them, and consider the complexion of your defence, it makes an easy proof have credit. But I think there was a full proof in your case; yet I say if there had been a great deal less proof, the jury might with justice have found you Guilty. And because you now declare yourself innocent of all you are charged with, I think myself bound to declare here in vindication of the country, and in vindication of the justice of the Court, that it was a verdict well given, and to the satisfaction of the Court, and I did not find my brothers did dislike it. This I say to you out of charity, that you may incline your mind to a submission to the justice that has overtaken you, and that you may enter into charity with all men, and prepare yourself for another life.

There is nothing now remaining, but to pronounce the sentence which the law provides for such an offence, which is this, and the court does award, 'That you Stephen Colledge shall 'be carried from hence to the place from 'whence you came, and from thence you shall 'be drawn on an hurdle to the place of execu- 'tion, where you shall be hanged up by the 'neck, and be cut down alive, your privy mem- 'bers shall be cut off, and your bowels taken 'out and burnt before your face, your head 'shall be cut off from your body, your body be 'divided into four quarters, which are to be at the 'king's dispose, and the Lord have mercy upon 'your soul.'

Colledge. Amen. My lord, I would know what time your lordship is pleased to appoint for my execution.

L. C. J. That will depend upon the king's pleasure, we do not use in these cases of High-Treason to precipitate the execution; but we will leave such order with the sheriff to receive the king's pleasure and obey it. He will not

do it so sudden, but that you shall have notice to prepare yourself; but that depends upon the king's pleasure, for your body is to be at his disposal.

Then the Court adjourned.

On Wednesday, Aug. 31, 1681, being the day appointed by his majesty for his execution, he was according to sentence executed over-against the Gate of the Castle at Oxford.

When he was come to the place of execution, the High-Sheriff spoke to him as follows:

High-Sheriff. Mr. Colledge, it is desired, for the satisfaction of the world, because you have professed yourself a protestant, that you would tell what judgment you are of.

Colledge. Dear people, dear protestants, and dear countrymen, I have been accused and convicted for treason; the laws adjudge me to this death, and I come hither willingly to submit to it: I pray God forgive all those persons that had any hand in it. I do declare to you whatever hath been said of me, I was never a papist, or ever that way inclined, they have done me wrong; I was ever a Protestant, I was born a Protestant, I have lived so, and so by the grace of God I will die, of the church of England, according to the best reformation of the church from all idolatry, from all superstition, or any thing that is contrary to the gospel of our blessed Lord and Saviour.

I do declare I was never in any popish service, prayers, or devotions, in my life, save one time; about some seventeen or eighteen years ago, as near as I remember, I was out of curiosity, one afternoon at St. James's chapel, the queen's chapel at St. James's; except that one time, I never did hear any popish service, any thing of the church of Rome, mass or prayers, or any thing else, private or public. I know you expect that I should say something as to what I die for: It hath been charged upon me, when I was apprehended and brought before the council, some of the council, the Secretary, and my lord Killingworth, and Mr. Seymour, they told me there was treason sworn against me; truly, they surprised me when they said so: for of all things in the world, I thought myself as free from that as any man. I asked them if any man living had the confidence to swear treason against me? They said several, three or four, as I remember: then they told me, it was sworn against me, that I had a design to pull the king out of White-hall, and to serve him as his father was served, or to that purpose, the logger-head his father, or that kind of language: I did deny it then, and do now deny it upon my death. I never was in any manner of plot in my days, neither one way nor another; I never knew any such persons, nor ever had such communication with any man hitherto: I know of no plot in the world but the popish plot, and that every man may know as much as I: If I had such a design as these men have sworn against me, to have seized his majesty, either at London, or this place at Oxford, I take God to witness, as I am a dying man, and upon the terms of my salvation, I know not any one man upon the face of the earth that would have stood by me; and how likely it was that I should do such a thing myself, let the whole world judge.

Dugdale swears, that I spoke treason to him, treasonable words in the coffee-house, and in the barber's shop by the Angel; he could not pretend to see me any where else; but it is false, and a very unlikely thing that I should speak treason to him. I must confess I was in his company at the coffee-house and that barber's shop, before I went out of town: but there could be no communication between us; for he was writing at one end of the room, and eating a piece of bread, and I lighted a pipe of tobacco at the other end, and took it, till sir Thomas Player, and sir Robert Clayton came to me, and we went to my lord Lovelace's out of town that night; so when they came, we took horse, and went out of town with the rest: for my part, I can't sum up my witnesses; I was under most strange circumstances as ever any man was; I was kept prisoner so close in the Tower, that I could have no conversation with any, though I was certain the popish Lords had it every day there, but I could have none: I could not tell the witnesses that were to swear against me: I could not tell what it was they swore against me, for I could have no copy of the indictment nor no way possible to make any preparation to make my defence as I ought to have done, and might have done by law.

I had no liberty to do any thing, as I am a dying man. And as to what Dugdale, Smith, Turbervile, and Haynes, swore against me, they did swear such treason that nothing but a madman would ever have trusted any body with, and least of all to papists, every one of them that had been concerned with plots and treasons among their own party, and under the greatest ties and obligations of damnation; and to be sainted if they kept it secret, and to be damned if they reveal it. If these men will not keep things private for their own party, how could I trust them? I take God to witness, and do freely acknowledge, I have sought my God with tears several times to inform me, if so be I had with any word transgressed at any time. I knew not of any part of what they swore against me, till such time as I heard it sworn against me at the bar.

This is very hard, gentlemen, but this is the truth: and there be a great many other strange reports that I have heard since I have been a prisoner; that I should be a means to convert the countess of Rochester, by bringing one Thomson, a priest, to her. Truly, all that I was concerned in, was some fifteen or sixteen years ago. I lodged at colonel Vernon's, that married the lady Brooks, the family were papists; the Brooks's were papists; and there was this Thomson, and I did suppose him a priest, in the house, though I never saw him at popish service, or worship, though I was there half a year; but coming afterwards to my lord Ro-

chester's about some business I had to do for him, and several other persons of quality; he sent for me one afternoon from the parsonage in Adderbury to his house, and his lady and he stood together: He sent to me, and asked me, if my horse were at home: said he, I would have you carry this letter to Mr. Thomson, if you are at leisure this afternoon: My lord, I am at leisure to serve you; so I took a letter from his hand, and his lady's too; as I remember (he made an offer that way) sealed with his own seal, and I carried it to Thomson, and delivered it to him: And he told me, that he would wait upon my lord, for it was for some lands my lord did offer, to raise money for some occasion: This is the truth of that scandal.

It is said that I had a priest several years in my house, viz. Sergeant, that came over from Holland to discover. About some ten years ago, that very same man came to me, but was a stranger to me, and he came to me by the name of Dr. Smith, a physician; and there was an apothecary in the Old Bailey, and a linen-draper within Ludgate, that came with him, they brought him thither, and took a chamber, and he lay about half a year, or three quarters, at times, by the name of Dr. Smith, and as a physician; this is the truth of that, and no otherwise. This is the entertainment of Sergeant.

So the occasion of my coming to Oxford I do say was voluntary; the parliament-men last parliament at Westminster, and several lords, dined together the day before they sat; the last sessions of parliament at Westminster, they sent for me to the Sun tavern behind the Exchange, and when I came, the duke of Monmouth, and several lords were together, and I believe above a hundred parliament-men of the Commons: The duke of Monmouth called me to him, and told me, he had heard a good report of me, that I was an honest man, and one that may be trusted; and they did not know but their enemies, the papists, might have some design to serve them as they did in king James's time by gun-powder, or any other way: And the duke, with several Lords and Commons, did desire me to use my utmost skill in searching all places suspected by them; which I did perform: And from thence I had, as I think, the popular name of the Protestant Joiner, because they had intrusted me, before any man in England, to do that office.

This same Haynes, one of them that swore against me, had discovered to me and several others, as to Macnamarra and his brother, and this Ivy, who are now all of another stamp, that the parliament was to be destroyed at Oxford, and that there was a design to murder my lord Shaftesbury, by Fitzgerald and his party; and that they did endeavour to bring Macnamarra over to him, and said, then it would be well with him; and they would not be long before they had Shaftesbury's life: And he made depositions of this to sir George Treby, as I heard afterwards, for I was not with him when it was sworn. I wish the Commons of England as well as I wish my own heart; and I did not understand, but when I served the parliament I served his majesty too; and let them be miserable that make the difference between them, for my part, I never did. I came to Oxford with my lord Howard, whom I look upon to be a very worthy honest gentleman, my lord Clare, my lord Paget, and my lord Huntington, and this captain Brown, and Don Lewes, were in my company, and came along with us, as they were my lord Howard's friends: Brown I have known, I believe, two or three months; but Lewes I never saw before that day; they said they came with my lord Howard. I take God to witness, I never had one six-pence, or any thing else to carry on any design; and if it were to save my life now, I cannot charge any man in the world with any design against the government, as God is my witness, or against his majesty, or any other person.

As for what arms I had, and what arms others had, they were for our own defence, in case the Papists should make any attempt upon us by way of massacre, or any invasion or rebellion, that we should be ready to defend ourselves; God is my witness, this is all I know. If this be a plot, this was I in, but in no other; but never knew of any numbers, or times appointed for meeting; but we have said one to another, that the Papists had a design against the Protestants, when we did meet, as I was a man of a general conversation; and in case they should rise, we were ready; but then they should begin the attempt upon us: This was my business, and this is the business of every good subject that loves the laws of his country and his king. For England can never hope to be happy under those blood-thirsty men, whose religion is blood and murder; which I do with all my soul, and did, ever since I knew what religion was, abhor and detest, viz. the church of Rome, as pernicious and destructive to human societies, and all government.

I beseech God that every man of you may unite together as Protestants against this common foe. Gentlemen, it is my sense, and I do in that believe, I am as certainly murdered by the hands of the Papists, as sir Edmundbury Godfrey himself was, though the thing is not seen. These witnesses certainly are mercenary men, and I beseech God Almighty to have mercy upon their souls, and forgive them; and either by his judgments or mercies reclaim them, that they shed no more innocent blood: There is not a man of them that I know of, that ever heard me say, or do, any bit of treason in my life. This is (the first, I may not say it is) but almost twentieth Sham-Plot that they have endeavoured to put upon the nation, to delude the people, and put off their own damnable plot. This is not the first, but I think, the sixteenth or seventeenth; I pray God that my blood may be the last. I pray God defend every man's blood, and all Protestants in England, from the hands of these bloody Papists,

by whose means I die this death; and if they should go on in this nature, I hope the good God will open every man's eyes to see it before he feels it. And, I beseech you, if you have any love for your king, your country, and the Protestants, unite together, if you are Protestants. I pray God those that deserve the name, let them be called how they will, either Dissenters, or Church of England men, that they may unite together like men, like Christians, against the common foe, who will spare neither the one side, nor the other, but beat you one against another like two pitchers; the last that stands, they will certainly destroy if they can. This is my sense, and God is my witness, I speak my conscience. I do not know, Mr. Sheriff, whether there be any thing else I have to say, or no; we have a good God, and I beseech every man that hears me this day, (for we live in a sinful age, good people, and it behoves every one of you, it cannot be long before all that look upon me in this condition must lie down in the dust, and, God knows, must come into an eternal state, either for mercy or for judgment.) I beseech you in the name of God, he is a God of mercy, and a God of patience and long-suffering, that you would break off your sins by repentance, and serve a good God, who must be your friend at last, or else you are lost to eternity.

O Lord how ungrateful wretches are we, that have a God of such infinite mercy and goodness, that affords us our life, our health, and a thousand mercies every day; and we, like ungrateful people, not deserving the name of men or Christians, live riotous lives, in debauchery and swearing, in malice, and the Lord knows how many evils; I beseech God that I may be this day a means in the hands of God, to bring some of their souls over to him: I beseech you, remember what I say; indeed I do not know, I have been so strangely used since I have been a prisoner, what to say, being brought from one affliction to another, that my body is worn out, and my memory and intellects have failed me much to what they were. I cannot remember what I have to say more, but that the Lord Jesus Christ would bless my country, and preserve it from popery, and in mercy bless his majesty: Good God be merciful to him, make him an instrument in thy hand to defend his Protestant subjects; Lord in mercy defend him from his enemies. Good God bless his people; Good Lord continue the gospel of Jesus Christ, thy gospel, in it's purity to us and our posterity, as long as the sun and moon endure. O Lord, save all that call upon thee; be merciful to all thy servants, all thy people that put their trust in thee; good Lord deliver them from the hands of their enemies; good God, let their lives, and bodies and souls, be all precious in thy sight.. O merciful God, put a stop to these most wicked conspiracies of thy enemies, and the nation's enemies, the Papists. Let no more Protestant blood be shed but this of mine, I beseech thee, O my God. O Lord look upon me, O Lord bless me, O good God receive me into thy blessed presence, by Jesus Christ my alone Saviour and Redeemer, in whom I put my trust alone for salvation: It is thee, O God, that I trust in, thou righteous Judge of Heaven and Earth: all Popery, all pardons, all Popes and Priests, all dispensations I disown, and will not go out of the world with a lie in my mouth. From the sincerity of my heart I declare again, that what I have said to you is the very sentiments of my soul, as God shall have mercy upon me, and to the best of my knowledge.

I desire the prayers of you, good people, while I am here; and once more I beseech you to think upon eternity, every one of you that hear me this day. The Lord turn your hearts and souls, if you have been wicked livers; if you do live wicked lives, the Lord in mercy convert you, and shew you your danger; for I as little thought to come to this as any man that hears me this day; and I bless God, I have no more deserved it from the hands of men, than the child that sucks at his mother's breast: I bless my God for it, and do say I have been a sinner against my God, and he hath learnt me grace ever since I have been a prisoner. I bless my God for a prison, I bless my God for afflictions, I bless my God that ever I was restrained, for I never knew myself till he had taken me out of the world. Therefore you that have your liberties, and time, and precious opportunities, be up and be doing, for God and for your souls, every one of you.

To his Son. Where is my dear child?

Sheriff. I made one request to you, and you gave me an imperfect answer: You said you were of the best reformed church in the world, the church of England according to the best reformation in the world: I desire you, for the satisfaction of the world, to declare what church that is, whether Presbyterian, or Independent, or the Church of England, or what?

Coll. Good Mr. Sheriff, for your satisfaction, for 20 years and above I was under the Presbyterian ministry, till his majesty's restoration; then I was conformable to the church of England when that was restored, and so continued till such time as I saw persecution upon the dissenting people, and very undue things done to their meeting places; then I went among them to know what kind of people those were: And I do take God to witness, since that time I have used their meetings, viz. the Presbyterians, others very seldom, and the Church of England. I did hear Dr. Tillotson not above three weeks before I was taken. I heard the church of England as frequently as I heard the dissenters, and never had any prejudice, God is my witness, against either, but always desired heartily that they might unite, and be lovers and friends, and had no prejudice against any man; and truly I am afraid it is not for the nation's good that there should be such heart burning between them: That some of the church of England will preach that the presbyterians are worse than the papists. God doth know that what I

say, I speak freely from my heart, I have found many among them truly serving God, and so I have of all the rest that have come into my company: men without any manner of design but to serve God, serve his majesty, and keep their liberties and properties; men that I am certain are not of vicious lives: I found no damners, or those kind of people among them, or at least few of them.

To his Son, kissing him several times with great passion. Dear child, farewell, the Lord have mercy upon thee. Good people, let me have your prayers to Almighty God to receive my soul.

And then he prayed. And as soon as he had done, spake as followeth:

The Lord have mercy upon my enemies, and I beseech you, good people, whoever you are, and the whole world that I have offended, to forgive me; whomever I have offended in word or deed, I ask every man's pardon; and forgive the world with all my soul, all the injuries I have received, and I beseech God Almighty, forgive those poor wretches who have cast away their souls, or at least endangered them, to ruin this body of mine: I beseech God that they may have a sight of their sins, and that they may find mercy at his hands: Let my blood speak the justness of my cause.

I have done: And God have mercy upon you all.

To Mr. Cushwait, Pray, Sir, remember me to Dr. Hall and Dr. Reynall, and thank them for all their kindnesses to me; I thank you, Sir, for your kindnesses: The Lord bless you all. Mr. Sheriff, God be with you: God be with you all, good people.

The Executioner desired his pardon, and he said, I do forgive you. The Lord have mercy on my soul. And so he was turned off, and the Sentence executed, but his quarters were permitted to be buried.

REMARKS on COLLEDGE'S Trial, by Sir JOHN HAWLES, Solicitor-General in the Reign of King William the Third.

BUT to return whence I have digressed,* Fitzharris being executed according to his sentence, though there was great grumbling amongst the protestants that those who set him on work were concealed, and never like to be discovered now he was dead; yet all was quiet, and the conspirators, who resolved, though Fitzharris miscarried in his design, yet the Plot should go on; but what it should be, or where the scene of it should be laid, or who the plotters should be, they were not well resolved.

Great noise of warrants being issued out there was, but at last all centered in an inconsiderable fellow, one Stephen Colledge, a joiner by trade, who for his honour, as a prisoner of state, was committed to the Tower for High treason. At first it was designed to lay the scene in London, and accordingly a bill of indictment of high treason was exhibited to the grand jury (whereof Wilmer was foreman) at the sessions-house: But the business of Fitzharris was so new, and smelt so rank, that the bill could not be digested, but was spewed out with an *Ignoramus*; for which Wilmer was afterwards forced to fly his country.

Then it was resolved the scene should be at Oxford, and accordingly the king's counsel, with Irish witnesses, at the assizes, post thither and prevail with the grand-jury to find the bill; but by what arts is not known. for he was privately shut up by them: and I should wonder, if he, who frequently, in the hearing of those who understood better than himself, had assurance enough to impose upon the courts, should scruple in private to impose any thing on an ignorant jury.

I know not how long the practice in that matter of admitting counsel to a grand-jury hath been; I am sure it is a very unjustifiable and unsufferable one. If the Grand-jury have a doubt in point of law, they ought to have recourse to the court, and that publicly, and not privately, and not rely upon the private opinion of counsel, especially of the king's counsel, who are, or at least behave themselves as if they were parties.

It is true, it is said they are upon their oaths; and though it be not expressed in their oaths, that they should do right between the king and subjects, yet that is implied in the oath, I agree. But have they behaved themselves as if they were under an oath? Besides, all men are not capable of giving advice to be relied on in so great a matter as life; but the manner of doing it being in private can never be justified. I know, in Fitzharris's case, the King's counsel were cajoling the Grand-jury in private for some hours: but I did not think fit to take notice of it in that trial, because, I think both the grand and petty jury did very well; they acted according to the best of their understanding, which is all that God or man required of them; they asked pertinent questions, they were overruled in some, not fully answered in others; not that I think either of them gave a verdict according to law upon the fact, as it appeared upon the evidence; but that was not the fault of the jury, but of the king's counsel, and of the court, who misled the jury. I thought it more proper to take notice of it in this trial, wherein the first bill was rejected by an understanding jury, and all men wondered how the

* See what preceded, printed at the end of Fitzharris's Case, at p. 429 of this volume.

second came to be found *Billa Vera*: and for that reason, one of the king's counsel boasted at court, of his service and cunning management in the matter.

The bill being found, the next matter was to bring the prisoner to his trial: and as he had more honour than what usually is bestowed on so mean a man to be committed to the Tower, though in truth it was to keep him from all means of defence; so to carry the matter on, he was allowed to have, by order of the king and council, a counsel and solicitor to come to him, and advise him for his defence at all events; a favour denied to Fitzharris, for his counsel was to advise to the matter of the plea only: but that favour in shew was only to betray him, as shall be shewn. And a third favour he had, which no man of his quality ever had: there were then three of the king's counsel sent from London, and all the counsel that could be picked up upon the spot, which were three more, and no less than four judges to prosecute and try him; but that was to make sure work of him.

The 17th of August, 1681, he came to his trial: his indictment, as to part, was in common form for treason, but particularly for designing to seize the king's person at Oxford, mixt with words he should say, as, that there was no good to be expected from the king, he minded nothing but beastliness, and that he endeavoured to establish arbitrary power and popery. To which being required to plead, he desired a copy of the indictment, a copy of the jury, to know upon what statute he was indicted, and counsel to advise him whether he had any thing pleadable in bar; all which were denied him. Then he desired he might have his papers, which were taken from him after he was brought from the prison, and before he came into court, at an house over-against the court: for so it seems the king's counsel had ordered the matter that the gaoler Murrel, and the messenger Sawel, after they had him out of the prison, should run him into an house, and take away all his papers, which they believed were the instructions, as in truth they were, of the counsel assigned him when in the Tower, and bring the papers to them; whereby they would not only disable him of his defence, but they could be better instructed how to proceed in a way for which he had not provided himself of any defence.

Murrel and Sawel did as the king's counsel directed them. Much wrangle there was whether he should have his papers or not; all the court agreed he should not have them till he had pleaded Guilty, or Not Guilty; and afterwards he should have the use of some, and not of others, because they did not appear to be written by himself, but by some counsel or solicitor; and as they said, none is allowed in treason, unless assigned by the court. The chief justice North said, they were not taken away by him; but, says Colledge, they were taken away by the keeper, under pretence of bringing them to his lordship. The court said they knew not what papers he meant, and knew nothing of it: he said, the indictment mentioned something of misdemeanor, as well as treason, but he knew not how to make his exceptions without his papers. I have thought fit to mention all these things, because this trial was the inlet to all that followed, and gave encouragement to spill nobler blood. The injustice of the violence used to the prisoner, must be measured from the reasons given for it, that the papers were instructions from counsel and solicitors, and none in law was allowed in treason. It is true, no counsel are allowed for the prisoner in a trial upon an indictment of any capital matter; but in an appeal for capital matters, counsel are allowed even on the trial. The reason given, that the indictment is the suit of the king, and no counsel or witness is allowable in a capital matter against the king, is foolish, as shall be hereafter shown; and as vain is the reason that the judges are counsel for the prisoner, which they ought to be [2 Co. Inst. 178]: but I doubt it will be suspected, that in this case, and many others, they did not make the best of their client's case; nay, generally have betrayed their poor client, to please, as they apprehended, their better client, the king: for so they say they are to be counsel likewise for the king in indictments, that is to say, they are to be indifferent and upright between both, so certainly they are to be in appeals; therefore that is not the reason why no counsel is allowed the prisoner in the indictment: but the true reason in probability is, that the prisoners in indictments are generally so very poor that they could not be at the charge of having counsel, and so non-usage gave colour of a law.

The other reason* my lord Coke gives for it, viz. that much of the truth may be discerned by the prisoner's behaviour, or answers, which would be concealed if he spoke by another, is not satisfactory; for the same is to be said in an appeal. As to the public, it is not material whether a man is prosecuted and punished by an indictment, or an appeal; and that appeals are less frequent than indictments, is only that the first is more chargeable than the last; for though we hear not of late of any appeals but in murder, yet they lie in robbery, burglary, felony, and in all crimes at common law punishable by loss of life or member: but though the rule in indictments is, that no counsel is allowed, yet it is confined to the trial. No law, common or statute, nor any usage, says, a prisoner shall not have counsel to advise him before or after the trial; and in murder, and all other crimes, it is always admitted; and why not in treason?

In treason, say some, it is criminal for one to advise or solicit for the prisoner; and the king's counsel said, he had known one indicted

* See something concerning another reason given by lord Coke, in the Note to the Case of Don Pantaleon Sa, vol. 5, p. 470, of this Collection.

for being a solicitor for one in high treason; and says the court, it is criminal for one to be solicitor or counsel in cases of high treason, unless assigned by the court: and whether it be so or no, is worth inquiry.

First, No law-book as to this matter makes any difference between treason, and other crimes; and advising and soliciting is spoken of in general terms; which being reduced to particulars, will shew the absurdity of it.

Suppose I, observing the indictment on which the prisoner was arraigned, was erroneous, and should therefore advise him to move and quash it for that error: for, say I, if you should be tried on this indictment, and found guilty, unless you move in arrest of judgment, you will be attainted, and then you can take no advantage of that error; and if you be acquitted, you may be indicted again, and tried again, because the first indictment was erroneous.

If this be law, as none can deny it, is it not lawful to advise him; and it is not fit for the court to quash the indictment faulty, notwithstanding all the cant of dilatories, subterfuges, and defending himself by plain matter of fact. Or suppose I advise in fact, that I hear that such a witness is come against him, I know he is hired to do the job, and I will prove it on him if called: or suppose I tell him, I know such a witness is convict of perjury, and if he will call me, I will produce the records of his conviction; can any lawyer say these things are criminal? But if I should advise a prisoner to escape out of prison, shewing him the way of doing it, it is criminal.

In all cases comforting a traitor is treason, [Co. Inst. 138]; but it is meant where you do it to keep him from justice, [Co. Inst. 183]; for else feeding a traitor in prison is treason, which none will affirm, [H. P. C. 218]. So that reducing general words to particular facts, clears the sophistry of them: nor is it criminal to be a solicitor in treason, for where there is no positive law, as in this case there is not, natural reason must take place; and better reason cannot be given than what the prisoner in this case gave: if a man be cooped up, and not suffered to go about his business himself, and no friend must be employed to do it for him, how is it possible for him to make his defence? I know it is said his innocency must defend him; but the folly of that saying shall be shewn in another place. But say they, the court shall assign him a counsel and solicitor; but when, and for what? only for a point of law. May not a prisoner want a solicitor for a matter of fact? Suppose he had occasion for a witness which he could not readily find, or occasion for a copy of a record, for want of which Mr. Cornish suffered; was it not reasonable for him to have a solicitor? And when shall the court assign him a solicitor? only when the prisoner comes upon his trial, and then it is too late to have any use of him; as Colledge was arraigned at twelve, and tried at two o'clock the same day; and as was Mr. Cornish's case. But, says the king's counsel, they had known one indicted for high-treason for being a solicitor in such a case, though I do not believe it; yet that authority goes no farther to prove the matter, than an indictment I knew against a person once, for stealing an acre of land; and against another for wickedly and devilishly breaking an award, whereby two unjust arbitrators directed to the prisoner to convey his land to a certain lord, without any satisfaction or recompence, proved those matters to be felonies.

But though a prisoner may be advised, yet that advice must not be reduced to writing Then suppose one man's memory be good, and can bear all the advice given him, and another man's memory bad, and cannot do it; is not the last hanged for having a bad memory, rather than for his crime? But though it may be reduced to writing, yet it must be his own hand-writing, and not another's; how ridiculous is the distinction? Suppose the prisoner cannot write, then he is hanged for his parent's fault or misfortune, for not educating him, or for not being able to educate him better.

Which is somewhat of kin to the late practice in the west, where many men were hanged for having old Jewish names, as Obadiah, or the like, with a jest, that their godfathers hanged them. But suppose it is not lawful in general to be a counsel or solicitor, with, or to a prisoner committed for high-treason; yet the prosecution being the king's, he may give a privilege which the law of Courts doth not allow, and in this case it was so done: for, to the confusion of those who did this injury, and of those judges who would not do the prisoner right, they have printed the orders of the king and counsel, which appointed Mr. West and Aaron Smith to be his counsel and solicitor.

If it was lawful for the prisoner to have counsel, and to have advice in writing; it was very unlawful, and as high a misdemeanor in the king's counsel to order his papers to be taken away, as they were capable of being guilty of; both the prisoner and the matters of his defence being under the protection of the Court.

It is not an ancient practice the seizing of papers, though of late used; it began, I believe, upon my lord Coke, whose papers were seized and carried to the secretaries office, upon the like pretences as of late, and when returned, were gelt of many bonds and other securities, to a great many thousand pounds value, which never came to light. It was afterwards practised upon some members of parliament, and, as I remember, voted illegal, as undoubtedly it is: for though sometimes you may meet with papers which may be evidence against the prisoner; yet it is possible that other papers than the prisoner's may be mixed with his to make good an accusation; nay, which is worse, some of the papers may be withdrawn, which may be the only matter of his defence, and that hath been often practised. And I cannot but remember a story about this matter: when sir William Jones died, it was said, that one from

Whitehall offered sir William Jones's servant a great sum of money but to let him search his master's study to find a paper which would discover great matters. A certain person discoursing with a privy-counsellor about it, the privy-counsellor said, it was not true; for, says he, if we had had a mind to have done it, could we not send a messenger on pretence of searching for treasonable papers, and bring all the study to Whitehall, and keep what we would of them?

But though that hath been often practised, yet this was the first time that ever a prisoner had the instructions for his defence taken away from him; and the manner was worse than the thing, it being done just as he was coming to his trial, relying upon his writing, not his memory, for his defence; besides the agony so great an injury put him in, when he had so great a concern upon him, as the trial for his life, and he could not but know by all that preparation, that it was more than ten to one against him: all which is well seen in his trial, where he so pathetically and sensibly pressed the Court for justice in this matter, which they excused with such mean answers, that all mankind must see they were satisfied of the injustice, and were resolved not to do him right: they knew not which way he came by the papers, they knew not but he may be criminal who brought them him; they knew nothing of his papers, they knew not what papers he meant; that his lordship did not take them away, and such-like stuff: as if it was not the duty of the Court to relieve the prisoner against the oppression of any such persons but themselves; else why did they not ask Murrel and Sawel who stood by, and were charged with taking them, for the papers, and have satisfied themselves of them? But in truth they knew before what they were. And Colledge was a true prophet, when finding his life so beset, he said, this was a horrid conspiracy to take his life: but it would not stop there, for it was against all the Protestants of England. And the rule the Court made at last was as unjust, that he should have the use f some of his papers after he had pleaded not Guilty, but not before; for suppose there was matter in them which could not be made use of after such plea, as a plea to the jurisdiction of the Court, a pardon, otherwise acquitted, and the like, could not be pleaded, or advantage taken of them after not Guilty pleaded; although there was not such, yet there might have been such pleas for ought the Court knew. How unjust then was it for him to plead not Guilty before he should have the use of his papers? But there was matter in them for quashing the indictment; and he hinted so much to the Court, as that the indictment contained crimes of different nature, as treason and misdemeanor, and I think it was good cause to quash the indictment.

In all civil matters, two matters of different natures cannot be put into one action, as debt and trespass; two capital crimes of different natures cannot be joined in one indictment, as murder and robbery: and for the same, and another reason, treason and misdemeanor cannot be joined in one indictment; for the jury may observe, that one part of the indictment, which in itself is but misdemeanor, as that he said, the king minded nothing but beastliness, &c. though charged in the indictment as treason, was proved, and not the material parts of the indictment, as designing to seize the king's person, &c. and finding some part of the indictment proved, might find him Guilty generally, which extends to every article of the indictment, and so the jury deceived, and the prisoner in danger; or suppose he was acquitted of such an indictment, if it ought to have been quashed, whether the prisoner shew the error or not, he may be tried again upon another good indictment for the same treason. If therefore what he offered was an error, or but like an error in the indictment, by the law which favours life, and the jeopardy on life, the Court ought not to have tried him on that indictment, but have directed another indictment to have been found. It is a vain objection to have said, that that would have been troublesome. Is the mischief of that comparable to that of putting a man twice in jeopardy of his life for the same thing? But it would have been a delay. I say none; for there was a Grand-jury in Court, and within the two hours time the Court adjourned (to give the king's counsel opportunity of viewing the prisoner's papers which were taken from him, and to consider of the method of his prosecution by them, which they did, and altered it from what they at first designed it) the king's counsel might have had a new bill found; but peradventure they could not prevail with that Grand-jury to have found a new bill; they remembered they had ill luck with the first bill at London, which I believe was the true reason: but I will do the Court no injury, in supposing that to be the cause of the adjournment which was not; it is is true, in the printed trial, it is pretended they adjourned in order to dine; yet those that knew the adjournment was by the direction of the king's counsel, and overheard their whispering with the Chief Justice (which is both an indecent and an unjust thing, and is neither better nor worse than a plaintiff or defendant's whispering a judge while his case is before him trying); and I know that the judges had breakfasted but a little before, and had no great stomach to their dinners, and therefore believe, that that before assigned, and not what was pretended, was the true cause: they might better have put off their dinner to their supper, than their supper to their breakfast, as they did, the trial lasting till early next morning.

But because of irregularities of Court and counsel, in all these matters, are shifted off and excused by two sayings not understood generally; the first whereof is, that the Court is to act for the king, and the counsel are for the king, and no person must come near the

prisoner, to the prejudice of the king, as in Fitzharris's case was often said; [illegible] witness was permitted to go on in an impertinent story, of a transaction between him and my lord Shaftesbury, in my lord Russel's trial, of which the [illegible] to incense the jury; declared it was not evidence, yet a great while afterward he went on in a like manner: nay, the counsel in summing up the evidence, repeated the same matter, which was permitted because it was for the king; and yet, when the earl of Anglesea began to say what the lady Chaworth told him, he was snubbed, and cut short; and Mr. Edward Heward was served the same sauce, because it was against the king: it is fit, therefore, to know what is meant in law by those words. Nobody doubts what the Courts or king's counsel of late days meant, but in law they are not so meant: for though many things are said to be the king's, as the protector of his people, and more concerned in their welfare than any private persons; yet they are so in preservation, and not in property or interest. The highways are the king's, in preservation for the passage of his subjects; and whoever obstructs them wrongs the king, as he is hurt when his subjects are hurt; but in property, the soil generally belongs to private persons. The king is hurt when his subjects are oppressed by force, because he has engaged to defend them; and therefore the offender is punished by the king, to deter the offenders, and others, from committing the same offences; which is for the benefit of the public. But as a man may be oppressed by open force, so he may be oppressed by private insinuations and false accusations, and the king has engaged to defend his subjects from such; not that it is possible to prevent them, but by consequence, that is, by punishing such as shall be found guilty of those crimes, which heretofore were punished with the highest arbitrary punishments we read of. The consequence is, that it is for the king to punish offenders, to acquit the false accused, and to punish the false accusers; that is to say, in all cases to do right according to law and truth.

Surely queen Elizabeth gave the best explanation of the words, [3 Co. Inst. 79.] when the lord Burleigh, seeing sir Edward Coke, the then Attorney-General, coming towards her, he said, Madam, here is your Attorney-General, 'Qui pro Domina Regina sequitur.' Nay, says she, I'll have the words altered, for it should be, 'Qui pro Domina Veritate sequitur.'

For the king, and for truth; they are synonymous words; for the king against the truth is a contradiction. And the judges and king's counsel having taken an oath to advise the king according to the best of their cunning, which is according to law and truth; if therefore the king's counsel use means, and the court permit them so to do, to suppress truth, or to disable the prisoner from making his innocence appear, as in Colledge's case was done, if they urge things as evidence of the crime whereof the prisoner is accused, which by law are not evidence, as in this case, in lord Russel's case, colonel Sidney's case, Mr. Hampden's, and Mr. Cornish's case, and in many more they did, and as in some of them shall be [illegible] as evidence, which is not proved, as in my lord Russel's trial, that my lord of Essex killed himself; if they wrest as evidence of the fact, what in sense is not so, as in colonel Sidney's case, the writing his book, (nay, for any thing appeared, it was writ before king Charles the second came to the crown) they are counsel against the king, being against truth, as well as against the prisoner.

I think no man will deny the truth of this proposition, That it is as much the king's interest to have an innocent accused of treason, acquitted, as it is to have a nocent accused of treason, convicted. If that be true, then let any one shew me a reason, if he can; for there is no law against it, why he may not have the same liberty of clearing his innocence, as the prosecutor hath of convicting him; I mean by free and private access of all persons to the prisoner, as is used in all other capital matters. If it be said he may get some to corrupt the witnesses against, or suborn others for him, the same may be said in all other matters; but in treason that is not a likely matter, for generally the prisoner never knows what he is accused of, and consequently cannot know his accuser, nor how to provide a counter-evidence, till he comes to be arraigned, and then it is too late: for generally he is presently tried after his arraignment, as was the case of Colledge, and my lord Russel, and Mr. Cornish; and persons committed for treason are so much the less able to corrupt or suborn witnesses, than any other criminals, that they generally, according to the late practice, have no accuser brought face to face to them, on their commitment as all other criminals have, who always are committed upon an accusation made upon oath in their hearing, and their defence heard before their mittimus made; and whatever the pretence may be, yet in experience, it is found, that more perjuries are committed in prosecutions for treason by the accusers, than by the witnesses for the prisoner.

One reason is, A witness in treason is more difficultly convicted than in any other crime: For treason is an *Ignis fatuus,* it is here and there, as Colledge was first in London, then in Oxford; it is not confined to place or time, as all other crimes are; in all other crimes, as murder, robbery, or the like, it must be proved to be within the county where laid; it must be of the person named in the indictment, which are evidences of fact, which in some sort prove themselves. And there was but one that I remember, for Oates I do not count one, was ever justly convicted of perjury in treason, and that too was for want of cunning, for he foolishly swore to time as well as place, which a witness in Mr. Hampden's trial would never be brought

to do: Besides malice and revenge, which in prosecutors and accusers in treason are generally the motives, go farther than money or kindness, which if used in any case, are the motives of false witnesses for the prisoner.

Now as for the king and for the truth are the same, so for the king and for the law are the same. The laws are the king's, as he is to see the execution and preservation of them; so for the king against the law is a contradiction.

Therefore to try a prisoner upon a vicious indictment, as was done in Colledge's and colonel Sidney's cases, is against the king as it is against the law, for by that means he is in danger to be hanged if convicted; or tried twice, if acquitted; which is against law.

It is no salvo of the matter what the judges said in Colledge's case, that the evidence of misdemeanor is no evidence of treason; for the same may be said in an indictment of murder and robbery; nor that the judges would take care to inform the jury which was evidence of treason, which of misdemeanor, which they promised to do, but were not as good as their words, as shall be shewn; for the court may forget so to do, and the jury may forget what the court said to them of that matter.

But notwithstanding all this, if the prisoner was innocent, there could be no harm done to him, for his innocence would defend him: This was a saying, and as mortal it was to Fitzharris, to Colledge, to colonel Sidney, to Mr. Cornish, and several others, as was the letter Θ amongst the Greeks. It is true, my lord Coke used the expression, but in another sense than that of late practised. I would fain know what they meant by the expression; Is it, that no man will or ever did swear falsly against a prisoner in treason. If that be true, how came the same persons to be so violent against Oates for what he swore against Ireland? or do they mean, that, let an accuser swear never so violently and circumstantially against a prisoner, yet if he be innocent it will do him no harm? If that be true, I would fain know how the prisoner shall escape; is it that his innocence shall appear in his forehead, or an angel come from heaven and disprove the accuser? Neither of which we have observed, though all have said, and I believe, that some persons have been very innocently executed. Or shall the accuser be detected by the bare questions of the prisoner? That I think will not be neither; and therefore to instance in the only person who hath of late escaped in a trial of treason, where there was a design against his life, which was my lord Delamere, if he had not had witnesses to have proved the persons mentioned to have been with him at the place and time sworn against him to be in other places, it was not his denial had served his turn, but he would have run the same fate with my lord Brandon. Nay, I am apt to think, had he been tried by a jury of commoners packed, as, at that time, they usually were, he had not escaped.

The truth is, when I consider the practice of late times, and the manner of usage of the prisoners, it is so very much like, or rather worse than the practice of the inquisition, as I have read it, that I sometimes think it was in order to introduce popery, and make the inquisition, which is the most terrible thing in that religion, and which all nations dread, seem easy in respect of it. I will therefore recount some undeniable circumstances of the late practice: a man is by a messenger, without any indictment precedent, which by the common law ought to precede, or any accuser or accusation that he knows of, clapt up in close prison, and neither friend or relation must come to him, he must have neither pen, ink or paper, or know of what, or by whom he is accused; he must divine all, and provide himself a counter-evidence, without knowing what the evidence is against him. If any person advise or solicit for him, unless assigned by the court by which he is tried, they are punishable: he is tried as soon as he comes into the court, and therefore of a solicitor there is no occasion or use; if the prisoner desires counsel upon a point of law, as was done in my lord Russel's trial, the counsel named must be ready to argue presently, and the court deliver their judgment presently without any consideration. The prisoner indeed hath liberty to except to thirty-five of the jury peremptorily, and as many more as he hath cause to except to, but he must not know beforehand who the jury are; but the king's counsel must have a copy of them; he must hear all the witnesses produced to prove him guilty together, without answering each as he comes, for that is breaking in upon the king's evidence, as it is called; though it hold many hours, as it happened in most of the trials: he must not have any person to mind him what hath been sworn against him, and forgotten by him to answer; for if that were alllowed the prisoner perhaps may escape hanging, and that is against the king: there is a proclamation to call in all persons to swear against him, none is permitted to swear for him; all the impertinent evidence that can be given is permitted against him, none for him; as many counsel as can be hired are allowed to be against him, none for him. Let any person consider truly these circumstances, and it is a wonder how any person escapes: it is downright tying a man's hands behind him, and baiting him to death, as in truth was practised in all these cases. The trial of Ordeal, of walking between hot iron bars blindfold, which was abolished for the unreasonableness of it, though it had its saying for it too, that God would lead the blind so as not to be burnt if he were innocent, was a much more advantageous trial for the suspected than what of late was practised, where it was ten to one that the accused did not escape. If any of these things have been legally practised, I have nothing to say against it, but I have never read any thing of common or statute law for it. And I can with better assurance say, than any person who hath practised these things, that no law in England

warrants them; and if not, then consider the unreasonableness of these methods.

There is yet one objection to be answered, which being a very great hardship upon the prisoner, gives some colour of imposing other hardships upon him, to wit, that a witness cannot be examined for the prisoner on his oath in a trial upon an indictment of a capital matter. It is not because the matter is capital, for then no witnesses ought to be examined upon oath for the appellee in a capital matter; neither is it because it is against the king, for then no witness ought to be examined on oath for the defendant in a trial upon an indictment of any criminal matter; yet in indictments of all criminal matters, not capital, it is permitted to the prisoner.

To say truth, never any reason was yet given for it, or I think can be, if you believe my lord Coke, 3d Instit. fol. 79. of which opinion my lord Hale is, in his Pleas of the Crown*, that that practice is not warranted by any act of parliament, book-case, or antient record, and that there is not so much as *scintilla juris* for it: for he says, when the fault is denied, truth cannot appear without witnesses. As for what is pretended, that it is swearing against the king, and therefore it is not allowed of; it is a canting reason, which, put into sensible English, a man will be ashamed to own. And as slight is the reason, that it being a matter of so high a moment as a man's life, the prisoner will be the more violent and eager, and the witnesses may be more prevailed upon to swear falsely, more than they would be in a matter of less moment: the weakness of that reason hath been in part, and shall be further shewn. I think none will deny, but the end of trials in any matters capital, criminal, or civil, is the discovery of truth: next it is as necessary for the prisoner to have witnesses to prove his innocence, as it is for the king to have witnesses to convict him of the crime: which proposition is agreed by the practice, it being always permitted, that the prisoner shall produce what witnesses he can, but they are not to be upon oath. In the last place, since truth cannot appear, but by the confession of the party, or testimony of witnesses of both sides, it is necessary to put all the engagement as well on the witnesses of part of the prisoner, as of part of the king, to say the truth, the whole truth, and nothing but the truth, as the nature of the matter will bear: and as yet no better means has been found out than an oath; which if denied to the prisoner's witnesses, either he is allowed too great an advantage to acquit himself, or he is not allowed enough.

If all that his witnesses say without oath, shall have equal credit, as if they swore it, then he hath too much advantage; for men may be found who will say falsely, what they will not swear, as is plain enough. How often doth a defendant say in a plea at law, that a deed is not his, which yet in an answer in Chancery, he will confess to be his? If his witnesses shall not have credit because not sworn, to what purpose then is it permitted him to produce them? If they shall have credit, but not so much as if sworn, I ask how much credit shall be given? Is it two, three or ten witnesses without oath shall be equivalent to one upon oath? And besides, that question never was nor can be answered, what credit shall be given them? There is an unreasonable disadvantage put on the prisoner, that a witness produced on his part, of equal credit with the witness against him, shall not have equal credit given him, because he is not on his oath; whereas he is ready to deliver the same things on his oath, if the court would administer it to him: And yet that difference was taken in Fitzharris's case, as to the credibility of Everard and Oates, the first being upon his oath, the last not.

I do not offer this as any reflection upon the late proceedings, but as a reason why matters in capital proceedings ought not to have been carried farther than heretofore they were, against the prisoner, by example of so unreasonable a practice.

But to return to the trial of Colledge, which came on in the afternoon, when the Attorney insisted that the king's witnesses ought not to be examined out of the hearing of each other, in which he was over ruled, but the rule not observed, nor was it material: for the king's counsel having the prisoner's writings, and by them observed how he intended to make the witnesses against him contradict themselves, they did not produce such witnesses as were not instructed to concur in the evidence of the same matter, but produced only such as were instructed to give evidence of distinct matters. And therefore Dugdale was first produced, who gave evidence of vilifying words spoke of the king at several times, at Oxford and London, by the prisoner, to himself alone; that he shewed the witness several scandalous libels and pictures, and said he was the author of them; and that he had a silk armour, a brace of horse pistols, a pocket pistol, a sword; that he said, he had several stout men to stand by him, and that he would make use of them for the defence of the protestant religion; he said, The king's party was but a handful to his party. Stevens swore the finding of the original of the Raree-Show in the prisoner's chambers. John Smith swore his speaking scandalous words of the king, and of his having his armour; and that when he shewed it the witness, he said, These are things that will destroy the pitiful guards of Rowley; that he said, He expected the king would seize some of the members of parliament at Oxford; which, if done, he would be one should seize the king; that he said, Fitzgerald, at Oxon, had made his nose bleed; but before long, he hoped to see a great deal more blood shed for the cause; that if any, nay, if Rowley himself, came to disarm the city, he would be the death of him. Haynes

* Tit. Evidence, p. 264. See Hist. P. C. vol. 2. cap. 37. p. 283.

swore he said, Unless the king would let the parliament sit at Oxon, they would seize him and bring him to the block; and that he said the city had 1,500 barrels of powder, and 100,000 men ready at an hour's warning. Turbervile swore, he said at Oxford; that he wished the king would begin; if he did not, they would begin with him, and seize him and said, he came to Oxford for that purpose.

Mr. Masters swore, that in discourse between him and the prisoner, he justified the proceedings of the parliament in 1640, at which the witness wondered; and said, How could he justify that parliament that raised the rebellion and cut off the king's head? To which the prisoner replied, That that parliament had done nothing but what they had just cause for, and that the parliament which sat last at Westminster was of the same opinion; that he called the prisoner Colonel in mockery; who replied, Mock not, I may be one in a little time.

Sir William Jennings swore as to the fighting with Fitzgerald, and the words about his bleeding.

For the Prisoner.

Hickman said he heard Haynes swear, God damn him, he cared not what he swore, nor whom he swore against, for it was his trade to get money by swearing. Mrs. Oliver said, Haynes writ a letter in her father's name unknown to her father. Mrs. Hall said, she heard Haynes own that he was employed to put a plot on the dissenting-protestants. Mrs. Richards said, she heard him say the same thing. Whaley said, Haynes stole a silver tankard from him. Lun said, Haynes said the parliament were a company of rogues for not giving the king money, but he would help the king to money enough out of the fanatics estates. Oates said, Turbervile said, a little before the witnesses were sworn at the Old Bailey, that he was not a witness against the prisoner, nor could give any evidence against him; and after he came from Oxford, he said, he had been sworn before the Grand-Jury against the prisoner, and said, the protestant citizens had deserted him, and God damn him, he would not starve. That John Smith said, God damn him, he would have Colledge's blood. That he heard Dugdale say, that he knew nothing against any protestant in England; and being taxed that he had gone against his conscience in his evidence, he said it was long of Colonel Warcup, for he could get no money else: that he had given out that he had been poisoned, whereas in truth it was a clap. Blake said, that Smith told him Haynes's discovery was a sham plot, a meal-tub plot.

Bolron said Smith would have had him given evidence against sir John Brooks, that sir John should say there would be cutting of throats at Oxford, and that the parliament-men went provided with four, five, six, or ten men a piece; and that there was a consult at Grantham, wherein it was resolved, that it was better to seize the king than let him go, whereas he knew of no such thing: that he would have Bolron to be a witness against Colledge, and told him what he should say, lest they should disagree in their evidence; that he heard Haynes say, he knew nothing of a popish or presbyterian plot; but if he were to be an evidence, he cared not what he swore, but would swear any thing to get money. Mowbray said, Smith tempted him to be a witness against Colledge, and was inquisitive to know what discourse passed betwixt him and my lord Fairfax, sir John Hewly, and Mr. Stern, on the road; and said, that if the parliament would not give the king money, and stood on the bill of exclusion, that was pretence enough to swear a design to seize the king at Oxford.

Everard said, Smith told him he knew of no Presbyterian or Protestant plot, and said, justice Warcup would have persuaded him to swear against some Lords a Presbyterian plot, but he knew of none; He said Haynes told him it was necessity, and hard pay drove him to speak any thing against the protestants; and being questioned how his testimony agreed with what he formerly said, answered, he would not say much to excuse himself; his wife was reduced to that necessity, that she begged at Rouse's door, and mere necessity drove him to it, and self-preservation, for he was brought in guilty when he was taken up, and was obliged to do something to save his life, and that it was a judgment upon the king or people; the Irishmen's swearing against them was justly fallen on them, for outing the Irish of their estates.

Parkhurst and Symons said, they had seen at Colledge's house his arms, about the latter end of November. Yates said, Dugdale bespoke a pistol of him for Colledge, which he promised to give Colledge. And upon discourse some time after the Oxford parliament, Yates said, Colledge was a very honest man, and stood up for the good of the king and government. Yes, said Dugdale, I believe he does, and I know nothing to the contrary. Deacon and Whitaker said they knew Colledge was bred a protestant, and went to church, and never to a conventicle that they knew of, and thought him an honest man. Neal, Rimington, Janner, and Norris, to the same purpose; and Norris, that Smith (in company where was discourse of the parliament-men's being agreed to go to Oxford, said he hoped they would be well provided to go, if they did go. El. Hunt said a porter, in her master's absence, brought the prints taken in Colledge's house eight weeks before; and said, Dugdale told her, after her master was in prison, he did not believe Colledge had any more hand in any conspiracy against his majesty than the child unborn: and he had as lieve have given an hundred pounds he had never spoke what he had; and that he had nothing to say against her master, which would touch his life.

Having summed up all the material part of the evidence in order it was given, for or against the prisoner; let us see whether, upon the whole, an honest understanding jury could,

with a good conscience, have given the verdict the then jury did; or whether an upright court could, with a good conscience have declared they were well satisfied in the verdict given, as all the four judges in that case did, though the chief justice North only spoke the words. And though it is too late to advantage the deceased, yet it will do right to the memory of the man, to whose dextrous management on his trial, many now alive owe the continuance of their lives to this day. It was not their innocence protected the lord Fairfax, sir John Brooks, and many others before-mentioned, and many not named in the trial, but Colledge's baffling that crew of witnesses, and so plainly detecting their falshood, that the king's counsel never durst play them at any other person but the earl of Shaftesbury, as shall be shewn; and failing there they were paid off, and vanished, and never did more harm visibly; what under-hand practices they might be afterwards guilty of, I know not.

Who could believe any one of those four witnesses, Dugdale, Haynes, Turbervile, and Smith, if it were for no other reason than the improbability of the thing; for (as Colledge said) was it probable he should trust things of that nature with papists, who had broke their faith with their own party, who could lay greater obligations of secrecy upon them than he was able to do? That he, a Protestant, should trust people who had been employed to cut Protestants' throats? And neither of them ever discovered any of the things they swore, till after the Oxford parliament, though most of them were pretended to be spoken and transacted before.

Who could believe Dugdale in any of his evidence against the prisoner, when Oates testified against him, that he said he knew nothing against any Protestants in England? And being taxed by Oates, that he had gone against his conscience in his evidence against Colledge to the grand jury at London, he said, It was long of colonel Warcup, for he could get no money else; which is a plain confession he had sworn wrong, and of the cause for which he did it, and of the person who induced him to do it. That he had given out that he was poisoned, whereas his disease was a clap: which was an ill thing in him, as it implied a charge of poisoning him on other persons. And when Elizabeth Hunt testified against him, that he said, after Colledge was in prison, that he did not believe Colledge had any more hand in any conspiracy against the king than the child unborn; and that he had as lieve have given an hundred pounds he had never spoken what he had; and that he had nothing to say against Colledge which could touch his life: And when Yates testified against him, that when Yates said Colledge was an honest man, and stood up for the good of the king and government; Yes, said Dugdale, I believe he does, and I know nothing to the contrary.

Who could believe Haynes in any part of his evidence against the prisoner, when Mrs. Hall and Mrs. Richards said, he owned he was employed to put a plot upon the dissenting Protestants? When Whaley testified against him that he was a thief, and had stole Whaley's tankard? When Lun testified that Haynes said the parliament were a company of rogues for not giving the king money; but he would help the king to money enough out of the fanatics estates? When Hickman testified against him he heard him say, God damn him, he cared not what he swore, nor against whom he swore, for it was his trade to get money by swearing? When Mrs. Oliver said, that he had writ a letter in her father's name, without her father's knowledge? When Bolron testified against him, that he said he knew nothing of a Popish or a Presbyterian Plot, but if he were to be an evidence, he cared not what he swore, but would swear any thing to get money? When Everard testified against him, that he said, Necessity and hard pay drove him to say any thing against the Protestants; and being taxed that his evidence against Colledge agreed not with what he had formerly said, he said he could not excuse it, but his poverty and self-preservation drove him to it? Which was a plain confession of the falshood of his evidence, and of the reason of it; and added, it was a judgment upon the king or people, the Irishmen's swearing against them, for outing the Irish of their estates: which can have no other sense, than the Irishmen's forswearing themselves against the English was a judgment, &c.

How could Turbervile be believed in any part of his evidence against Colledge, when Oates testified against him, that he said, a little before the witnesses were sworn against Colledge at the Old-Bailey, that he was not a witness against him, nor could give any evidence against him; and yet afterwards, at Oxon, Turbervile told him he had sworn against Colledge to the grand-jury, and said, the Protestant citizens had deserted him, and God damn him, he would not starve: which words, I think, need no explanation.

And lastly, how could Smith be believed in any part of his evidence against the prisoner, when it was testified against him by Blake, that he said Haynes's discovery was a Sham-Plot, a Meal-Tub-Plot? The meaning of the words, I think, are well-known. That he would have had Bolron swear against sir John Brooks, the lord Shaftesbury, and Colledge, things of which he knew nothing, and told him what he should swear, lest they should disagree in their evidence. When it was testified against him by Oates, that he said God damn him, he would have Colledge's blood? when it was testified against him by Mowbray, that he tempted Mowbray, to be a witness against Colledge and sir John Brooks, and was very inquisitive to know what discourse he had with the lord Fairfax, sir John Hewley, and Mr. Stern, on the road to Oxon; and said, if the parliament did not give the king money, but stood on the bill of Exclusion, that was pretence enough to swear a design to seize the

king at Oxon? when Everard and many others testified he said he knew of no Presbyterian or Protestant Plot. Now, if Colledge's witnesses were credited, it was impossible the king's witnesses could be credited; that was agreed by the court to be true upon the trial. The answer on the trial was, that the king's witnesses were on their oaths, the prisoner's were not; which was a reason in words, but not in sense.

And surely what Colledge said on that matter, without any knowledge in the law, cannot be answered. It is not fair dealing, said he, with a man for his life, because the witnesses against him, upon their oaths, deny the things the witnesses for him prove; therefore the witnesses against him must be believed, and the witnesses for him disbelieved, when yet the witnesses for him were ready, on their oaths, to maintain what they said for him.

Nor is the law so: for taking the law to be, that a witness for the prisoner shall not be sworn, which is only made good by practice; the same law, that is to say practice, is that a witness without oath, for the prisoner, is of equal credit with the witness against him upon oath, and none can shew the contrary till of late days.

To give one example of many, where it was necessary for the prisoner to produce a witness to prove his innocency, and where the witness for him was as much believed as the witness against him: There was a person, whose name I do not remember, arraigned (at the same time that an indictment of high treason was endeavoured to be found against the lord Shaftesbury) for robbing another of money, and of a hired horse, of which likewise the person was robbed. The robbing of the money and a horse was proved by himself, and several others; but that the prisoner was the person that committed the robbery, none positively swore but the person robbed; who likewise swore, that the horse on which the prisoner was taken, was the horse taken from him; against which the prisoner proved, by the person of whom the horse was agreed to be hired, that the horse the prisoner was taken upon, was not the horse he let to hire to the person robbed; whereupon the prisoner was acquitted; and yet the prisoner's witness was not on his oath, and the person robbed was on his oath: which, besides that it proves the matter for which it is brought, shews the folly, as well as injustice of the practice of imprisoning men, without letting them know for what, and without confronting them with the witnesses against them, upon the commitment. For how could this man have known what witnesses to produce, unless he had known what in particular he was indicted for? And how could he have sent to such witnesses, unless he had had the liberty of sending to the persons who were to be witnesses for him? And it shews the folly of those sayings, that a man's innocence must defend him, and that the evidence against the prisoner must be as clear as the sun at noon-day. All will agree that the prisoner in this case was innocent, and yet that alone, without producing a witness to prove his innocence, would have stood him but in little stead; and how could he have known what sort of evidence to have ready, unless he knew what he was accused of?

I do not mean what crime he was accused of, as treason, murder, robbery, theft, or any other crime; but unless he knew the person robbed, when, where, and other circumstances; which, say some, is not to be permitted in prosecutions of high-treason; for if so, then no man shall be hanged for high-treason; unless there was as strong proof against him, as is required in any indictment of any capital matter: and that, they say, is not to be expected in treason; for no man will call two witnesses to be evidences of his words or actions, being overt-acts of his design of high-treason. The objection is too foolish to be answered; for it is neither better nor worse, than that if a man shall not be hanged for treason without evidence, he shall never be hanged for treason; for no evidence, and evidence which the law rejects, is the same in sense, though different in words: and as the intent of the mind is difficult to prove on the part of the king, so is the prisoner's part of producing counter-evidence much more difficult; and therefore the law hath taken care, by the statute of Edward the third, that the intent shall be proved by an overt-act; and by the statute of Edward the 6th, that that overt-act shall be proved by two witnesses. And therefore, since the law hath taken care that there shall be a stricter proof in high-treason than in any other crime, for the judges to say a less proof may be admitted to convict one of high-treason than of any other crime, is very ridiculous; unless they will at the same time say, that the parliament who made those statutes, were men of little understanding, and not to be regarded. And certainly, it was a good counter-evidence which was given in behalf of the prisoner, by some witnesses, though slighted by the court, and not permitted by the court to be given by others, that there were great endeavours to set up sham plots, and charge the Protestants with them: For let any one shew me a reason, why the evidence of sham plots, though they do not immediately concern the prisoner, is not as good evidence for him, as the evidence of a real plot, in which he was not concerned, is against him. The last was permitted to be given in evidence against my lord Russel, col. Sidney, and others; though the first was not permitted to many witnesses in this trial, and it was a material objection which Colledge made, That there was no proof of any persons being concerned with him in the design of seizing the king.

It was an unadvised answer the court gave, that he alone might be so vain as to design it alone: For if from thence an inference is made, as was insinuated by the court to the jury, that therefore he did alone design it, it was an evidence of his being a madman, not a traitor.

Had the evidence been of the mischiefing the king by means which a single person is capable of using, as stabbing, shooting, and the like, the matter is not impossible; but it being by means which it is impossible for a single person to execute, it carries such disbelief with it, that it is impossible to find a man in his senses at the same time guilty of it. And a man that is *non compos mentis,* if my lord Coke* and Hale† are to be believed, cannot be guilty of high-treason within that branch of the statute, compassing and imagining, &c.

It is true, a madman may be guilty of treason, in attempting the king's person; but for that he is no more said to be punished, than beasts of prey are when killed; which are more properly said to be destroyed than punished for the public good. But if so good a counterproof in Colledge's case was not made, as ought to have been, some allowances ought to be made for the prisoner's ignorance of what he was accused of, his usage and strict imprisonment before his trial, the ruffling him just before his trial in the manner before declared, the depriving him of his notes, the giving an evidence of many hours long against him, before he was permitted to answer any part of it. And the use of pen, ink, and paper was but of little advantage to him; for a man that hath not been used to do it, cannot take notes of any use. And in truth, he complained he had not taken notes of half said, but relied on the court to do him justice in summing up the evidences; which they promised to do, but broke their words.

It must likewise be considered, that the concern a man hath upon him, when he is upon trial for his life, is so far from fortifying, that it weakens his memory: Besides, the foul practice, without any remorse, put upon him and his witnesses; some of them imprisoned, that he could not have them at the trial; others so threatened, that they durst not appear for him, and the cry of the auditory against him and his witnesses, were mighty discouragements. All these things being considered, how could any understanding jury take it on their oaths, That the evidence against the prisoner, of a design to seize the king, &c. was as clear as the sun at noon-day?

As for the evidence which Mr. Masters gave, if it were true, it was no evidence of treason; an erroneous opinion may make an heretic, but not a traitor: it is a very distant consequence that because he affirmed that the parliament in 40 had done nothing but what was just in respect of king Charles the first, therefore the prisoner was guilty of a design against king Charles the second: Besides, that in all probability, though Mr. Masters might inveigh against the parliament, Colledge might only justify them by throwing the ill things done in that time upon the papists, as Colledge in his defence says; and Mr. Masters, after much pumping, recollected himself, and said he thought the prisoner said, the papists had a hand in those things; which proved the truth of Colledge's assertion.

As for the evidence of Colledge's saying he might be a colonel in time; if he hoped for what he said, it was no crime, or proof of a crime, it is no more than what every soldier hopes for, and he himself had been one.

As for the evidence of Atterbury, Sawel, and Stevens, of their seizing the pictures; admit they swore true, it did not amount to the proof of the treason in the indictment, or of any sort of treason: and yet if Colledge's maid said true, it looks as if the finders or some other person sent them to Colledge's house, in order to find them there.

Of all sorts of evidence, the finding papers in a person's possession is the weakest, because no person can secure himself against designs upon him in that kind. And after Dangerfield's design upon colonel Mansel, and the evidence in Fitzharris's trial, that the design of that pamphlet was to convey copies of it into some members of parliament's pockets, and then seize them, that piece of evidence ought to have been spared, till those and other practices of the like kind had been forgotten.

The last witness was sir William Jennings, of Colledge's saying he had lost the first blood in the cause, but it would not be long before more would be lost; what was that more, than that he thought more would be lost in the cause, which he interpreted the Protestant cause? Suppose he thought so without reason, and was mistaken, where was the crime? But if he thought so upon good reason, and good reason he had to think so, there was no pretence of a crime in it. I believe most men thought as Colledge did, from the time of the business of Fitzharris; and what imputation was it to him? Why were not all the expressions he used in his trial as good evidence against him as that saying? For he then said, it was an horrid conspiracy to take away his life, and would not stop at him, for it was against all the Protestants of England, and the like; which was his opinion, and after-times shewed him a true prophet.

One thing was very dishonestly insinuated, that the prisoner was a papist, which was only to incense the jury against him, and it had its effect; whereas it was very plain that he was a Protestant, though perhaps a dissenter, and therefore had not lately come to the public church; and under that notion the papists and some Protestants were contented that dissenters should be punished as papists; yet if they could have proved him a papist, no doubt they would have done it, for the destruction of the man was the design of the prosecution, and it mattered not for what treason he was convicted, so he was convicted. And he himself gave a pretty sort of evidence against himself, if they could have proved him a papist: he proved, and confessed, he was educated a Protestant;

* 3 Inst. 4. 6. 4 Co. Rep. 124, b.

† H. P. C. p. 10, 43. Hist. of P. C. Vol. 1,

and if they could have proved him reconciled to the Popish religion, which was treason, it helped them a great deal in their proofs: it was therefore very disingenuous in the chief justice to reproach him at his condemnation, that he had not made that proof of his religion as it was expected, when his religion was not the matter of which he was indicted; that was slily insinuated to exasperate, and no proof pretended to be made of his being a papist. But he had more reason to complain of the injustice of the Court in summing up the evidence, who did it in such a manner, that if they had been counsel for the prisoner, as they pretended, they would have been justly suspected to have taken a fee of the other side to betray their client.

For, as Colledge readily said, if the chief justice had looked on his notes, he would have found more evidence against Turbervile, and Dugdale, than he had repeated. And it was a lame excuse for the chief justice to say, he referred it to the memory of the jury, for he could not remember more; when, as I dare say, after about thirteen hours evidence, the jury remembered no more, than that they were to find him Guilty.

The truth is, upon the whole, what Colledge said was true; they took away all helps from him for defending himself, and therefore they had as good have condemned him without a trial. Notwithstanding all which, the courage of the man never fainted, but after he was condemned, boldly asked, when he was to be executed? To which the lord chief justice replied, it depended on the king's pleasure; but smoothly said, in those cases of high treason they did not use to precipitate the execution, it should not be so sudden but that he should have notice to prepare himself. And in truth he had from the 18th, on which he was condemned, to prepare himself, to the 31st of August 1681, on which he was executed; a much longer time than was allowed my lord Russel, or Mr. Cornish, and many others. And the true reason of so long a reprieve, was to see how the nation would digest the matter, and whether the man by the terror of death could be prevailed upon to become a tool to destroy other innocents: but when it was found that the people were quiet, and that the prisoner could not be prevailed upon to do an ill thing to save his life, his execution was ordered; yet as a shew of mercy, his quarters were permitted to be buried; a favour he slighted, with saying that he cared not whether he was eaten up with flies or worms. The same favour was likewise shewed Fitzharris, but the true reason of both was, that they had a mind that the trials and pretended crimes, for which Fitzharris and Colledge were condemned, should be forgotten; which would not be so soon done, if their quarters were always exposed to view But though all people were quiet, yet there was great grumbling, and most honest men were afraid; and the constancy of Colledge at his execution was such, that it made the most violent against him relent.

The author of the Critical Review of the State Trials, in justification of these proceedings against Colledge, or rather, perhaps, by way of set-off to them, alleges the parliament's Ordinance of 1649 making words Treason. This Ordinance is cap. 44 of that year, and it enacts, "That if any person shall maliciously or advisedly publish, by writing, printing, or openly declaring that the government was tyrannical, usurped or unlawful, or that the Commons in Parliament assembled were not the supreme authority of the nation, every such offence should be adjudged to be High Treason."

From N. Luttrell's "Brief Historical Relation," MS. in All Souls' Library, Oxford, it appears that in "July, 1682, Mrs. Goodwin, sister to Stephen Colledge, lately executed for treason, was committed to Newgate, on the information of her own husband, for treason;" and that, on "Sept. 6th, Mrs. Sarah Goodwin, sister to Stephen Colledge, was tried for high treason, on the testimony of her husband, for treasonable words spoke; but there being no other evidence against her, she was discharged."

It appears by 3 Modern Rep. 52, that in Mich. Term, 36 Car. 2, a person convicted of drinking to the pious memory of Colledge, was in the Court of King's-Bench, sentenced to pay a fine of 1,000*l.* to stand in the pillory, and to find sureties for his good behaviour.

282. The Trial of SLINGSBY BETHEL,* esq. at the Bridge-House in Southwark, for an Assault and Battery on Robert Mason, at the Election of Members of Parliament for the Borough of Southwark: 33 CHARLES II. A. D. 1681.

THE Court being sat, the jury were called, as follows: Edward Collingwood, brazier, Francis Waker, comb-maker, Zebulon Newington, chandler, alias salter, William Head, woollen-draper, Humphry Roberts, John Allyn, baker, John Morgan, grocer, William Morrice, Francis Ferrey, Richard Frankling, Thomas Wade, butcher, Edw. Kemp, ale-draper. Being sworn, the Indictment was read.

"The Jurors for our sovereign lord the king, upon their oath do present, That Slingsby Bethel, late of the parish of St. Olave's Southwark, within the town and borough aforesaid, in the county of Surry, esquire, on the 12th day of March, in the three and thirtieth year of the king, with force and arms at the parish aforesaid, and within the town and borough aforesaid, in the county aforesaid, in and upon one Robert Mason, at that time one of the king's watermen, in the peace of God, and of our lord the king, then and there standing, did assault and make a battery, and the said Robert Mason then and there most grievously and dangerously did beat, wound, and evil entreat so that his life was greatly despaired of, and other enormities that then and there he offered to, and brought on the said Robert Mason; and that the same Slingsby Bethel, then and there, to wit, the same 12th day of March, in the 33rd year aforesaid, in the parish aforesaid, in the town and borough aforesaid, in the presence and hearing of very many of the subjects of our sovereign lord the king, then and there to the said Robert Mason, he spake, uttered, and with a loud voice declared and published these provoking, threatening, and opprobrious words, to wit, 'Sirrah,' pointing at the said Robert Mason, I, (meaning himself, Slingsby Bethel) 'will have your coat,' (a certain cloth coat of a red colour, with which the said Robert Mason was covered, and adorned with a certain badge of our said lord the king upon the said coat) 'plucked off your back,' to the great terror, disturbance, and trouble of divers of our sovereign lord's liege people and subjects, being then and there present, to the evil example of all others offending in the like case, as also against the peace, crown, and dignity, of our sovereign lord the king, &c."

Mr. *Peasely*. My lord, and you gentlemen of the jury, Slingsby Bethel, esq. stands indicted, for that he, the said Slingsby Bethel, made an assault and battery on Robert Mason: as also for menacing and threatning words; saying to him the said Robert Mason, 'Sirrah, I will have your coat plucked off your back,' to the great terror and damage of the said Robert Mason, &c. to which indictment he has pleaded, Not Guilty.

Mulloy. My lord, and you gentlemen of the jury, I am counsel for the king, against Slingsby Bethel, esq. who, upon the 12th day of March last, in the 33rd year of the king, did assault Robert Mason, one of the king's water-

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* The following character of Bethel is from the hostile and indignant muse of Dryden:

"The wretch who Heav'n's anointed dar'd to curse;
Shimei, whose youth did early promise bring
Of zeal to God, and hatred to his king,
Did wisely from expensive sins refrain,
And never broke the Sabbath but for gain;
Nor ever was he known an oath to vent,
Or curse, unless against the government.
Thus, heaping wealth by the most ready way
Among the Jews, which was to cheat and pray;
The City, to reward his pious hate
Against his master, chose him magistrate.
His hand a vase of justice did uphold;
His neck was loaded with a chain of gold.
During his office treason was no crime;
The sons of Belial had a glorious time:
For Shimei, though not prodigal of pelf,
Yet lov'd his wicked neighbour as himself.
When two or three were gather'd to declaim,
Against the Monarch of Jerusalem,
Shimei was always in the midst of them;
And if they curs'd the king when he was by,
Would rather curse than break good company.
If any durst his factious friends accuse,
He pack'd a jury of dissenting Jews,
Whose fellow-feeling in the godly cause
Would free the suff'ring saint from human laws:
For laws are only made to punish those
Who serve the king, and to protect his foes.
If any leisure time he had from pow'r,
(Because 'tis sin to misemploy an hour)
His bus'ness was, by writing, to persuade
That kings were useless, and a clog to trade:
And, that his noble stile he might refine,
No Rachabite more shunn'd the fumes of wine.
Chaste were his cellars, and his shrieval board,
The grossness of a City-feast abhorr'd:
His cooks, with long disuse their trade forgot,
Cool was his kitchen though his brains were hot.
Such frugal virtue malice may accuse,
But sure 'twas necessary to the Jews:
For towns, once burnt, such magistrates require,
As dare not tempt God's providence by fire.
With sp'ritual food he fed his servants well,
But free from flesh, that made the Jews rebel;
And Moses' laws he held in more account,
For forty days of fasting in the Mount."

"In the year 1680, Bethel and Cornish were chosen sheriffs. The former used to walk about more like a corncutter than sheriff of London. He kept no house, but lived upon chops; whence it is proverbial, for not feasting, to Bethel the City." North's Examen.

men, and did injuriously beat and strike the said Robert Mason, did give several opprobrious words, saying, he would have his coat plucked off his back, &c. To which he pleadeth, Not Guilty.

Mr. *Holt.* My lord, and you gentlemen of the jury, I am counsel for the king, against Slingsby Bethel, esq. you understand the issue you are to try, it hath been opened; the question is, whether Mr. Slingsby Bethel be guilty of this battery, and the matter contained in the indictment, and the aggravating words therein or no? The occasion was, that in March last, there was an election for two burgesses to be chosen to serve in parliament for this borough; this Robert Mason was desired to come from Lambeth, to see whether any of that parish came to poll, which had no right so to do. The competitors were, sir Richard How, captain Rich, Slingsby Bethel, and Edward Smith, esqrs. Mr. Slingsby Bethel shewed, at his entrance into the borough, what inclination and temper he came with; for his followers, and such as came with him, came with their God-damme's, and several execrable oaths against those that voted against him; after the election began, and the poll demanded, truly, then Mr. Bethel acted his part, and took occasion to go off from the place where he was, and strike several persons that were acting against him, particularly this Robert Mason, finding him to be against him, took his cane, and knocked him over the pate, and afterwards knowing him to be the king's waterman, said he deserved to have his coat plucked over his ears: were the affront against him as a single person, it were not of so bad consequence; but we are to take notice of the solemnity of the occasion of the meeting: now, consider the occasion, it was for the choosing of parliament-men; and had it not been for the prudence of the waterman, in forbearing to strike again, God knows the effects, and what an uproar it might have occasioned: but he prudently refrained, and took his course in a legal way, and according to law hath preferred this indictment against Mr. Slingsby Bethel. Now though the said Mr. Bethel be so great a man, and a person of value lately Sheriff of the city of London: and he, Robert Mason, appearing to be but a poor waterman, yet I don't question, he will find an English jury to do him right.

King's-Counsel. Call Mr. Robert Mason, Arthur Adams, Thomas Walbroke, Griffin Meade, Tho. Smith, Alexander Dory, —— Lawrence.

Mr. *Holt.* Mason, What can you say on the king's and your own behalf, concerning this matter?

Mason. I was standing upon the steps, by the door in the artillery ground, and Mr. Bethel came and gave me divers blows on the stairs, knocked me with his cane, and followed me down beating of me, and said, 'Sirrah, I will have that coat plucked over your ears;' and I answered, 'So you would my master's too, if you could.'

Mr. *Thompson.* By whose solicitation came you there?

Mason. I was desired to be there.

Thompson. What did he strike you also with his fist?—*Mason.* Yes.

Thompson. Where did he hurt you with all his blows?—*Mason.* On the breast.

Thompson. How many blows?

Mason He gave me twenty blows at least I can swear safely; but how many more, I know not.

Thompson. Did not you, before Mr. Bethel came there, interrupt the people's coming to poll, and what did Mr. Bethel say?

Mason. He asked what I did there, and bid me go down.

Justice *Pyrs.* Did Mr. Bethel single you out from the rest of the company?

Mason. Yes, he did.

King's-Counsel. Call Adams. Adams, what can you say? Did you see Mr. Bethel strike Mason, and what words did he say?

Adams, first witness. There was a tumult at the stairs, and they called to me, being constable, and when I came, Mr. Bethel and Mason were together, and a great company followed them; I said, Sirs, pray keep the peace; and I saw Mr. Bethel give him two or three shugs, and said, 'Sirrah, I will have your coat off your back;' and Mason answered, 'Ay and so you would my master's too, if you could.'

Holt. Adams, tell the court what you think would have been the consequence if Mason had struck again.

Adams. It would have been of a sad consequence.

Holt. What was Mr. Bethel's behaviour, when he entered into the borough? Did you see him come into the borough?

Adams. They came in and cried, No Abhorrers, No Abhorrers.

Thompson. Did you hear Mr. Bethel say so?

Adams. No.

Thompson. Did you hear him swear?

Adams. No.

Thompson. Who was it that swore?

Holt. He that rid first.

Thompson. Mason said, Mr. Bethel gave him twenty blows; Did you see it?

Adams. I was not there all the while, I did not see it.

Thompson. Thomas Walbroke, what can you say to the case in hand?

Walbroke. I stood by the stairs when Mr. Bethel passed; I saw Mr. Bethel thrust him down the stairs, and I said, 'Robert, take care what you do! Mr. Bethel said 'Sirrah, come down;' Mason said, 'I will come when I see my own time, I do nobody any hurt:' Mr. Bethel answered, I 'command you to come down,' and his answer was, 'I will when I see my own time.'

Thompson. Did you see any blow given by Mr. Bethel?

Walbroke. No I saw none; I won't swear to any blows, but I saw two or three pushes in the breast; he pushed him back.

Thompson. And how many blows were given, ten, twenty, or how many?

Walbroke. I will not answer any thing concerning that.

Thompson. Upon the oath you have taken (being, I think, you are an honest man) had the waterman this coat on at that time? Or had he not a campaign coat over it.

Walbroke. He had that coat, but I don't remember any other.

King's Counsel. Call Griffith Meade. Give an account of what you can of this matter.

Meade. I saw a great number of people come to the place, and saw Mr. Bethel give him a push, and that was all.

Thompson. What words did you hear?

Meade. No words.

Thompson. How was this man clothed? Was he clothed with this coat, or had he a campaign coat over it?

Meade. I cannot tell.

Thompson. Upon the oath you have taken, how many blows did you see given, because they say twenty?

Meade. No blows at all, but a little push.

Call *Thomas Smith*. (He appeared.) What do you know?

Smith. As Robert Mason and myself stood together, Mr. Bethel came round the burying-place, and he brought a great multitude of persons with him, and bid Mason come down the steps: Mason answered, I will come down when I see my time. Mr. Bethel said, If you will not come down, I will have your coat plucked off your back. Afterwards many words passed, which I cannot remember, and Mr. Bethel pushed him on the breast.

Second Counsel. Mr. Smith, Pray give the court an account of the behaviour of the men that followed Mr. Bethel: Did you not see Mr. Bethel give Robert Mason a push, when he was in the Artillery ground?

Smith. I saw none.

Holt. What do you think the consequence had been, if Mason had struck again?

Smith. Had he given any blows again, I do believe a hundred and a hundred had been slain.

Thompson. Smith, pray give an account of the behaviour of the men that came with Mr. Bethel, and what coat Mason wore, and whether he had not a campaign coat on it?

Smith. Sir, I know not that, but he had the same coat then on his back which he has on now.

Thompson. Why, what made you think, if Mason had struck Mr. Bethel, that it would have made such a great disturbance.

Smith. Because he was the king's servant.

Call *Alexander Dory*. Dory, give the court an account of the matter in question. Did you see Mr. Bethel give Mason any blows?

Dory. Sir, Mr. Bethel gave him some pushes in the breast, and said he would have his coat off his back.

Thompson. Had he the same coat on as now he hath?

Dory. I saw the same, and no other.

Mulloy. Call Lawrence. He appeared. Lawrence, give the court and jury an account of what you know of the quarrel between Mr. Bethel and Robert Mason. Did you see Mr. Bethel give him any blows? And give an account of the behaviour of Mr. Bethel and his company, when they came into the borough.

Thompson. This indictment is for an assault and battery; if you can give an account of that, do; but not of the behaviour of those that came with Mr. Bethel; that is not the matter at this time.

Holt. I answer, Sir, it is not; but we ask the question, to make out the behaviour of Mr. Bethel and his company, and shall leave it to the jury, what judgment to make of it.

Lawrence. I saw the persons that came with Mr. Bethel, hectoring and swearing at a strange rate, and the persons which rid before, cried Hollow, hollow.

Thompson. I appeal to Mr. Holt; What if John an Nokes, or Tom a Styles, swear and hector, &c. shall Mr. Bethel answer for that, in a matter that falls out long afterwards, as this did?

Lawrence. I saw their behaviour, as I have said; and when Mr. Bethel came to Robert Mason, he stood with his hands behind him, Mr. Bethel bid him come down; he said, no, he would not: Then said Mr. Bethel, I will pluck your coat off your back? and Mason answered, Ay, and so you would my master's too, if you could.

Lord Mayor. Did Mr. Bethel swear, when he came into the Borough?

Lawrence. No.

Lord Mayor. Who did swear?

Lawrence. He that rid first.

Thompson. May it please your lordship, I am of counsel for Mr. Bethel the defendant, who has been, and stands indicted for making an assault and battery upon Robert Mason; and for speaking many menacing and threatening words, as, that he would pull his coat over his ears, &c. and for giving several blows; unto which we have pleaded, Not Guilty. They have produced several witnesses, and Robert Mason himself, who is so thorough-stitch in the case, that he swears so as no one can believe him; for his own witnesses do not; for they do not swear, nor pretend to swear like him, being not able to stretch at that rate; he is desperately mistaken, to speak the best of him.

For this Mason swears Mr. Bethel gave him 20 blows at least, but how many more he cannot say: see how this will look, when we shall prove, by substantial and credible men, that not one blow was given, or push either. But suppose he were pushed, yet his evidence agree not one with another; for some swear to one push, some to more: but Mr. Mason swears to the full number of 20 blows at least, and that positively, but how many more, he doth not remember. But suppose it were so, yet the matter is not so much, but what may be justified by the occasion given; and what

would be a good plea in law, in an action, w[ill] be the same upon pleading Not Guilty in this case.

May it please your lordship, the occasion of Mr. Bethel's coming here was this; being about the chusing of parliament-men for this borough, the competitors were, sir Richard How, Mr. Rich, Mr. Bethel, and Mr. Smith; there was a house wherein they appointed to poll, called the Artillery-House: when they came to take the poll at this place, where there is a pair of stairs which leads to the door, the manner of taking the poll was thus; first to fill the house, by that door to the stairs, and after they had voted, to put them out at the other door; this being the occasion of the battery, (however aggravated) will, to all that know it, or shall take the matter into consideration, seem a very shameful thing to ground an indictment upon. But this Mason, a very officious man, who had no right to poll, (as himself confesses) and who might have spared the trouble (for any authority he had) of coming there; and it might have been better he had stayed at home, by what he has sworn. This man and one Sam. Sams, a hectoring carman, were set upon the stairs; and their business was not (as they now pretend) to take notice who were fit to poll, but to understand who were for Mr. Bethel and Mr. Smith, and those they did abuse, and push them down the steps; which Mr. Bethel being informed of, came out of the house, and spoke civilly to them, and said, Friends, What have you to do here? If you have not a right to poll, come down from the place: which Mason refusing, the defendant took him gently by the hand, and led him down the steps, giving neither blow nor push; we shall call witnesses to prove this. Now, for a gentleman that stood as one of the competitors for a parliament-man, at that time, in that place, he might do this to a person that had nothing to do there: nay, they themselves say, there ought not to be any interruption at an election; and that the interruption was from themselves, and that occasioned the mighty battery they make so much of. We shall call our witnesses, and make this matter appear to be our case; and then, though Mason hath spoken of 20 blows, if believed, as there is but little reason for it, it will be sufficiently justified by the witnesses we shall produce, and the evidence we shall give in this matter.

Call Mr. Nath. Travers, constable, Mr. Benjamin Tarrant, Mr. Geo. Hampton, Mr. Mark Clark, Mr. Thomas Weekes, Mr. Benjamin Gerrard.

Thompson. Let us begin with Mr. Travers. Mr. Travers, what account can you give of the matter?

Travers. May it please your lordship, I remember it as if it were but just now; I was called out of the house, to come to this door, hearing the people were in a very great disturbance; I came to this Robert Mason, and said, What do you there, to make this disturbance, have you a right to poll? He answered: It may be I may. I told him, if he would not be civil, I should take a course to indict him.

Thompson. And what was he doing?

Travers. He was throwing people from both sides with his elbows. In this time, a report being carried to sheriff Bethel, of a person's leg broken, and a man like to be killed, sheriff Bethel came to the steps, and took him just by the arm, thus—[Shewing the manner] —and said, Pray, Friend, what hast thou to do here, hast thou a right to poll? At first he said, He had; afterwards he said, No. Then said sheriff Bethel, Pray go about your business. Mr. Bethel gave no blow, nor did so much as shew any passion, or angry countenance; and said no more: but others said, Mason was a rude person, and that he deserved to have his coat plucked over his ears.

Thompson. Did you not hear Bethel say so?

Travers. No, but it was said by some of the company.

Thompson. I ask one question more. Mason said he had twenty blows, what say you to that?

Travers. He had not one, upon the oath that I have taken.

Thompson. Had he this coat on, or no?

Travers. Truly I know not, I cannot tell; but he had a badge, whereby he discovered himself to be some gentleman's servant.

Thompson. Was Sams there?

Holt. Mr. Thompson, is that a fair question?

Thompson. I did it purposely to try your observation; you would call to what others did long before the battery, I must not ask if one was there at the time of the battery.

Holt. Did you not see Mr. Bethel on the Artillery-ground, was not Mason pushed here?

Travers. I tell you, Sir, there was not one blow given.

Holt. Then you did not see the quarrel on the ground?

Travers. I tell you, there was no quarrel on the ground: I stood on the steps when sheriff Bethel came; and the sheriff, when he was half way on the steps, seeing the waterman's posture he was in, said, friend, have you any thing to do to poll; if you have not, why do you make a disturbance? He answered, It may be I have, and it may be not. Pray, Friend, said sheriff Bethel, if you have not, come down, I went from thence about the ground, and did not see the least blow given, or any appearance of passion.

Thompson. Before Mr. Bethel came, how did this man behave himself, did he not shout, and behave himself rudely?

Holt. Let him speak of himself, let not words be put into his mouth.

Thompson. Had he a red coat on?

Travers. I cannot say it.

Thompson. Mr. Tarrant, what can you say?

Tarrant. I was on the ground when the sheriff came, I was at some distance; but

upon the oath I have taken, I saw Mr. Bethel and the waterman coming together, but I saw no blow, and I am sure there was not one blow given.

Mr. Weekes, Give an account of what you know.

Weekes. My lord, I saw sheriff Bethel when he came into the ground, and went up the steps; I made haste after him, and was there all the while, and there was nothing like a blow; but all he did was to this purpose—Pray, Friend, (said he) if you have no right to poll, go your way, what have you to do here? And I followed after him into the Artillery-ground, and there was nothing of a blow, or any thing like it.

Thompson. You were there all the while?

Weekes. Yes, I was.

Thompson. Yet Mason saith, there were 20 blows given.

Weekes. Upon the oath I have taken, there was none, nor any thing like it.

Holt. Mr. Weekes, do you live in London, or do you live in the Borough?

Weekes. Sir, I live in London.

Holt. What is this witness to the purpose then?

Thompson. May not a man live in London, and be a good evidence here? Notwithstanding, call Mr. Gerrard.

Mr. Gerrard, what can you say?

Gerrard. I was in the ground before Mr. Bethel came out of the polling-house; and I saw this waterman, and Sam. Sams, thrusting of people down, that seemed to be for Mr. Bethel and Smith, crying, How and Rich.

Weekes. My lord, my memory failed in this point; but, upon the oath I have taken, what that gentleman swears, it is true.

Thompson. Pray, Sir, (as you seem to be a sober man) were any blows struck by Mr. Bethel?

Gerrard. I went with sheriff Bethel there at that time, and asked the waterman what he had to do there? I cannot well tell what answer he made; but Mr. Sheriff said, If you have no right to poll, pray go about your business. Upon the oath I have taken, he did not strike one blow, no more than he doth now, standing in this Court before your lordship.

Lord Mayor. Was there any pushing or thrusting by Mr. Bethel?

Gerrard. Upon my oath, my lord, not any.

Thompson. And you say you were there all the while, and saw no disturbance given by Mr. Bethel?

Gerrard. I am sure there was not.

Thompson. Had he this coat on, or no; or had he not a campaign coat on?

Gerrard. To the best of my remembrance he had a campaign coat on, and I believe he had.

Thompson. Mr. Hatfield, pray give an account of what you know of the matter.

Hatfield. There were two men which I saw in red coats, which pushed down the people that came to poll for Mr. Bethel, before Mr. Bethel came; and had not Mr. Bethel come to appease the tumult, I do believe there had been much mischief done by them and Sams.

Thompson. Upon the oath you have taken, were any blows given?

Hatfield. No, Sir, there were none.

Thompson. Were there any blows given by Mr. Bethel?

Hatfield. No, Sir, not one; for Mr. Bethel being informed of the incivility of Mason and Sams, Mr. Bethel came civilly to them, and intreated them to come down, and bid them be gone, and not make a disturbance.

Mulloy. Call Lawrence again, to shew that Mason did not make the disturbance.

Lawrence. I saw Robert Mason, and the party with him, behave themselves very civil; and the disturbance that was proceeded from the other party.

Thompson. This is the same man we had but now, he is called to witness again; a pretty way of multiplying witnesses: I appeal to Mr. Mason himself, whether this be not the same man you called once before?

Thompson. My lord, and you gentlemen of the jury, I think the case is plain, and needs no arguments; I shall only take notice how careful these men are (as they pretend) to keep the king's peace. The matter you see, in short, is Mr. Bethel (who stood for a parliament man of this place, and at the same time bore an eminent character, as sheriff of the city of London) upon information given of the disturbance made by this Mason, and of the unfairness of their proceedings, only came civilly, and took him by the arm, persuading him to come away, and make no disturbance.

And this is the truth of the case, and the mighty battery they pretend to. Now, suppose that when people are in such a croud, and upon such an occasion, there were some pushes (as is the utmost here pretended) could this be a sufficient matter to ground an indictment upon? No, gentlemen, no: this indictment, and the design of it, is to raise a dust, and, if possible, to cast reflections on Mr. Bethel; but it is more than they can do in point of law, by any matter here proved, if Mason's witnesses do swear true: yet you see how Mason behaves himself, crying How and Rich, striking down all that came between Sam. Sams and him; so they broke the peace, and raised the disturbance themselves. And in that case, any man (and why not Mr. Bethel?) might have taken him, and carried him before a magistrate, and have justified it. But now, for the credit of the thing: you see that none swears it but Mason himself; but even he swears to that impossibility, so over-reaches the matter, through the excess of his passion in swearing, that no one can believe him; if he had sworn modestly, as the rest did, to two or three pushes, it might have been credited; but to 20 blows, no one can believe it; neither doth any one of his own witnesses swear like him, or of so much as one blow given: so there is not one word Mason saith can be credited.

Then, my lord, admit it to be so, yet you saw Mr. Bethel was not the person that first began this disturbance: Now, if the other party had been indicted and tried, as indeed it had been much more fit they should, we could have proved much against them.

And as to the fact, and manner of what Mr. Bethel did, it was no more than coming in a civil manner, asking whether he had a right to poll; when he said no, he took him civilly by the arm and led him down; and this is a justifiable assault, being the nature of the thing required a necessity of somewhat of action in it. I appeal to you of the jury, whether there be any cause for this indictment, or colour of reason for you to find it?

Holt. Gentlemen of the jury, you have heard the evidence on both sides, and the question is, Whether in your consciences, you can disbelieve eight witnesses, that swear positively to the battery, and believe those witnesses that did not see it? If you acquit Mr. Bethel, you must necessarily convict eight persons of perjury: But if you do not find for Mr. Bethel, the other witnesses cannot be convicted of perjury; for how can men swear (though they were there all the time) that they did not see? Possibly they might be very honest men, and present at the time, and yet not see Mr. Bethel strike, and so not swear to it: But our witnesses swear very true; I hope you will be guided by sense and conscience, and not by spectators humours, and apprehensions, that come here and hiss in a court of justice. Now, eight witnesses swearing it, I do appeal to the court, whether in matters of this nature one witness for the affirmative, be not more valid than many of the negative?

They take notice of the impossibility, and why, because they swear, as they say, at an extravagant rate, that Mr. Bethel give him twenty blows.

Gentlemen, if Mr. Bethel will beat a man extravagantly, it is not extravagancy to swear it. Now, Mason's evidence is confirmed by all the rest produced, and no contradiction: If one swear to ten, and another to two, and another to three, is this inconsistent? No, gentlemen, it is evident those men swear cautiously and fearfully; for if otherwise, they could swear to as many as twenty, as Mason hath done. Who is the best judge, he that felt the blows, or they that swear there was not one given? He that felt them, I am sure.—Gentlemen, it was in a crowd, it is possible they may not see all; yet their evidence is a concurring circumstance.

Next I come to the point of law, how a man that is a candidate at an election, can beat any man that stands in his way; I do not understand that to be law. If any man had beaten Mr. Bethel, he might have beaten him again in his own defence; but there was no such thing, Mr. Bethel saw no disturbance himself, but was informed of it, and so became too officious; though he was sheriff of London, yet he was not an officer there; for he was not a constable there; and it was a constable's office, and he only could have seized him; and not a constable neither, unless he had seen the king's peace broken.—And as to what Mr. Thompson saith, that it is impossible that such an election should be carried on without some bustle. It is true, in a crowd, men justling one another, and by accident strike another down, it is no battery: But is it necessary for Mr. Bethel to thump a man on the breast? Is it necessary for Mr. Bethel to beat a man with his cane? Is it necessary for Mr. Bethel to give a man twenty blows? Is it necessary for Mr. Bethel to pluck a man's coat off his back? Is it necessary to an election? It is not necessary; and so being not necessary, is not by law justifiable. Gentlemen, as Mr. Thompson saith, it is a case of example; I say so too; and it is fit persons that will do such things, should be made an example.

Justice *Pyrs* afterwards summed up the evidence, and told the jury (as Mr. Holt the counsellor for the king had before well observed) that they were to have regard to the positive affirmative evidence, Mason having sworn positively to several blows that were struck by Mr. Bethel, and that eight witnesses had sworn in the affirmative, and that though there were seven witnesses produced by Mr. Bethel, which were on the negative part; yet they were to observe, that the law did not allow of those negative evidences. But for that so many had sworn in the affirmative, that they saw a thing done, and as many swear that they saw it not; he could not tell what to say, but to leave it to the jury, saying, that one affirmative was better than forty negative oaths.

So the Jury went out, and in a very short time were pleased to find the indictment, and brought Mr. Bethel in Guilty.

Then Mr. Bethel's counsel moved in arrest of judgment, for that no indictment lay for the words, and the court for that reason staid the judgment, as to that part of the indictment, and gave judgment only as to the assault and battery, and fined Mr. Bethel five marks. Upon which, the counsel for the king moved to have him taken into custody, until he paid the fine; which he presently paid and was discharged.

283. Proceedings at the Old-Bailey, upon a Bill of Indictment for High Treason, against ANTHONY Earl of SHAFTESBURY,* 33 CHARLES II. November 24, A. D. 1681.

The Grand Jury:

SIR Samuel Barnardiston, John Morden, Thomas Papillon, John Dubois, Charles Hearle, Edward Rudge, Humphrey Edwin, John Morrice, Edmund Harrison, Joseph Wright, John Cox, Thomas Parker, Leonard Robinson, Thomas Shepherd, John Flavell, Michael Godfrey, Joseph Richardson, William Empson, Andrew Kendrick, John Lane, John Hall.

The Oath.

'You shall diligently enquire, and true 'presentments make of all such matters, articles 'and things, as shall be given you in charge, as 'of all other matters and things as shall come 'to your own knowledge, touching this present 'service; the king's counsel, your fellows and 'your own, you shall keep secret; you shall 'present no person for hatred or malice; 'neither shall you leave any one unpresented, for 'fear, favour or affection, for lucre or gain, or 'any hopes thereof; but in all things you 'shall present the truth, the whole truth and 'nothing but the truth, to the best of your 'knowledge. So help you GOD.'

L. C. J. (Pemberton.) Gentlemen of the Jury, we are all met here, in one of the most solemn assemblies of this nation; it is upon the execution of justice upon such as shall be found offenders, and Guilty of the breach of the king's laws.

This commission by which we sit, and you are summoned, doth in its nature extend to all offences whatsoever, against the laws of the land, treasons, misprisions of treasons, felonies, and all other crimes and offences against the king and his government, such as are vulgarly called Pleas of the Crown; they all fall under our cognizance and your enquiry in a general manner. But I must tell you, there is a particular occasion for this commission at this time. His majesty having information of some evil traiterous designs against his person and government, has thought fit to direct a due examination of them, and that the persons may be brought to condign punishment who shall be found Guilty thereof. You must not therefore expect any general and formal charge from me: Truly, I came hither this morning, with an apprehension that you had your directions given you before, by the

* "A bill of indictment was presented to the grand jury against lord Shaftesbury. The jury was composed of many of the chief citizens of London. The witnesses were examined in open court, contrary to the usual custom: The witnesses swore many incredible things against him, mixed with other things that looked very like his extravagant way of talking. The draught of the association was also brought as a proof of his treason, though it was not laid in the indictment, and was proved only by one witness. The jury returned 'Ignoramus' upon the bill. Upon this the court did declaim with open mouth against these juries; in which they said the spirit of the party did appear, since men even upon oath shewed they were resolved to find bills or 'Ignoramus,' as they pleased, without regarding the evidence. And upon this a new set of addresses went round the kingdom, in which they expressed their abhorrence of that association found in lord Shaftsbury's cabinet; and complained, that justice was denied the king; which were set off with all the fulsom rhetoric that the penners could varnish them with. It was upon this occasion said, that the grand jury ought to find bills even upon dubious evidence, much more when plain treason was sworn; since all they did in finding a bill was only to bring the person to his trial, and then the falshood of the witnesses was to be detected. But in defence of these 'Ignoramus' juries it was said, that by the express words of their oath they were bound to make true presentments of what should appear true to them: And therefore, if they did not believe the evidence, they could not find a bill, though sworn to. A book was writ to support that, in which both law and reason were brought to confirm it: It past as writ by lord Essex, though I understood afterwards it was writ by Somers, who was much esteemed and often visited by lord Essex, and who trusted himself to him, and writ the best papers that came out in that time. It is true, by the practice that had generally prevailed, grand juries were easy in finding bills upon a slight and probable evidence. But it was made out, that the words of their oath, and the reason of the law seemed to oblige them to make no presentments but such as they believed to be true. On the other hand a private ill opinion of a witness, or the looking on a matter as incredible, did not seem to warrant the return of an 'Ignoramus:' That seemed to belong to the jury of life and death. The chief complaint that was made in the addresses was grounded on their not finding the bill on the account of the draught of the association: And this was in many respects very unreasonable. For as that was not laid in the bill, so there was but one witness to prove it; nor did the matter of the paper rise up to the charge of high treason. And now Dugdale and Turbervile, who had been the witnesses upon whose evidence lord Stafford was condemned, being within a year detected, or at least sus-

Recorder; for it is our usual way, not to come until the juries are sworn in this place, and their directions given them; but since I find it otherwise, I take it to be my duty to say something to you, but shall not go about now to make any such formal charge, as in commissions of this nature is wont to be done; nor to give an account of all offences that fall under your enquiry of a Grand Inquest, impannelled by virtue of such a commission at large; nor must you expect I should acquaint you with all the crimes that you may enquire of as such an Inquest.

I shall content myself so far, as on the sudden I can recollect my thoughts, to acquaint you with the nature of those bills; with the

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pected of this villany, I could not but reflect on what he said to me, that he was confident I should see within a year that the witnesses would be found to be rogues." 1 Burnet, 508.

"Colledge's blood was too mean a sacrifice to appease the offending ghosts of the martyred Roman saints, and was but an inlet to spill nobler blood; therefore upon the 31st of August he was executed; and upon the 24th of November following, 1681, the earl of Shaftesbury had a bill of High-Treason at the sessions of the Old Bailey, London, preferred against him.

"Upon the 20th of April 1679 the king after he had sent the duke into Holland, dissolved his old privy-council, and chose a new one, whereof the earl of Shaftesbury was president; and in parliament declared the ill effects he had found of single councils and cabals, and therefore had made choice of this council; which, next to the advice of his great council of parliament (which he would often consult in all his weighty and important affairs) he would be advised by this privy-council; and to take away all jealousy that he was influenced by Popish councils, he had sent his Brother beyond sea.

"But now, *quanto mutatus!* No more parliaments so long as this king lives. The council, whose advice, next the parliament, he would take, is now dissolved, and the president's life is sought for; the duke of late sent away, that he might not influence the king's councils, is now returned, and governs all, and made high commissioner of Scotland, where, at this time, he is contriving the destruction of the noble earl of Argyle, whilst his brother is doing that of my lord of Shaftesbury, and both act their parts under the veil of sacred justice. But how to bring the earl of Shaftesbury upon the stage, was matter of great enquiry; other evidence besides Irish, and those Colledge had so baffled, could scarce be found, and this evidence 'twas feared, would no more prevail upon a London Grand Jury, than before it did when the bill was preferred against Colledge.

"Captain Henry Wilkinson was a Yorkshire gentleman who having served king Charles I. in his wars, and been very instrumental in the restoration of king Charles II. being fallen into decay (a fate usually attending the cavaliers who served either of those kings) was for his sufferings, integrity and honesty, preferred by the earls of Craven and Shaftesbury to be Governor of Carolina, and one of his sons to be Surveyor General of it, and another a register. Captain Wilkinson made use of the little stock he had left, and such credit, as he could procure, to fit himself upon this account, and hired a ship called the Abigail, and victualled her for the master and ten men, and such other passengers as he should take in.

"In this number, one Mr. John Booth, desired that he and his family might accompany the captain to Carolina, which was agreed to; but the captain being under several disappointments, and the charges of the ship's lying in the river four months, unsupportable, he was arrested and thrown into the Compter; from whence he removed himself to the King's-bench. The captain's necessities were equal, or more than those of the Irish evidence; but the captain (at least as he supposed) had no need of a pardon, for any thing designed against the king and government, as the Irish evidence had; so the first attempt upon him was to hire him to give evidence against my lord of Shaftesbury.

"If Empson and Dudley were so zealous to fill Henry the Seventh's coffers, by straining the penal laws to utmost rigour, as the vogue went, Graham, Baynes, and Burton, were as zealous to pack juries, and procure evidence for carrying on this black design.

"Upon the 8th of October, Baynes made his first attack upon the captain, and told him that he had been lately with Mr. Graham, who had a great interest with my lord H. and that the captain could not but know much of my lord Shaftesbury's designs, and that he had now a desired opportunity to discover them; and urged the captain not to deny the proffer, and that he need not fear his getting a pardon; but the captain was constant that he knew nothing of any such design. By this time Booth was a prisoner in the King's-bench, as well as the captain; and upon the 11th, Booth attacked the captain, and told him he might have 500*l.* per annum, or 10,000*l.* if he would discover what he knew of my lord Shaftesbury's design against the king, and that the captain should appear at court, and have assurance of it from persons of honour; but this wrought not upon the captain neither. Upon the 13th Baynes, Booth, and Graham renewed the promises Baynes and Booth had made, and that he should have the king's promise for the same, and his royal word for a reward for his sufferings; and that Graham was sent by some of the council to bring the captain to the king, and that he had an order for it. But all would not do; for the captain was resolved not to go to Whitehall, if he could help it. Upon the 14th Booth told the captain, that Mr. Wilson my lord Shaftesbury's secretary, (who was a prisoner in the Gate-house) had sent to the council, that he would come, and discover all

enquiry whereof, you shall at present, upon this occasion, be troubled, and your duty concerning this enquiry. I hinted to you at first that they are matters of High Treason, which is a crime of the greatest and highest nature of any crime that can be committed against man: Other crimes, as felonies, riots, trespasses, and things of that nature, they may occasion disorders and troubles in a state or a kingdom; but I must tell you, treason strikes at the root and life of all: It tends to destroy the very government, both king and subjects,

he knew, and therefore he urged the captain to have the honour of being the first discoverer, and that to the former promises the captain should have 500*l* per annum settled on him in Ireland by the duke of York: But all to no purpose.

"Upon the 15th, Booth and Baynes, attacked the captain again; The captain asked Baynes why he was so urgent for his testimony; Baynes answered, That as yet they had none but Irish evidence, which would not be believed; but if the captain came to it he was not blemished in his credit; and then Baynes told him, if he would not go, he had a Habeas Corpus from my lord chief justice Pemberton, to carry him to Whitehall.

"In the afternoon the captain was carried by his Habeas Corpus to Whitehall, and examined in the secretary's office by my lord Conway, and secretary Jenkins; and in his examination, in comes the king into the office, as before he had done into the dutchess of Portsmouth's chamber, when my lord H. came to kiss her hand; and there the king told the captain he had served his father and him faithfully, and hoped he would not now decline his obedience; to which the captain answered he never deserved to be suspected. Then the king told him he had not the opportunity to serve his friends, but hoped he might: Then the king examined him what he knew of my lord Shaftesbury having a design against his person; but the captain upon his oath denied that he knew any thing, so the king left him to the farther examination of secretary Jenkins.

"But this business did not stay here; for the captain was carried into another room, where were present the king, my lord chancellor, the lord chief justice Pemberton, and several other of the nobility, with Graham, Baynes and Booth; where my lord chancellor was very sharp upon the captain, and put several questions to him, which he could not answer, and told the captain, there were two sorts of advancements, and that the captain was like to come to his trial before the lord Shaftesbury.

"The business was, Booth had sworn, that the captain had a commission from my lord Shaftesbury, for a troop of fifty men, to be my lord's guards against the king, and that Booth was listed in it: This Booth had sworn, but was so unfortunate in it, as to swear this was when the parliament was at Oxford, at which time the captain was making his preparations for his intended government of Carolina: but whether the king believed the captain or Booth, is unknown; but it stopped here, and the captain was no higher advanced upon Booth's oath, nor could be prevailed upon to be a witness against my lord Shaftesbury, though his wife was as much tempted to have it so, as the captain was; so the captain's only advancement was to be remanded to prison.

"However, it was resolved that my lord Shaftesbury should be prosecuted, and so upon the 24th of November a bill of High-Treason was preferred against him to the great inquest at the sessions house in the Old Bailey: and Baynes proved a true prophet, though Booth swore to the captain's command of fifty men, to be a guard to my lord; for the jury neither believed him nor the evidence so baffled at Colledge's trial, nor the Irish evidence added to that, and so returned an 'Ignoramus' upon it.

"Suetonius, in the life of Tiberius, says, he never could have made such ravages upon the Roman empire, and exercised such cruelties, if he had not been backed by an officious and flattering senate, which carried the face of justice in it: And though it be evident, that for near eighty years, these three kings of the Scottish race had been endeavouring to establish an arbitrary and tyrannical government over this nation, yet except king James the first, who if his necessities had not forced him, would have never had a parliament after the first; and who by his own authority created so many monopolies, and benevolences, and in the parliament of the 12th and 18th years of his reign, without any colour of justice, imprisoned so many worthy gentlemen, without the benefit of Habeas Corpus's, for their debates in parliament; yet these other two pretended to raise their tyrannies under the form of justice, and therefore Charles the First, after he for 15 years together, had not only exceeded his father in granting monopolies, and raising money by loans, benevolences, coat and conduct money; but also in taking the customs without grant of parliament, and such as were never granted by parliament; and in further raising ship money, and imprisoning the members of parliament without benefit of their Habeas Corpus's; yet he thought best to do it by such judges as he should make: So this king, in the executions of Fitzharris and Colledge, would have the colour of justice by a form of law, for which there was no law.

"But as the knights of Malta could make knights of their order for eight pence a piece, yet could not make a soldier or seaman: So these kings, though they could make what judges they pleased, to do their business, yet could not make a grand jury, from whom the judges in all criminal cases between the king and subject must take their measures: These grand-juries in London are returned by the sheriffs, and the sheriffs are chosen by the livery.

"This difficulty, after my lord Shaftesbury's

and the lives, interests and liberties of all, a therefore has always been looked upon as crime of the most notorious nature that can be whatsoever, and accordingly punishments have been appointed for it of the highest and severest extremity. There was at common law great variety of opinions concerning treason, and there were many disputes about it, what should be treason, and what not; and therefore it was thought fit, by the wisdom of our ancestors, to have a law to declare treason; and by the statute of the 25th of Ed. 3, there was a plain

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Case, put the court to their trumps, and at present a stop to their proceedings: The assistance of the duke of York was necessary, but at this time he was busy in Scotland, as before said." 2 Roger Coke's Detection, 308.

An encomiastic account of Shaftesbury printed in the Harleian Miscellany, vol. 5. p. 368, under the title of "A brief account of many "memorable passages of the life and death of "the earl of Shaftsbury," &c. concludes thus:

"I shall give one memorable passage said to have passed between the earl and some of the popish lords, soon after his commitment; the story is this: meeting accidentally with one of the popish lords, he was asked by him, 'What 'his lordship did there, and that he little 'thought to have his good company?' to which the earl of Shaftsbury replied, 'That he had 'lately been sick of an ague, and was come 'there to take some Jesuits powder.' It was said, during the whole time of his lordship being in the Tower, he remained very cheerful, beyond what could have been expected from a person labouring under such extreme pains and diseases. During the earl's imprisonment, many made it their business to detract and vilify him; and it was their mode to drink his health at an hempen string, and call him 'Tory Tapskin,' (alluding to the tap which had been applied upon the breaking out of an ulcer), and 'king of Poland!' (It was a standing joke among the opponents of Shaftsbury, that he hoped to be chosen king of Poland at the vacancy, when John Sobieski was elected.) After the earl's trial, it is reported he arrested one Baines, one of the witnesses, for a conspiracy, also several others; but, being not suffered to have his trial against them in London and Middlesex, he remitted the same till another opportunity."

"Shaftesbury, afraid of a trial, offered, if the king pleased, to go and live in Carolina. The Lord Chamberlain was for the king's hearkening to him." Macpherson's Life of king James the Second, written by himself. See the Introduction to the Case of lord Clarendon, vol. 6, p. 291, of this Collection.

North is very acrimonious against Shaftesbury. Dryden, too, is very severe upon him, though with some qualification:

"A name to all succeeding ages curs'd;
For close designs and crooked counsels fit,
Sagacious, bold, and turbulent of wit;
Restless, unfix'd in principles and place,
In pow'r unpleas'd, impatient of disgrace:
A fiery soul, which, working out its way,
Fretted the pigmy body to decay,
And o'er-inform'd the tenement of clay.
A daring pilot in extremity;
Pleas'd with the danger, when the waves went high,
He sought the storm; but, for a calm unfit,
Would steer too nigh the sands, to boast his wit.
Great wits are sure to madness near ally'd,
And thin partitions do their bounds divide;
Else why should he, with wealth and honour bless'd,
Refuse his age the needful hours of rest?
Punish a body which he could not please;
Bankrupt of life, yet prodigal of ease?
And all to leave what with his toil he won,
To that unfeather'd, two-legg'd thing, a son;
Got while his soul did huddled notions try,
And born a shapeless lump, like Anarchy.
In friendship false, implacable in hate;
Resolv'd to ruin, or to rule the state.
To compass this, the triple bond he broke;
The pillars of the public safety shook;
And fitted Isr'el for a foreign yoke:
Then seiz'd with fear, yet still affecting fame,
Usurp'd a patriot's all-atoning name:
So easy still it proves, in factious times,
With public zeal to cancel private crimes.
How safe is treason, and how sacred ill,
Where none can sin against the people's will!
Where crowds can wink, and no offence be known,
Since in another's guilt they find their own!
Yet fame deserv'd no enemy can grudge;
The statesman we abhor, but praise the judge.
In Isr'el's courts, ne'er sat an Abethdin
With more discerning eyes, or hands more clean;
Unbrib'd, unsought, the wretched to redress,
Swift of dispatch, and easy of access.
Oh! had he been content to serve the crown
With virtues, only proper to the gown—
Or had the rankness of the soil been freed
From cockle, that oppress'd the noble seed—
David for him his tuneful harp had strung,
And Heav'n had wanted one immortal song.
But wild ambition loves to slide, not stand,
And fortune's ice prefers to virtue's land."

"A martial hero, first, with early care,
Blown, like a pigmy by the winds, to war;
A beardless chief, a rebel ere a man;
So young his hatred to his prince began.
Next this, (how wildly will ambition steer!)
A vermin, wriggling in th' usurper's ear.
Bart'ring his venal wit for sums of gold,
He cast himself into the saint-like mould;
Groan'd, sigh'd, and pray'd, while godliness was gain,
The loudest bagpipe of the squeaking train.
But, as 'tis hard to cheat a juggler's eyes,
His open lewdness he could ne'er disguise.
There split the saint; for hypocritic zeal
Allows no sins but those it can conceal.

declaration made of what was treason, and what not: By that law, 'For any one to compass, imagine, or intend, the death of the king'

Whoring to scandal gives too large a scope:
Saints must not trade; but they may interlope.
Th' ungodly principle was all the same,
But a gross cheat betrays his partner's game.
Besides, their pace was formal, grave, and slack;
His nimble wit outran the heavy pack:
Yet still he found his fortune at a stay,
Whole droves of blohckeads choaking up his way:
They took, but not rewarded, his advice;
Villain and wit exact a double price.
Pow'r was his aim; but thrown from that pretence,
The wretch turn'd loyal in his own defence,
And malice reconcil'd him to his prince.
Him, in the anguish of his soul, he serv'd,
Rewarded faster still than he deserv'd.
Behold him now exalted into trust,
His counsels oft convenient, seldom just.
E'en in the most sincere advice he gave,
He had a grudging still to be a knave.
The frauds he learnt in his fanatic years,
Made him uneasy in his lawful gears:
At best, as little honest as he could,
And, like white witches, mischievously good.
To his first bias, longingly, he leans,
And rather would be great by wicked means."

Mr. Fox in a letter to Serjeant Heywood writes:

"I am quite glad I have little to do with Shaftesbury; for as to making him a real patriot, or friend to our ideas of liberty, it is impossible, at least in my opinion. On the other hand, he is very far from being the devil he is described. Indeed, he seems to have been strictly a man of honour, if that praise can be given to one destitute of public virtue, and who did not consider catholics as fellow creatures; a feeling very common in those times. Locke was probably caught by his splendid qualities, his courage, his openness, his party zeal, his eloquence, his fair dealing with his friends, and his superiority to vulgar corruption. Locke's partiality might make him, on the other hand, blind to the indifference with which he (Shaftesbury), espoused either monarchical, arbitrary, or republican principles, as best suited his ambition; but could it make him blind to the relentless cruelty with which he persecuted the papists in the affair of the popish plot, merely, as it should seem, because it suited the purposes of the party with which he was then engaged? —You know that some of the imputations against him are certainly false: the shutting up the Exchequer, for instance. But the two great blots of sitting on the Regicides, and his conduct in the popish plot, can never be wiped off. The second Dutch war is a bad business, in which he engaged heartily, and in which (notwithstanding all his apologists say,) he would have persevered, if he had not found the king was cheating him."

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for I will give you no more of that statute, nor concerning the sense thereof, than may be for your purpose now, I say, by that law, 'to compass, imagine, or intend the death of the king, 'and to declare it by overt-act, or to levy war 'against the king,' were declared (amongst other things in that statute mentioned) to be High-Treason: And this hath obtained for law among us ever since; and by that standing law, nothing is to be accounted treason, but what is therein particularly declared so; but upon many emergent occasions, there hath been several other laws, as the case hath required now and then, for to declare and bring other particular crimes within the compass of treasons: So there was a law made in queen Elizabeth's reign for enacting several crimes to be treasons, during her life; which was made upon the occasion of the inveterate malice of the Roman Catholics against her and her government; and so there hath been in other king's reigns upon other occasions.

Amongst the rest, it was thought fit, by the parliament assembled here, in the 13th year of this present king, to make a particular law for the enacting and declaring several crimes to be treasons, during this king's life; they had great grounds, and too much occasion for it, and so they express it in the preamble of that law. The wounds which the then late treasons had made, that had so far obtained in this kingdom, were then still bleeding, ripe and scarcely closed; many traiterous positions, and many seditious principles were spread, and had obtained and gained footing among the people of this kingdom; and the parliament had reason to believe that where they had been so maliciously bent against the king and his family, and had taken off his father, and maintained so long and dangerous a war against him, almost to the utter destruction and extirpation of him, and all his good subjects, and of his, and all our interests, properties and liberties, and had almost destroyed a flourishing kingdom; here they had reason, I say, to be careful, to prevent the like mischiefs for the future; therefore, gentlemen, they did think fit to make a new law for this purpose; and whereas the law before was, that it should be treason, to compass, imagine, or intend the death of the king, so as it were declared by overt-act; now they thought it would be dangerous to stay till an overt-act should declare the intention: for when they had seen such malicious and evil designs against the king and supreme authority; and that they had prevailed so far, as to murder one king and banish another; and had gone a great way in the destruction of the government of this kingdom, absolutely to root it quite out; they had reason then, as much as they could, to prevent the designs before they should grow full ripe, and vent themselves in overt-acts; therefore, it was enacted by that statute, made in the 13th year of this king's reign, "That if any one should compass, imagine, or intend the death of the king or his destruction, or any bodily harm that might tend to his death, or destruction, or any

maiming or wounding his person, any restraint of his liberty, or any imprisonment of him; or if any should design or intend to levy any war, against him, either within the kingdom, or without; or should design, intend, endeavour, or procure any foreign prince to invade these his dominions, or any other of the king's dominions, and should signify or declare this by any writing, or by any preaching or printing, or by any advised, malicious speaking, or words, this shall be high treason."

Now this hath altered the former law greatly, especially in two cases: first as to levying of war; the intention was not treason before, unless it had taken effect, and war had been actually levied: and then as to the designing and compassing the king's death, that was not treason, unless it was declared by an overt-act: as to the imprisoning, or restraining of the liberty of the king, they of themselves alone were not high treason: but now by this, law these are made treason,—by this law, during his majesty's life; and the very designing of them, whether they take effect, or not take effect, though it be prevented (before any overt-act) by the timely prudence of the king and his officers—though it should be timely prevented, that there is no hurt done, yet the very design, if it be but uttered and spoken and any ways signified by any discourse: this, gentlemen, is made treason by this act; and this hath wrought very great alteration in the case of treason now; formerly it was said, and said truly enough, that words alone would not make treason: but since this act, gentlemen, words, if they import any malicious design against the king's life and government, and traiterous intention in the party, such words are treason now within this act: and this act was made with great prudence, and with great care to take off that undue liberty that men had taken to themselves; in those times of licentiousness, people had taken to themselves an undecent and undue liberty to vent all their seditious and malicious minds one to another, without any restraint at all: therefore now, gentlemen, you must consider, that words if they signify or purport any traiterous intention or design in the party, either against the king or his government, either to restrain his liberty or imprison him, or to do him any bodily hurt, or any crime of that nature; this is treason within this act of parliament.

Look ye, gentlemen, now as to the indictments that shall be brought before you, you are to consider these things: 1. Whether the matter contained in them, and which you shall have in evidence, be matter of treason within the former, or this act of parliament? And here, if you doubt of it, then you must advise with us that are commissionated by his majesty, to hear and determine these crimes; and in matters of law we shall direct you: and you are to enquire if there be two witnesses that shall testify the matters in evidence to you; for without two witnesses, no man is to be impeached within these laws; but if there be two witnesses that shall testify to you matters to make good the indictments, then you have ground to find the indictments. But I must tell you, as to this case of two witnesses, it is not necessary that they should be two witnesses to the same words or to words spoken at one time, or in the same place; that is not necessary: if one be a witness to words that import any traiterous design and intention, spoken at one time, and in one place; and another testify other seditious and traiterous words spoken at another time, and in another place; these two are two good witnesses within this statute, and so it hath been solemnly resolved by all the judges of England, upon a solemn occasion.

Look ye, gentlemen, I must tell you, That that which is referred to you, is to consider, whether, upon what evidence you shall have given unto you, there be any reason or ground for the king to call these persons to an account; if there be probable ground, it is as much as you are to enquire into: you are not to judge the persons, but for the honour of the king, and the decency of the matter, it is not thought fit by the law, that persons should be accused and indicted, where there is no colour nor ground for it; where there is no kind of suspicion of a crime, nor reason to believe that the thing can be proved, it is not for the king's honour to call men to an account in such cases: therefore you are to enquire, whether that that you hear be any cause or reason for the king to put the party to answer it. You do not condemn, nor is there such a strict enquiry to be made by you as by others, that are sworn to try the fact, or issue: a probable cause, or some ground, that the king hath to call these persons to answer for it, is enough, gentlemen, for you to find a bill, it is as much as is by law required. Gentlemen, you must consider this, That as it is a crime for to condemn innocent persons, so it is a crime as great to acquit the guilty; and that God that requires one of them, requires both; so that you must be as strict in the one, as you would be in the other. And let me tell you, if any of you shall be refractory, and will not find any bill, where there is a probable ground for an accusation, you do therein undertake to intercept justice; and you thereby make yourselves criminals and guilty, and the fault will lie at your door. You must consider, gentlemen, you are under a double obligation here to do right; you are under the obligation of Englishmen, as we are all members of one great body, of which the king is head; and you are engaged, as Englishmen, to consider, that crimes of this nature ought not to go unpunished: then you have an oath of God upon you, you are here sworn to do according to what the evidence is. Now therefore, if you have two witnesses of words that may import a treasonable design or intention in any of those parties, against whom you shall have indictments offered to you, you are both bound by the law of nature, as you are members of this body; and by the law of God, as you have taken an oath upon you, for to find those bills.

Gentlemen, compassion or pity is not your province, nor ours in this case; there is no room for that, in enquiries of this nature; that is reserved to an higher and superior power, from which ours is derived: Therefore, gentlemen, I must require you to consider such evidence as shall be given you, and to be impartial, according to what you shall hear from the witnesses, if you have ground, upon what evidence you shall have given you, to believe that there is any reason or cause for the king to call the persons named in such indictments, as shall be tendered to you, to answer for what is objected against them therein, you are to find those bills; that is all that I shall say to you; only pray God to direct you in your enquiry, that justice may take place.

[Then a Bill of High-Treason was offered against the Earl of Shaftesbury; and sir Francis Withins moved, That the evidence might be heard in court.]

L. C. J. Gentlemen of the jury, you hear it is desired by the king's counsel (and that we cannot deny) that the evidence may be publicly given, that it may not be hereafter in the mouths of any ill minded persons abroad, to scatter any mistakes or untruths up and down; or to slander the king's evidence, or to say any thing concerning them that is not true: Therefore, we cannot deny this motion of the king's counsel, but desire that you will take your places, and hear the evidence that shall be given you.

[The Jury then desired a copy of their oath, which the court granted, and then they withdrew. After some little time they returned, and then the clerk called them by their names.]

Foreman. My Lord Chief Justice, it is the opinion of the jury, that they ought to examine the witnesses in private, and it hath been the constant practice of our ancestors and predecessors to do it; and they insist upon it as their right to examine in private, because they are bound to keep the king's secrets, which they cannot do, if it be done in court.

L. C. J. Look ye, gentlemen of the jury, it may very probably be, that some late usage has brought you into this error, that it is your right, but it is not your right in truth: For I will tell you, I take the reason of that use for grand juries to examine the witnesses privately and out of court, to comply with the conveniences of the court; for generally upon such commissions as these are, the business is much; and at gaol deliveries there are a great many persons to be indicted and tried, and much other work besides, of other natures to be done: And if at such times, we should examine all businesses publicly in the court, it would make the business of these commissions of a wonderful great length and cumbrance. Therefore the judges, for the conveniency of the matter, have allowed, that witnesses should go to the jury, and they to examine them; not that there is any matter of right in it; for without question, originally all evidences were given in court: The jury are officers and ministers of the court, by which they enquire, and evidence sure was all given in court formerly; and the witnesses still are always sworn in court, and never otherwise. And, gentlemen, I must tell you, it is for your advantage, as well as for the king's, that it may be sure, that you comply with your evidence, that you do nothing clandestinely; therefore it is for your advantage that this is done, and the king likewise desires it. Now I must tell you, that if the king requires it of us,* and it is a thing that is in it's nature indifferent, we ought to comply with the king's desire to have it examined in court; you shall have all the liberty that you can have in private; what question soever you will have asked, yourselves shall ask it, if you please, and we will not cramp you in time, nor any thing of that nature. Therefore gentlemen, there can be no kind of reason why this evidence should not be given in court. What you say concerning keeping your counsels, that is quite of another nature, that is, your debates, and those things, there you shall be in private, for to consider of what you hear publicly. But certainly it is the best way, both for the king, and for you, that there should, in a case of this nature, be an open and plain examination of the witnesses, that all the world may see what they say.

Foreman. My lord, if your lordship pleases, I must beg your lordship's pardon, if I mistake in any thing, it is contrary to the sense of what the jury apprehend. First, they apprehend that the very words of the oath doth bind them, it says, 'That they shall keep the counsel's, 'and their own secrets:' Now, my lord, there

* "The Foreman, by himself, lays his hand on the book, and the marshal administers to him the following oath:

"'My lord, or sir, (as the Foreman's name 'may be), you, as foreman of this grand in'quest for the body of this county of A. shall 'diligently enquire, and true presentment make 'of all such matters and things as shall be 'given you in charge: The king's counsel, 'your fellows, and your own, you shall keep 'secret: You shall present no one for envy, 'hatred, or malice; neither shall you leave 'any one unpresented for fear, favour, or af'fection, or hope of reward; but you shall 'present all things truly as they come to your 'knowledge, according to the best of your un'derstanding: So help you God.'

"The rest of the grand jury, by three at a time, in order, are sworn in the following manner:

"'The same oath which your foreman hath 'taken on his part, you and every of you, 'shall well and truly observe and keep on your 'part: So help you God.'" Crown Circuit Companion.

In the "Book of Oaths" p. 206, the Oath 'of great Inquest' is thus stated: 'Ye shall 'truly enquire, and true presentment make of'

can be no secret in public; the very intimation of that doth imply, that the examination should be secret; besides, my lord, I beg your lordship's pardon if we mistake, we do not understand any thing of law.

Mr. *Papillon.* Your lordship is pleased to say, that it hath been the common usage and practice; sometimes, my lord, we have heard that that hath been the law of England, that hath been the custom of England: If it be the ancient usage and custom of England, that hath never been altered from time to time, and hath continued so, we desire your lordship's opinion upon that; as we would not do any that may be prejudicial to the king, so we would not do the least that should be prejudicial to the liberties of the people; if it be the ancient custom of the kingdom to examine in private, then there is something may be very prejudicial to the king in this public examination; for sometimes in examining witnesses in private, there come to be discovered some persons guilty of treason, and misprision of treason, that were not known, nor thought on before. Then the jury sends down to the court, and gives them intimation, and these men are presently secured; whereas, my lord, in case they be examined in open court publicly, then presently there is intimation given and these men are gone away. Another thing that may be prejudicial to the king, is, that all the evidences here, will be foreknown before they come to the main trial upon issue by the petty jury; then if there be not a very great deal of care, these witnesses may be confronted by raising up witnesses to prejudice them, as in some cases it has been: Then besides, the jury do apprehend, that in private they are more free to examine things in particular, for the satisfying their own consciences, and that without favour or affection; and we hope we shall do our duty.

L. C. J. Look ye, Mr. Papillon, it is reasonable that we should give you our advice in this case: I must tell you, if you had considered of what I had said before, I thought I had obviated these objections: First, as to what you do say that you are bound to conceal your counsels, and the king's secrets, that is very true; as to your counsels, that is, your debates, you are bound to conceal them: As to the king's secrets, so long as he will have them kept secret, you are bound to keep them so too; but it doth not deprive the king of the benefit of having it public, if he have a desire for it; you don't break your oath, if the king will make it public; you do not make it public; 'tis the king does it. Then as to that that you do say, that you apprehend the common usage of the kingdom to be a law; that is true, Mr. Papillon, in some sense; a constant and uninterrupted usage goes for a law among us; but I thought I had told you before, that both of ancient and latter times there have been examinations of the witnesses in court, in cases of this nature; and we are not without precedents of it every year, every term, continually from time to time, evidence is heard in court by the grand jury; it is as usual a thing with us, as any thing, if it be desired, nothing more frequent, or more common: I never heard it denied, or stood upon by any grand-jury, in my life, till of late here; you may be instructed with a thousand precedents, for I am sure it is a common and ordinary case, upon such occasions, if desired, to hear the evidence in court.

Look ye, gentlemen, as to that care that you have of the king's affairs, the king has reason to take it well that you are so careful for them; and that you are so mindful of his concerns, he hath a great deal of reason to think well of you for it: And, gentlemen, consider this, that his majesty's counsel have certainly considered of this evidence, before they brought this to a public enquiry; or else it would be a hard thing if they should come raw, and not know what the witnesses can say; for though you are the jury to hear the witnesses, yet you must consider, that the king's counsel have examined whether he hath cause to accuse these persons, or not; and, gentlemen, they understand very well, that it will be no prejudice to the king to have the evidence heard openly in court; or else the king would never desire it.

Foreman. My lord, the gentlemen of the jury desire that it may be recorded, that we insisted upon it as our right; but if the court over-rule, we must submit to it.

L. C. J. Here are enough persons to take notice of it; to make records of such things, is not usual; it is not our business here to record every thing, that every man will desire to be recorded: We can record nothing but what is in order to the proceedings,

'all such things as you are charged withall on 'the queene's behalf, the queene's counceil, 'your owne, and your fellowes, you shall well 'and truly keepe; and in all other things the 'truth present: So help you God and by the 'contents of this booke.'

At the end of a pamphlet entitled, "Observations on the Duty and Power of Juries. London, printed 1796, reprinted 1798," is given the following *Appendix*:

"At the second sessions, held at the Old Bailey 12th Jan. 1796 in the mayoralty of Mr. Alderman Curtis, The King *v.* Crossfield, Smith, Higgins, and Le Maitre for High-Treason. The Solicitor of the Treasury, acting for the Attorney-General, requested to be admitted during the examination of the witnesses on the above indictment; but the grand jury, after debating upon the matter some time, determined, that, consistently with their Oath, no person, however exalted his station, could, if not a witness upon the occasion, be present whilst the jury were making their inquest into the charges in any indictment. The Solicitor therefore, was not admitted." See the Note to the Case of the Regicides, vol. 5. p. 972 of this Collection.

but notice enough is taken of it; you need not fear but that there will be witnesses enough.

L. C. J. (North). Gentlemen, I must say something to fortify what my Lord Chief Justice has said: If any of us had been of a different opinion, we would have spoken it; the same thing was stood upon, and discoursed on the last sessions, and then all the judges were of this opinion, and in what all the judges agree to, you should acquiesce. I must tell you from my own experience; where the king will, he ought to have it kept secret: I have not known it done publicly in the orderly course of business; but I have often known where it hath been desired by those which prosecute for the king, that evidence hath been given openly; and I never knew it denied: If any of my brothers think otherwise, I desire they would speak; but, I tell you as to my experience, this is the case.

Sheriff P. I de the witnesses may be kept out of the court, and called one by one.

L. C. J. It is a thing certainly, that the king's counsel will not be afraid of doing; but Sheriffs do not use to move any thing of this nature in court, and therefore 'tis not your duty, Mr. Sheriff, to meddle with it.

Sheriff P. It was my duty last time, my lord, and appointed.

Att. Gen. (Sir Rob. Sawyer) You were acquainted 'twas not your duty last time, and you appear against the king.

Then the Indictment was read.

(London *ss.*) 'The jurors of our sovereign lord the king, upon their oaths present, that Anthony earl of Shaftesbury, late of the parish of St. Martin's in the Fields, in the county of Middlesex, as a false traitor against the most illustrious, and most excellent prince, our sovereign lord Charles the 2nd by the grace of God, of England, Scotland, France, and Ireland, king, his natural lord, the fear of God in his heart not having, nor weighing the duty of his allegiance; but being moved and seduced by the instigation of the devil, the cordial love, and true, due, and natural obedience, which true and faithful subjects of our said sovereign lord the king, towards him our said sovereign lord the king, should, and of right ought to bear, wholly withdrawing, and with all his strength intending the peace and common tranquillity in this kingdom of England, to disturb, and war and rebellion against our said sovereign lord the king, to stir up and move, and the government of our said sovereign lord the king, within this kingdom of England, to subvert, and him our said sovereign lord the king, from the title, honour, and regal name of the imperial crown of his kingdom of England to depose and deprive, and him our said sovereign lord the king to death and final destruction to bring and put, the 18th day of March, in the 33d year of the reign of our sovereign lord Charles 2, now king of England, and divers other days and times, as well before as afterwards, in the parish of St. Mary le Bow, in the Ward of Cheap, London, traiterously compassed, imagined, and intended the death and final destruction of our said sovereign lord the king, and the ancient government of his kingdom of England, to change, alter, and wholly to subvert, and him our said sovereign lord the king, from the title, honour, and kingly name of his imperial crown of this kingdom of England to depose and deprive, and war and rebellion against our sovereign lord the king, to move and levy within this kingdom of England; and his said most wicked treasons, and traiterous compasses, imaginations and purposes aforesaid, to fulfil and perfect, he the said Anthony earl of Shaftesbury, as a false traitor, with divers armed men, subjects of our said sovereign lord the king, then being, maliciously traiterously and advisedly, did provide and prepare then to be aiding to him the said earl of Shaftesbury, to fulfil and perfect his treasons aforesaid. And his said wicked treasons, traiterous compasses, imaginations and purposes, the sooner to fulfil and perfect, he the said Anthony earl of Shaftesbury as a false traitor, with one John Booth, and other subjects of our said lord the king, then and there traiterously assembled, met and consulted; and the same wicked treasons, and traiterous compasses, imaginations and purposes aforesaid, then and there to the said John Booth, and other persons, to the jury unknown, in the hearing of divers liege subjects of our sovereign lord the king, then and there present, openly, publicly, maliciously, traiterously and advisedly did say and declare, and to persuade and induce the said John Booth to be aiding and assisting in his said treasons, compasses, imaginations, and purposes, he the said Anthony earl of Shaftesbury, as a false traitor, maliciously, advisedly, and traiterously, the said 18th day of March, in the 33d year of the reign of our said sovereign lord the king, at the parish and ward aforesaid, within the city of London aforesaid, falsely, advisedly, subtilly, maliciously and traiterously said, asserted and declared, that in a short time the parliament was to sit at Oxford, and that he the said Anthony earl of Shaftesbury had inspected the elections, and considered the inclinations and dispositions of the generality of the members of parliament elected; and that he the said Anthony earl of Shaftesbury was satisfied that the parliament would insist upon three atters, (to wit) The bill of exclusion against the Duke of York; the abolishing the act of parliament of the 35th of queen Elizabeth, and the passing of a new bill for uniting the protestant dissenters; with divers other good and wholesome bills. To which he the said Anthony earl of Shaftesbury was certain that the king's majesty would refuse to give his royal assent; and therefore he the said Anthony earl of Shaftesbury did expect that there would be a division between the king's majesty and the parliament; and that many noble lords and worthy members of the Lower House did con-

cur in the same opinion; and they were resolved to insist upon the passing of those bills: And if the king's majesty refused, that they (meaning him the said Anthony earl of Shaftesbury, and the said noble lords and worthy members) and provided strength to compel the king's majesty to grant thereunto: And that for his part, he the said Anthony earl of Shaftesbury had provided stout men to be commanded by captain Wilkinson, (meaning one Henry Wilkinson, one of the subjects of our now sovereign lord the king;) of which he the said Anthony earl of Shaftesbury had agreed that the said John Booth should be one.

"And further, the jurors aforesaid upon their oaths do say, that the aforesaid Anthony earl of Shaftesbury, his said wicked treasons, and traiterous imaginations, to fulfil, perfect and bring to effect afterwards: to wit, the said 18th day of March, in the 33rd year of his said now majesty's reign, in the parish and ward aforesaid, within the city of London aforesaid, as a false traitor in the presence and hearing of divers liege people of our said sovereign lord the king, then and there present, openly and publicly, falsely, maliciously, advisedly and traiterously said, asserted, published, and with a loud voice declared, that our said now lord the king was a man of no faith, and that there was no trust in him; and that our said lord the king deserved to be deposed, as well as Richard the Second, late king of England deserved.

"And further, the jurors aforesaid upon their oaths do say, that the said Anthony earl of Shaftesbury, his said wicked treasons, and traiterous imaginations aforesaid, to be fulfilled and perfected, and brought to effect the said 18th day of March, in the 33rd year of his said now majesty's reign, in the parish and ward aforesaid, in the city of London aforesaid, as a false traitor, in the presence and hearing of divers liege subjects of our said lord the king then and there present, openly and publicly, falsely, maliciously, advisedly, and traiterously said, asserted, published, and with a loud voice declared, that he the said Anthony earl of Shaftesbury, could never desist, until he had brought this kingdom of England into a commonwealth without a king, and that the said Anthony earl of Shaftesbury, and all those that him the said Anthony earl of Shaftesbury, would assist, (and he knew many that would assist him the said Anthony earl of Shaftesbury) would make England a commonwealth as Holland was: and that he the said Anthony earl of Shaftesbury, and other traitors unknown, would live as in Holland, and that he our said lord the king, and all his family, should be rooted out.

"And further, the jurors aforesaid do say, that the said Anthony earl of Shaftesbury, his said wicked treasons, and traiterous imaginations aforesaid, to be fulfilled, perfected, and brought to effect afterwards, the said 18th day of March, in the 33rd year of his said now majesty's reign, in the parish and ward aforesaid, in the city of London aforesaid, as a false traitor, in the presence and hearing of divers liege subjects of our said sovereign lord the king then and there present, openly, publicly, falsely, maliciously, advisedly, and traiterously said, asserted, published, and with a loud voice declared, that our now sovereign lord the king was a man of an unfaithful heart, and not worthy to be trusted, and not fit to rule and govern, being false, unjust, and cruel to his people; and if he would not be governed by his people, that they (meaning him, the said Anthony earl of Shaftesbury, and other traitors to the jurors unknown) our said sovereign lord the king would depose, against his allegiance and duty, and against the peace of our said sovereign lord the king, his crown and dignity, &c. and against the form of the statute in such case made and provided, &c."

Sir *Fr. Withens.* Gentlemen of the jury, this is an indictment against the earl of Shaftesbury; I shall not trouble you to open the indictment, because the evidence will be somewhat long, I shall only tell you which way we shall go.——

L. C. J. North. I do not know whether you desire the witnesses should be examined a-part, do you desire that, gentlemen?

L. C. J. If you do desire it, gentlemen, they shall, for Mr. Sheriff hath nothing to do with it; but if you do desire it, you shall have the witnesses called one at a time, and all the rest shall be put out of the Court.

Jury. My lord, it is our desire.

L. C. J. We did deny it to Mr. Sheriff, because we are to keep men within their duty. Here it is not his duty to meddle with any thing of this nature.

Foreman. My lord, we desire we may have a list of their names, and that they may be put a-part, that they may not hear what one another say.

Sir *Fr. Withens.* My lord, there is one part I would open.

L. C. J. There is no need for it at all—You shall have their names told you as they are called.

Harrison. My lord, we pray we may have a list of their names.

L. C. J. If you desire it, you may have it: but it will be no advantage, for you will hear them named, and you may write them down as they come in.

Godfrey. We desire a list; for you told us, the king's counsel had examined them, and knew who they were.

L. C. J. I will tell you, the Court is to have their names indorsed, for they do not bring witnesses in hugger-mugger, and I suppose they are indorsed here.

L. C. J. North. It is want of experience that makes you ask this; you are told, they are indorsed here.

L. C. J. Look you, sir Samuel Barnardiston, you must have the indictment itself out with you, and all their names written upon the back of that indictment; but that you should

desire to have the names of them in a roll beforehand, I do not know, if there be any reason that you can assign for it.

Foreman. One thing more I have to say, that we may see the warrant by which the earl of Shaftesbury was committed, for there are some other questions depend upon it.

L. C. J. That we cannot do, for the lieutenant of the Tower hath that warrant, which he keeps for his indemnity; we cannot demand it from him upon any terms: any thing that you do desire of us, let us know; what is reasonable, and within our power we will grant; and for other desires of your's, we tell the reason why we cannot grant them.

Papillon. My lord, if your lordship pleases, I will only acquaint your lordship, that the gentlemen of the jury do seem to be of opinion, that your lordship gives them leave to examine the witnesses; and the jury, because they would not put the Court to too much trouble, do desire, that the witnesses should come one after another, and make their information, and then the jury would withdraw, to consider what proper questions to ask them, and come down again.

L. C. J. You shall do so, gentlemen. Look you, we did, at the request of the last jury, use the same method; after they had heard the witnesses what they gave in evidence, they came and desired leave to ask them some questions, which we granted, and they were all called one by one, and did examine them; you shall do so, gentlemen.

Att. Gen. I was informed this morning there were several questions to be asked of several witnesses to direct the Grand-jury how to demean themselves.

L. C. J. Mr. Attorney, the request is reasonable enough.

Harrison. We desire they may be examined one by one.

L. C. J. North. I suppose you do not stand upon it for these witnesses, they are clerks of the council, that only prove a paper which it seems was found in the earl of Shaftesbury's house: if you will, they may go out, and be called in again.

Harrison. We humbly beg it.

Godfrey. I was foreman of the jury at Fitzharris's trial, and it was complained he had hard measure from some Irish witnesses, and that it was severe that they should be examined in troops: it hath troubled me since that I did not put them out and examine them a-part.

L. C. J. Look ye, gentlemen, you that are witnesses for the king, you must go all out, and come in as you are called, one by one.

[Which done, William Blathwait, esq. was produced, and a paper delivered in.]

Saunders to Mr. Blathwait. I pray, Sir, give an account how you came by that paper?

Blathwait. This paper, gentlemen, was put into my custody by Mr. Gwyn, clerk of the counsel, who seized it among others in my lord Shaftesbury's house: he gave me the key of the room where they were kept, and it hath been altogether in my custody, except for a short time that it was delivered to Mr. Secretary Jenkins, by whom it was re-delivered to me. Mr. Gwyn having seized papers at my lord Shaftesbury's house brought them to the council-office, and put them into one of the rooms, and locked the door, and delivered the key to me. When I was ordered by the committee of examinations, I fetched up the trunks and papers, and brought them into the council chamber, and the trunks were opened in the presence of some of the Lords of the council, and in the presence of Mr. Wilson, who was appointed to attend here on the behalf of my lord Shaftesbury, and he was always present when the papers were taken out of the trunks and bags: This was one paper, and was taken out upon the 6th of July in the presence of Mr. Wilson, who took particular notice of this paper, as may appear by his own hand. The trunk was sealed, it was a great trunk, and it was opened in the presence of Mr. Samuel Wilson and Mr. Starkey, who were both appointed by my lord of Shaftesbury.

L. C. J. Was this paper found in one of those trunks or boxes that was delivered to you by Mr. Gwyn?

Blathwait. This paper was taken out of a velvet-bag which Mr. Gwyn had put into the great trunk, which trunk was sealed and opened in the presence of Mr. Wilson and Mr. Starkey.

Sir *Fr. Withens.* Did you find that paper in the trunk

Blathwait. I took this and others out of the velvet bag, which was in the great trunk.

L. C. J. Call Mr. Gwyn to give an account where he found these papers. Look you, gentlemen of the jury, you hear what his evidence is, would you ask him any thing while he is here.

[Then Mr *Gwyn* coming in.]

L. C. J. Where had you the trunk you delivered to Mr. Blathwait?

Gwyn. My lord, on the 2nd of July, by a warrant from the secretary, I was commanded to go to my lord Shaftesbury's house to search his papers, I did there meet with a great many papers, and I took a note how I had parted them, and into what parcels I had put the papers; there were several sorts of them in a great hair trunk, and there was a velvet bag in which I put some papers that were loose in my lord's closet above stairs. My lord Shaftesbury, as soon as I came, gave me the keys, and told me where his closets were, and said he would seal them up with his own seal: I staid for it, but he sent me word by a gentleman that I might put my own seal if I pleased: I did put my seal upon the trunk, but afterwards being sent another way, I delivered it to this gentleman Mr. Blathwait: whether any of the papers were taken out afterwards I cannot tell.

L. C. J. Mr. Gwyn, that your evidence

may be the better understood, tell me; were all the papers that were in that velvet bag in my lord Shaftesbury's closet?

Gwyn. In my lord Shaftesbury's closet above stairs.

L. C. J. This you swear; when you delivered it to Mr. Blathwait, all the papers were in that bag; was there nothing in that bag, but what you took in my lord Shaftesbury's closet?

Gwyn. Nothing, my lord.

L. C. J. Look you, gentlemen, you do observe that this paper was put into the bag by Mr. Gwyn, and Mr. Blathwait swears he found it in the bag, and delivered it to Mr. Secretary Jenkins; therefore if you please, Mr. Secretary Jenkins, you shall be sworn whether that paper was delivered to you by Mr. Blathwait, because we would clear it as we go, whether that be the paper was delivered to Mr. Secretary Jenkins by Mr. Blathwait. I pray, sir, was that the paper that Mr. Blathwait did deliver into your hands?

Sec. *Jenkins.* My lord, this is the paper, this paper was delivered into my hands by Mr. Blathwait in the council chamber. I cannot say that this numerical paper was taken out of the velvet bag; but there were a great many papers taken out of it, and I having the honour to be at the examination of the papers: this was ordered to be put (and was put) into my hands, with nine papers more.

L. C. J. Was it out of your hands?

Sec. *Jenkins.* It was out of my hands; for upon Monday last I took out the nine papers intrusted with me, and this tenth out of my desk and caused my servant to mark them by numbers. Then I sealed up these papers and sent them to Mr. Graham. Mr. Graham brought them back again to me without any alteration whatsoever; then I put this tenth paper into the hands of Mr. Blathwait again. All the while it was in my hands, it was under lock and key, and none of my servants saw it, but the time it was numbered; and no manner of alteration was made in this, or any other of the nine papers.

L. C. J. Now it appears this was the paper taken in my lord Shaftesbury's closet.

Then this Paper was read as followeth.

"We the knights, &c. finding to the grief of our hearts, the popish priests and Jesuits, with the papists and their adherents and abetters, have for several years last past pursued a most pernicious and hellish plot, to root out the true protestant religion as a pestilent Heresy, to take away the life of our gracious king, to subvert our laws and liberties, and to set up arbitrary power and popery.

"And it being notorious that they have been highly encouraged by the countenance and protection given and procured for them by J. D. of Y. and by their expectations of his succeeding to the crown, and that through crafty popish counsels his designs have so far prevailed, that he hath great and many dependents upon him by his bestowing offices and preferments both in church and state.

"It appearing also to us, that by his influence mercenary forces have been levied and kept on foot for his secret designs contrary to our laws; the officers thereof having been named and appointed by him, to the apparent hazard of his majesty's person, our religion and government, if the danger had not been timely foreseen by several parliaments, and part of those forces with great difficulty, caused by them to be disbanded at the kingdom's great expence: And it being evident, that notwithstanding all the continual endeavours of the parliament to deliver his majesty from the counsels, and out of the power of the said D. yet his interest in the ministry of state and others have been so prevalent, that parliaments have been unreasonably prorogued and dissolved * when they

* In the State Tracts, there is the following Account of Proceedings at the Sessions for the City of Westminster, against Tho. Whitfield, Scrivener; John Smallbones, Woodmonger; and Wm. Laud, Painter; for tearing a Petition prepared to be presented to the King's Majesty, for the sitting of the Parliament.

It being the undoubted right of the subjects of England, and warranted by the law of the land, and the general practice of all former times, in an humble manner to apply themselves to his majesty, in the absence of parliaments, by Petition; for the redress of their grievances, and for the obtaining such things as they apprehend necessary or beneficial, to the safety and well-being of the nation. [Vide the Resolutions of the Law, Cook's Jurisdiction of Courts, 79. Hobart, 220. Vek Magna Chart. Exil. Spencer, 51. Vide the Proclamations of king Charles I.] And it being their duty to which they are bound, by the express words of the oath of allegiance,* to represent to him any danger which they apprehend threatening his royal person or his government; divers persons in and about the city of Westminster, considering the too apparent and unspeakable danger his majesty and his kingdoms are in, from the hellish plots and villainous conspiracies of the bloody papists and their adherents; and *conceiving no sufficient* (or at least so fit) remedy could be provided against it, but by the parliament, by whom

* 'I do swear from my heart, That I will 'bear faith and true allegiance to his majesty, 'his heirs, and successors, and him and them 'will defend to the uttermost of my power 'against all conspiracies and attempts what-'soever, which shall be made against his or 'their persons, their crown and dignity. And 'will do my best endeavour to disclose and 'make known unto his majesty, his heirs and 'successors, all treasons and traiterous conspi-'racies, which I shall know or hear of, to be 'against him or any of them.'

have been in hot pursuit of the popish conspiracies, and ill ministers of state their assistants.

And that the said D. in order to reduce all into his own power hath procured the garrisons, the army and ammunition, and all the power of the seas and soldiery, and lands belonging to these three kingdoms to be put into the hands of his party and their adherents, even in opposition to the advice and order of the last parliament.

"And as we considering with heavy hearts how greatly the strength, and reputa-

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alone several persons accused of these accursed designs, can be brought to trial, did prepare and sign a petition; humbly representing to his majesty, the imminent danger his royal person, the Protestant religion, and the government of this nation were in; from that most damnable and hellish plot, branched forth into several the most horrid villainies: for which several of the principal conspirators stand impeached by parliament, and thereby humbly praying that the parliament might sit upon the 26th of January, to try the offenders, and to redress the important grievances, no otherways to be redressed; of which Thomas Whitfield, John Smallbones, and William Laud, inhabitants in Westminster, taking notice, upon the 20th day of December last, they sent to Mr. William Horsley, who had signed and promoted the petition, and in whose custody it was, to bring or send it to them, for that they desired to sign it: and thereupon Mr. Horsley attended them, and producing the petition, in which many persons had joined, he delivered it at their request to be by them read and signed; but Mr. Whitfield immediately tore it in pieces, and threw it towards the fire; and Smallbones catching it up, said that he would not take 10*s.* for the names, and then they declared that they sent for it for that very purpose, and owned themselves all concerned in the design.

Upon Mr. Horsley's complaint hereof to a justice of the peace, a warrant was granted against them, and they being taken thereupon, after examination of the matter, were bound to appear and answer it at the next quarter sessions of the peace for the city of Westminster; and upon Friday the 9th of January instant the sessions being holden, and there being present several justices of the peace that are eminent lawyers, the matter was brought before them, and the grand jury indicted the said Whitfield, Smallbones, and Laud as followeth, viz.

The City, Borough, and Town of Westminster, in the County of Middlesex. }

"The jurors for our sovereign lord the king upon their oath do present, That whereas the subjects and liege people of the kings and queens of this realm of England, by the laws and customs of the realm, have used and been accustomed to represent their public grievances by petition, or by any other submissive way; and that the 20th day of December in the 31st year of our lord Charles the 2nd, by the grace of God, of England, Scotland, France and Ireland, king, defender of the faith, &c. at the parish of St. Martin's-in-the-Fields, within the liberty of the dean and chapter of the collegiate church of St. Peter, of the city, borough and town of Westminster, in the county of Middlesex; a Petition written in paper, was prepared and subscribed with the hands of divers the said king's subjects and liege people, (to the jury unknown) and to our said sovereign lord king Charles 2, directed, and to our said sovereign lord the king to be presented and delivered; by which Petition it was shown, That whereas there had been and was a most damnable plot against the royal person of our said sovereign lord the king, the Protestant religion, and well-established government of this realm; for which plot several of the principal conspirators were impeached by parliament, and whereby it was humbly prayed that the parliament which was prorogued to the 26th day of January next ensuing in the said year, might then sit to try the offenders, and to redress the pressing grievances not otherwise to be redressed. And that Thomas Whitfield, late of the said parish of St. Martin's-in-the-Fields, in the liberty aforesaid, and the county aforesaid, yeoman, John Smallbones, late of the said parish, within the liberty aforesaid, in the county aforesaid, woodmonger, and William Laud, late of the parish aforesaid, in the county aforesaid, yeoman; being persons ill-affected, and contriving, devising and intending as much as in them lay, to hinder the sitting of the said parliament, as was prayed by the said Petition, and also to hinder the trial of the said offenders, and redressing the said grievances, the said 20th day of December in the said 31st year of the reign of our said sovereign lord the king, as rioters and disturbers of the peace of our sovereign lord the king, for the disturbing of the peace of our said sovereign lord the king, with force and arms at the said parish within the liberty aforesaid, in the county aforesaid, unlawfully and riotously did assemble themselves; and being so then and there assembled, with force and arms then and there unlawfully, riotously and injuriously, the said Petition being delivered by one William Horsley to them, the said Thomas Whitfield, John Smallbones and William Laud, at their request, and for the subscribing their names thereunto if they should think fit, did tear in pieces, in contempt of our said sovereign lord the king, and of his laws, to the evil example of all others in the like cases offending, and against the peace of our said sovereign lord the king, his crown and dignity."

The names of the Grand-Jury that found the bill, are these: William Jacob, Thomas Trevor, Erasmus Browne, Henry Dugley, Richard Streete, John Henly, John Weston, Martin Fregg, John Pierce, Robert Pinke,

tion, and treasure of the kingdom both at sea and land is wasted and consumed, and lost by the intricate expensive management of these wicked destructive designs; and finding the same counsels after exemplary justice upon some of the conspirators, to be still pursued with the utmost devilish malice, and desire of revenge; whereby his majesty is in continual hazard of being murdered to make way for the said D.'s advancement to the crown, and the whole kingdom in such case is destitute of all security of their religion, laws, estates and liberty, sad experience in the case, queen Mary having proved the wisest laws to be of little force to keep out popery and tyranny under a popish prince.

"We have therefore endeavoured, in a parliamentary way, by a bill for the purpose, to bar and exclude the said duke from the succession to the crown, and to banish him for ever out of these kingdoms of England and Ireland. But the first means of the king and kingdom's safety being utterly rejected, and we left almost in despair of obtaining any real and effectual security, and knowing ourselves to be intrusted to advise and act for the preservation of his majesty and the kingdom, and being persuaded in our consciences that the dangers aforesaid are so eminent and pressing, that there ought to be no delay of the best means that are in our power to secure the kingdom against them, we have thought fit to propose to all true Protestants an union amongst themselves, by solemn and sacred promise of mutual defence and assistance in the preservation of the true Protestant religion, his majesty's person and royal state, and our laws, liberties, and properties, and we hold it our bounden duty to join ourselves for the same intent in a declaration of our united affections and resolutions in the form ensuing:

"'I. A. B. do in the presence of God solemnly promise, vow, and protest to maintain and defend to the utmost of my power, with my person, and estate, the true protestant religion, against popery and all popish superstition, idolatry, or innovation, and all those who do or or shall endeavour to spread or advance it within this kingdom.

"'I will also, as far as in me lies, maintain and defend his majesty's royal person and estate; as also the power and privilege of parliaments, the lawful rights and liberties of the subject against all incroachments and usurpation of arbitrary power whatsoever, and endeavour entirely to disband all such mercenary forces as we have reason to believe were raised to advance it, and are still kept up in and about the city of London, to the great amazement and terror of all the good people of the land.

"'Moreover J. D. of Y. having publicly professed and owned the popish religion, and notoriously given life and birth to the damnable hellish plots of the papists against his majesty's person, the protestant religion, and the government of this kingdom; I will never consent that the said J. D. of Y. or any other, who is or hath been a papist or any ways adhered to the papists in their wicked designs, be admitted to the succession of the crown of England; but by all lawful means, and by force of arms if need so require, according to my abilities, will oppose him, and endeavour to subdue, expel, and destroy him if he come into England, or the dominions thereof, and seek by force to set up his pretended title, and all such as shall adhere unto him, or raise any war, tumult or sedition for him, or by his command, as public enemies of our laws, religion and country.

"'To this end we and every one of us whose hands are here under-written, do most willingly bind ourselves and every one of us unto the other jointly and severally, in the bond of one firm and loyal society or association, and do promise and vow before God, that with our joint and particular forces we will oppose and pursue unto destruction all such as upon any title whatsoever shall oppose the just and righteous ends of this Association, and maintain, protect, and defend all such as shall enter into it in the just performance of the true intent and meaning of it. And lest this just and pious work

Nathanael Wilkinson, Edward Whitefoot, John Gentle, Thomas Harris, William Fortune, Roger Higdon, James Harroid, Cornelius Rickfield, George Wright, apothecary, Walter Wright, Adam Langley.

Upon Wednesday the 7th of this instant January, many gentlemen and eminent citizens, who had been concerned for managing the Petition for the sitting of the parliament, upon the 26th instant, met together and agreed upon the method of finishing the same, and of nominating fit persons for the presenting it to his majesty; which being accordingly done, these gentlemen following, viz. sir Gilbert Gerrard, bart. son-in-law to the late bishop of Durham; Francis Charlton, John Ellis, John Smith, Johnson, of Stepney, Ellis Crispe, Anthony Selby, Henry Ashurst, Thomas Smith, esqrs. gentlemen of good worth and estates, and several of whom have been eminent sufferers for his majesty, did this 13th of January, attend his majesty with it at Whitehall, when being introduced to his royal presence, sir Gilbert Gerrard kneeling, presented the Petition.

Sir John Reresby says: This evening, (Oct. 20), his majesty talked with me a great while, in St. James's Park, and at the duchess of Portsmouth's; his discourse ran chiefly upon the late unequal verdicts and proceedings of the juries of London and Middlesex; concerning which he broke out into this expression, 'It is a hard case that I am the last man to 'have law and justice in the whole nation.'"

It is likely enough that the rejection of the bills against Shaftesbury and Colledge was a cause of the attack upon the charter of the city. See the Case of the Quo Warranto in this Collection, A. D. 1681, and the passage from Roger Coke, cited in a Note thereto.

should be any ways obstructed or hindered for want of discipline and conduct, or any evil-minded persons under pretence of raising forces for the service of this Association, should attempt or commit disorders; we will follow such orders as we shall from time to time receive from this present parliament, whilst it shall be sitting, or the major part of the members of both Houses subscribing this Association when it shall be prorogued or dissolved; and obey such officers as shall by them be set over us in the several counties, cities, and boroughs until the next meeting of this or another parliament; and will then shew the same obedience and submission unto it, and those who shall be of it.

"'Neither will we for any respect of persons or causes, or for fear, or reward, separate ourselves from this Association, or fail in the prosecution thereof during our lives, upon pain of being by the rest of us prosecuted, and suppressed as perjured persons, and public enemies to God, the king, and our native country.

"'To which pains and punishments we do voluntarily submit ourselves, and every one of us without benefit of any colour or pretence to excuse us.'

"In Witness of all which premisses to be inviolably kept, we do to this writing put our hands and seals, and shall be most ready to accept and admit any other hereafter into this Society and Association."

Sir *F. Withens*. This paper is very plausibly penned in the beginning, and goes a great way so, but in the last clause but one, there they come to perfect levying war; for they do positively say, they will obey such officers as either the parliament or the major part of them, or after the parliament is dissolved, the major part of those that shall subscribe this paper shall appoint; they will obey all such officers.

Foreman. Pray, what date is this paper of?

Sir *F. Withens*. It was after the bill for the exclusion of the duke of York, for it says, that way failing, they would do it by force.

Foreman. There is no hand to it at all?

Sir *F. Withens*. No, none at all. One thing I had forgot, that they would join to destroy the mercenary forces about London, which is downright levying war against the king and his guards.

Mr. *Saunders*. The design of it is pretended to oppose popery and arbitrary power, and destroy the papists; but that doth not seem so much in it's self: but when you have heard the evidence you will hear who were the papists that were to be destroyed by this army.

John Booth.

Jury. He has stood in the face of the court all this while.

L. C. J. When did Mr. Booth come down?

Jury. He was here before we went up, my lord, and hath been here ever since.

L. C. J. Look ye, gentlemen, they tell you he was carried away and came down but now.

Booth. No, my lord, I came down but now.

Shepherd. My lord, we desire a list of their names, that we might know who is here, and who is not.

Mr. *Godfrey*. This man hath been here all this while, and all the others may be here for aught that I know

Sir *F. Withens*. In the first place give an account what discourse you have had with my lord Shaftesbury.

L. C J. Speak out, that the jury may hear you.

Booth. I will speak as loud as I can. In the month of January, about the middle of January last, I was introduced into my lord Shaftesbury's acquaintance by one captain Henry Wilkinson. I say, I was introduced into my lord Shaftesbury's acquaintance by one captain Henry Wilkinson. This captain Wilkinson is a Yorkshire gentleman, he has known me above twenty years, and he and I have had familiar conversation a long while; so waiting upon my lord Shaftesbury, our first business that we went about was, captain Wilkinson did pretend to receive a commission from my lord Shaftesbury, and some others of the lords proprietors of the palatinate of Carolina to be their deputy governor; and he told me the prospect of that journey was like to be very hopeful, and that his interest was good, and that he could procure me a commission, and such a number of acres for quality and quantity as I did desire: and he said he did not design to go over immediately in his own person, but he would send his eldest son, and his youngest son, and if he went, he would return again as occasion should serve. I consented to him in all this, and we discoursed it divers times together, and we went to my lord Shaftesbury on purpose to receive commissions in order to this purpose. The first time I went there was the earl of Craven, sir Peter Colleton, and one Archdell, a quaker; I thought him a quaker because he kept his hat on, when the rest of the Lords stood bare in civility to him. We discoursed the thing about Carolina. After this, and before, captain Wilkinson and I had several discourses about the juncture of affairs in these times, though I knew him to be an old royalist, and one that served his majesty and his late father very much in the wars; yet being under great disappointments of preferments at court, and missing the reward he expected from the king, his heart was turned another way, and he had repented himself of those services he had done for the king, and was become a man of another opinion; and there was some inducements upon me that I was inclined to the same opinion: So he expressed himself to my lord, and so from one thing to another we went on in discourse, and related the several parliaments, and the proroguing them, and the disappointments of the people, and the fear of popery and arbitrary power: And this was not done once, nor twice, nor ten times; for I cannot enumerate them, for we kept a continual club, and conversed together fami-

liarly near three quarters a year. After this first acquaintance with my lord Shaftesbury at his house, I did frequently go with captain Wilkinson, and between Christmas and March four or five times: And I observed this, that when we came to my lord Shaftesbury's they were cautious in our accession: In the first place it was to be known by some of the servants, who he was in company with: And in the second place the names were sent up, who they were that were to speak with him: Sometimes we had an alehouse at the Bell in the same street: (I forget the name of the street) we staid at the alehouse till we had a fit time, captain Wilkinson had acquaintance with his porter and his gentleman of his chamber: And so we often discoursed. And from the concerns of Carolina we fell to matters more public concerning the state. I remember he would use to inveigh sharply against the times, and look upon himself as not so valued nor so respected, nor in those places and dignities as he expected he should be, and seemed to be discontented, and he did fear popery would be introduced, and arbitrary power: And when parliament-men were to be elected, there came every week news, bringing particulars of such boroughs and counties, as had made particular elections for members for parliament; whether knights, citizens, or burgesses: And he would often consider that parliament that was to sit at Oxford, what they were as to their inclination and dispositions: And he said, they would insist upon the same things the other parliaments before had done. Particularly he said the parliament would never grant the king any assistance of money nor satisfy him in those things that he desired, unless he gave the people first satisfaction in those things that they insisted on before, and he believed would insist upon after*; and ——— the bill of excluding the duke of York from the crown: Another was *the abolishing the statute of the 35th of Elizabeth: And the third was giving his royal assent for the passing a new bill, whereby all dissenting protestants, nonconformists, or what you will term them, should be freed from those penalties and ecclesiastic punishments that they are subject to by the present established law: And he said, if these and some other wholesome laws and bills were passed by the royal assent of the king, he believed that when the people had received this security and satisfaction, that they would be very willing to grant the king such accommodations of money by way of assessment, or so, as his necessary occasions should also require: but without this he believed, there would be a breach between the king and the parliament, and that they had ordered the parliament should meet at Oxford, and not at this metropolis at London, where they might go on without fear of being overawed: That this was an intention to awe the parliament. But he said, himself and divers noble lords, and members of the House of Commons had considered themselves and their own safety, and that they judged it dangerous to go to Oxford, where they were sure the guards, the retinue of the court, and the assistance of the scholars (which usually incline to the crown) might so over-awe the parliament, that they might not so freely proceed in a way for the public good as they intended; and therefore he and others had considered with themselves, that it were fit for them to have guards, and send them thither; and to this purpose he had *established a matter of fifty men, persons of quality, that he believed would have men along with them; and he intrusted captain Henry Wilkinson with the command of these men, and they were to come to Oxford at such a time, and if there were any breach between the king and the parliament, or any violence offered to any of these members by the guards, or retinue of the court, that then these men, with others that other lords had provided, should repel his force, by greater force, and should purge the guards of all the papists and tories, and such as were against the Protestant religion, and the established laws of the land; and likewise these men should be ready to assist himself, and those other persons in his confederacy, to purge from the king those evil counsellors which were about him; particularly there were named, the earl of Worcester, my lord Clarendon, my lord Hallifax, my lord Feversham, and Mr. Hide, now lord viscount Hide: And these persons were looked upon to be dangerous, and gave the king evil advice, and made him continue so very deaf to what the parliament urged him to; and therefore they said they would not only purge the guards, and repel that force by a greater force, but also take those Lords by violence from the king, and bring the king to London, to the chief metropolitan city, where those things should be established, which they designed for their safety in these two respects, for the preserving the protestant religion, and likewise for the keeping and defending us safe from arbitrary power and government. Upon this captain Wilkinson did desire me that I would be one of those under his command: This I did consent to. And he requested me further, that I would provide for myself horse and arms; and likewise arms for my man, and he would provide me a horse for my man. I did accordingly provide arms for myself, and a good stone-horse for myself, and arms for my man before the parliament did sit at Oxford. I think the 23d of March, I do not punctually remember the day, and when the parliament was set, we enquired and heard how things went on, and found that it was as my lord Shaftesbury had predicted, that the parliament did insist upon those very things that he told they would do, but never believed or imagined they would be soon dissolved. Upon Thursday before the parliament was dissolved, captain Wilkinson told me, he expected that very week to have a summons to go up to Oxford with those men that were listed with him; but then Saturday's

news came of the dissolution of the parliament, and therefore it took no further effect. The whole matter, the main design was this, that my lord Shaftesbury should have so many men to attend him there for the security of his person, and likewise to repel the force of the king's guards, or any other persons that followed the king; and also to remove from him those five Lords, and bring the king back to London, to establish those laws that I have mentioned.

Sir *Fr. Withens.* Pray what time did you discover this?

Booth. About six weeks ago.

Sir *Fr. Withens.* Had you any discourse with the earl of Shaftesbury after captain Wilkinson spoke with you, or before the sitting of the parliament?

Booth. I said before, that the first motion of these fifty men that were to be my lord Shaftesbury's guard came from captain Wilkinson; but after this, when I went with captain Wilkinson to my lord Shaftesbury, the same thing was discoursed there. The last time I was with my lord Shaftesbury, was about a week before he went to Oxford, about ten days before the parliament sat, or a week, and then I heard the same discourse from my lord Shaftesbury's own mouth.

Sir *Fr. Withens.* Had you any other discourse with my lord Shaftesbury?

Booth. I say, I made three or four visits between Christmas and March, and we had discourse every time particularly about the king's person, and if the king did refuse these motions, that then these men were to be taken from him, and he repelled with a greater force, and be brought to it by force.

Sir *Fr. Withens.* Did you ever make any solicitation to any to make this discovery?

Booth. Thus far I did, and I will tell you the whole matter in that point; there was one Walter Banes, an acquaintance of mine, and I found that he had, at Wilkinson's request, engaged himself in some business that one Brownrig, an attorney in Yorkshire, had writ to him about, concerning some men that were to swear against my lord Shaftesbury. I asked Mr. Banes what men these were? He said, he thought they were Irishmen. I said, I do not know what conversation in that nature my lord Shaftesbury might have with Irishmen, for I know none of them; but I am satisfied that he had conversation tending to these ends that you speak of with some Englishmen, and that I know. This Mr. Banes did take particular notice of, and and he was very frequently upon me to tell him what the matter was, and I gave him some intimation of it. Truly it was very much upon my spirit, and I could not tell whether I was able to carry it through or not, or had better to let it alone as it was in silence: but discoursing still more with him, and at the result of that discourse we had by degrees, I did give him some intimation of it. And after that, upon second thoughts, I took a resolution to discover it, and when I did discover it, I do here in the presence of God declare, that no mortal did know any thing of what I had to say, in reference to the king; nor did I make any more applications in the world, but took pen, ink, and paper, and writ it down, and sealed it under a cover, and sent it to the council.

Sir *Fr. Withens.* Gentlemen of the jury, would you ask him any questions?

Papillon. The jury told your lordship before, that after all had been examined they would consider what questions.

L. C. J. Where would you have these witnesses that have been examined to stand?

Papillon. We leave to the sheriffs to appoint a place for them.

L. C. J. To keep them a-part it is utterly impossible, for we must have as many rooms then as there are witnesses.

Jury. Let one man keep with them.

L. C. J. Empty that place where they were the last time, and let them stand there.

Edward Turbervile.

Sir *Fr. Withens.* Mr. Turbervile, have you had any discourse with my lord Shaftesbury?

Turbervile. Yes, several times. In February last I am not positive in the time, but about the beginning of the month, I waited upon my lord Shaftesbury about some monies. I waited upon him to have his advice how I might come by it, and to gain my lord Shaftesbury's letter in my behalf to the president of the council to stand my friend, and he said, there was little good to be had from the king, as long as his guards were about him; for, were it not for his guards, we would quickly go down to Whitehall, and obtain what terms we thought fit. Said I, my lord, I suppose his guards cannot defend him from the whole kingdom. His lordship said, that the rabble were all of that side, especially the people about Wapping and Aldersgate-Street; and the rich men of the city would vote for elections; but they could not expect they should stand by them in case there should be any disturbance, for they valued their riches more than their cause. And at Oxford I heard my lord say again, he wondered the people of England should stickle so much about religion, and that if he were to choose a religion, he would have one that should comply with what was apt to carry on their cause.

Mr *Saunders.* Had you any other discourse with him at any other time?

Mr. *Turbervile.* I told you all that is material that I can say to it.

John Smith.

Smith. My lord, I only beg a word or two from your lordship, of some reflections cast upon me.

L. C. J. Go to your evidence.

Smith. My lord, this is something to my evidence.

L. C. J. You may take another time for that.

Smith. My lord, it hath been reported about in coffee-houses and taverns, that I should swear there was a general design against his majesty; and that I swore it before the king and secretary of state; and that I also swore it at the trial of Mr. Colledge and Mr. Rowse: I take it upon my oath I never swore any such thing, neither can I swear there was a general design by the city, or the parliament against the king.

L. C. J. Speak what discourse you have had with my lord Shaftesbury.

Smith. My lord, I suppose it is past all doubt, that I have been very often with my lord Shaftesbury; and I have often in his discourse observed, that he spake very irreverently and slightly of the king; sometimes saying he was a weak man, and sometimes saying he was an inconstant man; a man of no firm or settled resolution; and a man that was easily led by the nose, as his father was before him, by a popish queen, which was the ruin of his father: this was both in public and in private. I have also observed sometimes in his discourse, something that he mentioned of the earl of Essex; and that the king should declare, that the earl of Shaftesbury was not satisfied to be an ill man himself, but got over the earl of Essex too: this the earl of Shaftesbury declared publicly in his own house. Another story was of the rebellion of Scotland, that the king should say, that the earl of Shaftesbury was the chief promoter of that rebellion; and when this was told my lord Shaftesbury, that he should send word back again to the king, "I am glad (says he) that the king sees not his own danger, nor what he runs himself into: and pray tell him, that, if I were to raise a rebellion, I could raise an otherguess rebellion than the rebellion was in Scotland." But now, as to the particular points I am to charge him with: I remember, my lord, that my lord Shaftesbury sent for me one time, and that by one Manly; sometimes they call him major Manly, sometimes captain Manly; and this man found me at Mr. Bethel's club in Newgate-Street, at the Queen's-Arms; and there he told me my lord Shaftesbury would speak with me that night. I immediately left the club, and went to my lord Shaftesbury's; and I was introduced into the dining-room, where there were two gentlemen in discourse with my lord; and as soon as he saw me, he asked me how I did: I told him I was very well, and came in obedience to his lordship's command to wait upon him; for major Manly told me your lordship had a mind to speak with me: he said he had. Soon afterwards these two gentlemen went away. Upon this my lord turns about, Mr. Smith, said he, Mr. Hetherington was with me this morning, and told me he was afraid that the Irish witnesses would go over to the Court party, and retract what they had said formerly. My lord, says I, I know no person can better and with more ease hinder that than your lordship, by procuring some small allowance for them; for they complain much of poverty. Says he, master Hetherington has the charge of them, and hath a special care of them, and I believe they do not want. My lord, says I, I know nothing of that, he knows what provision he hath made for them. This is the thing, said my lord, that I would have you do; they stand in great awe of you, and you must persuade them from going nigh that rogue Fitz-gerald, that great villain, that is pampered up, and maintained by the king and the Court-party, to stifle the Plot in Ireland. My lord, says I, do you think the king would be at such vast charges for to bring over witnesses, and at last maintain men to stifle this Plot, for that is the way to stifle the Plot in England too, as well as that? Says he, what is this frequent dissolutions and prorogations of parliament for, but to stifle the Plot here, and to hinder the lords in the Tower to come to a trial? This is a strange thing, my lord, said I, when he gave Dr. Oates, Mr. Bedloe, and Mr. Dugdale such large allowances to prosecute this Plot. Says my lord, this is nothing, that may hold for a year or two, he may take it off when he will, but the chief means are put by, whereby we might find out the depth of this Plot; and if Mr. Dugdale and Dr. Oates be knocked on the head, then where is this Plot? then there will come an act of oblivion for them, and all things will be well as they were before. My lord, said I, this is very strange to me. I can give you instance of it, says he, when I was lately in the Tower, I told some I saw popery coming in, and that it was hard to prevent it. I am sorry to hear it, said I, but what would you have me do with these Irish witnesses? Says he, persuade them not to go near Whitehall, nor this Fitzgerald. And said he, one thing more I would have you mind, Mr. Smith, that if the king were not as well satisfied with the coming in of popery as ever the duke of York was, do you think the duke of York would be so much concerned in the bring-in of popery as he is? I am sorry for it, my lord, if it be so. After this I parted with my lord Shaftesbury, with full instructions from him to those Irish witnesses. I met Mr. Etherington the next morning, and I told him that I was with my lord Shaftesbury: says he, I know your business, and would have you meet us at the Sun Tavern in the afternoon. My lord, I went according the time appointed, and met him at the Sun Tavern between six or seven, or eight of the clock, as near as I can remember. When I came to them I began to open those great and horrid crimes that I heard Mr. Fitzgerald accused of, that he was a man come to discover a plot, and disowned it here, and retracted all he had said. I told them what a crime this was. In short, my lord, they promised never to go near the man. I parted that night and came to my lodging, and the next morning Mr. Hetherington and one Mr. Bernard Dennis came to my lodging and told me, that this Bernard Dennis was ready to give in information against Fitz-

gerald, that he had tampered with him to forswear all he had sworn before, I went presently with Mr. Hetherington and Mr. Dennis to my lord mayor, who was then sir Patience Ward; after we had told the business to sir Patience Ward, sir Patience asked this Dennis if there were any other persons present. Yes, says he, there was. Says sir Patience, you are upon your oath, if you know not the nature of an oath, I will tell you. The information was drawn up; the copy of this information I carried to my lord Shaftesbury and shewed it him, he read it, and was very well pleased with it, and said, Mr. Smith, don't you see the villainy of that man and that factious party, and that the king runs the same steps as his father did before him, how can any thing of this nature be done without the king and the court pampered him up? My lord, said I, I think now the thing is clear. Ay, says he, these are the very same steps that his father followed when he was led by his popish queen, and the poor man doth not see his danger. I parted from my lord, and came and gave an account of this very discourse to the club in Newgate-street, and they were glad of it, and I told what my lord Shaftesbury said, that the king would never be quiet till he came to his father's end, he followed the same steps. Another thing that I have observed particularly before the parliament went to Oxford; I went to see him, and we fell into some discourse, and my lord said there was great preparations made, and a great many gathered together upon the road between London and Oxford. My lord, said I, what is the meaning of that? Any body may see, says he, that is only to terrify the parliament to comply with the king's desire, which I am sure the parliament never will, for we are as resolute now as ever; and more resolute, for we see clearly what the king aims at, and that is to bring in popery: which I told several years ago, and when I was last in the Tower; but says he, we have this advantage of him, if he offer any violence to us, (for we expect it) that we have the nation for us, and we may lawfully oppose him, and he will meet with a very strong opposition; for all that come out of the country, shall be well horsed, and well armed, and so we shall be all; and here is the city which now has a question in debate among them, whether they shall bear the charge of their own members or no, but they are willing to do it, and send so many men to wait on them, and if we oppose the king, as we may do, for it hath been done in former times, the whole nation is to stand by us, and as I said when I was in the Tower, I would die, before I would ever bring in popery or any of that nature.

Jury. Repeat that again.

Smith. He said, that the king, if he offered any violence at Oxford to the parliament, he would meet with a strong opposition, and that the gentlemen that came out of the country were well provided with horse, arms, and men, to oppose him, and that they might lawfully do it if the king offered any violence to them whilst they sat, and that the nation stood by them, and that they did represent the nation, and that for his part he and all his friends would do it to the utmost of their power, and, as old as he was, he would be one that would oppose it to his power. My lord, said I, we can expect nothing but confusion from this parliament in this nature, for then we shall be involved in another civil war, nothing else can put an end to our miseries, or make this nation a settled nation, but a civil war. Then, my lord, said I, by this means we shall make an end of monarchy, or else enslave the nation to popery for ever. No doubt of one, says he, but we are sure of one, for the nation is of our side, and the city you know how they are, and where-ever they strike, I am sure the nation will, and this I'll stand and die by. This is the substance of what I have to say against my lord Shaftesbury, and upon the oath I have taken, I am sure I have not added a word. One word more I have to say, it is reported I have been hired and suborned, I do admire why this city of London, where there are as worthy men, and as great lovers of the king and government as any in the world, should say any such thing; I was never suborned by them, nor never took a farthing of their money, nor never took a farthing of the king in my life.

L. C. J. Who supposes it?

Smith. It is in print, my lord, it was in the book that came out last night; it is supposed, my lord, for it is in print.

L. C. J. I had reason to expect that there was no such objection.

Brian Haines.

Mr. *Saunders.* Give your knowledge of what discourse you have heard concerning my lord Shaftesbury.

Haines. Sir, I have heard him vilify the king very often, and he told me about the Narrative that I made about sir Edmundbury Godfrey's death, Mr. Ivy and I went to him one day and he spoke to me of it, and I desired him not to expose my person to the king's anger, for I was sure he would never grant a pardon to any man that impeached the earl of Danby. Says he, do not fear, if he doth not grant you a pardon, he makes himself the author of the plot; and, says he, the earl of Essex, my lord Maxfield and I, we do all resolve if you put it in writing, we will go to the king, and beg a pardon of his majesty for you, and if he doth not grant it, we will raise the whole kingdom against him; for, says he, he must not expect to live peaceably in his throne, if he doth not grant it. For he makes himself author of the plot.

My lord, said I, he hath dissolved so many parliaments for the sake of the earl of Danby, and prorogued so many parliaments, therefore he will never grant me this pardon. Says he, do not fear, it is the best pretence we can have in the world, and if you will but put it in writing, and let me read it, that I may give my opinion of it, the work is done; and if he doth not do it, we are prepared to raise arms against

him. I was with him another time after I made this Narrative, and he told me the two Mr. Godfreys were with the king at Windsor, and begged a pardon of his majesty for me, but the king would not grant it, but if he be an honest man, let him die at my mercy, let him come in and declare what he knows. Said I, I would not have your lordship expose my cause in these days. This is the best time for it in the world, says he, if he doth not do it, he cannot expect to be long king of England. Pray, my lord, said I, what shall I do in the mean time? I will go beyond sea, said I. No, says he, do not leave the kingdom, he dares as well be hanged as meddle with you. I desired him a second time not to expose me to the king's fury, and I prayed him to help me to a little money to go beyond sea, for I was sure I could not be safe in England. Says he, have a care of yourself; but, says he, he dares as well be hanged as meddle with you. Then I was in close conference with him one day, and I gave him so exact an account of all transactions from king Charles the First's reign, the commencement or coming to the crown, to this very day, that he was mightily satisfied; finding by me that I was a traveller, he was mightily pleased, and free with me. Pray, my lord, what model do you take, or intend to do? Says he, do you not think but there are families in England that have as great pretences to the crown as the king? Says he, there is the duke of Bucks, in the right of his mother, she was descended from Edward, one of the Edwards, and in her right he claims the barony of Ross, he hath as great a right to the crown of England, as ever any Stuart of them all.

Jury. Speak that again.

Haines. I was in conference with my lord Shaftesbury one day, and I gave him an exact account of all transactions, and I asked what they did intend to do with the government, if they pulled the king down. Says he, do you think there are no families in England, that have as much pretence to the crown as any of the Stuarts? I know none, my lord. Says he, there is the duke of Bucks, that is descended of the family of the Plantagenets; he named some of the Edwards, in her right he should have the barony of Ross, and in her right he has as good a title to the crown of England as ever any Stuart had.

John Macnamarra sworn.

Sir *Fr. Withens.* Pray give an account to the Jury of what discourses you had with my lord Shaftesbury.

Macnamarra. My lord, I was with my lord Shaftesbury a little before he went to Oxford, before the parliament sat there, and my lord told me at that time, that he would take care, together with those that were with him at Oxford, for the witnesses that where concerned in the Popish Plot.

Harrison. Speak out, pray, Sir.

Macnamarra. My lord told me he would take care, with those that were with him, for the witnesses that were concerned in the Popish Plot; after my lord went to Oxford, I writ him a letter, giving his lordship, to understand, that whereas his lordship was pleased to promise, that he would take care of the witnesses, that he would be pleased to take care of me, as well as the rest of the witnesses; after my lord came home from Oxford, I went to him, to see what was done. His lordship was pleased to express himself and say that the king was popishly affected and did adhere to popery, and that he took the same methods that his father before him took, which brought his father's head to the block, and we will also bring his thither; and told me also, that he told some persons of quality, that this would fall out five years before; at the same time my lord told me, that there was a collection of money made, and that the meeting was at the Sun tavern, and that there came a Tory Lord in to hinder their proceedings, but say she, we do remove to Ironmonger-Lane, and says he, you shall hear further in a fortnight. I came to my lord a fortnight afterwards, and his lordship was pleased to tell me, that there was provision made for the witnesses, and that it was in the hand of one Mr. Rowse, that was servant to sir Thomas Player; there was one Mr. Ivy, and I think my brother was by too, when his lordship spake these words: He said that the king was a faithless man, that there was no credit to be given to him, and that the duchess of Mazarine was his cabinet council, who was the first of womankind. This is all that I have to say, my lord.

Sir *Fr. Withens.* Do you remember nothing at any other time?—*J. Macnamarra.* No.

Sir *Fr. Withens.* Did you hear any thing about deposing the king?

J. Macnamarra. Yes, he did at the same time say, the king deserved to be deposed as much as ever king Richard the second did.

Dennis Macnamarra.

Mr. *Saunders.* Tell these gentlemen whether you have had any discourse with the earl of Shaftesbury.

D. Macnamarra. He said, my lord, that the king was a man that ought not to be believed, and there was no belief in him, and that he ought to be deposed as well as king Richard the second, and that the duchess of Mazarine was one of his cabinet council, and that he did nothing but by her advice.

Sir *Fr. Withens.* Begin again.

L. C. J. Raise your voice a little, for the Jury do not hear you.

D. Macnamarra. That the king is a man that ought not to be believed, that there was no belief in him, and that he ought to be deposed as well as king Richard the second, and that the duchess of Mazarine was his cabinet council, and that he did nothing but by her consent.

L. C. J. Who was with you at that time?

D. Macnamarra. There was Mr. Ivy and my brother at his own house.

L. C. J. When was this?

D. Macnamarra. It was at the latter end of March or the beginning of April.

Sir *F. Withens.* You say Mr. *Ivy* was by at the same time?

D. Macnamarra. Yes.

Sir *F. Withens.* Call Mr. Ivy.

Jury. What place was it in?

D. Macnamarra. In his own house.

Edward Ivy sworn.

Ivy. My lord, soon after the parliament was dissolved at Oxford, I was at my lord Shaftesbury's house, where he was speaking against the king, and said, that he was an unjust man, and unfit to reign, and that he was a Papist in his heart, and would introduce popery.

Jury. Say that again.

Ivy. I tell you I was at my lord Shaftesbury's house, where he was then speaking against the king, saying, that he was altogether unjust, and not fit to reign, and he wondered he did not take example by his father before him, and did really believe that he was a Papist in his heart, and intended to introduce Popery. I was sometimes after with him, and I told him one Haines had told me he had something to discover about the death of sir Edmundbury Godfrey, and several other things, and my lord desired to see him, and I brought Mr. Haines, to his house, and he desired him that what he had to say he would put in writing, and he should have a pardon, and that if the king did deny it, as he dares not deny it, but if he does, we will rise upon him and force him.

Sir *F. Withens.* Had you any other discourse at other times?

Ivy. Yes, I had other discourse, but not to this purpose.

Sir *F. Withens.* Was you frequently with him?

Ivy. I was frequently with him; he desired at the time I was with him to bid Colledge to come to him, and I went and came again to Haines with instructions how to proceed, and I took his examination of him, and carried it to my lord, and he desired it might be explained what he meant by the tall black man; and, says he, if he does mean the king, he must explain himself, and speak of the king, or of the duke of York, or the rest; and if he does, we will take care of him as long as he lives; but unless he does, we will do nothing for him: And I was with him with my lord Shaftesbury, and my lord Shaftesbury did exclaim against the king.

Sir *F. Withens.* What words did he speak?

Ivy. He said he was altogether an unjust man, and not fit to reign, and that he believed he was a Papist in his heart, and designed to introduce Popery, and therefore they designed to depose him, and set up another in his stead.

Sir *F. Withens.* Do you remember any discourse of Richard the Second at that time?

Ivy. No, Sir, I do not remember any thing of it.

Bernard Dennis sworn.

Sir *F. Withens.* Pray tell the jury what discourse you had with the earl of Shaftesbury at any time, and what it was.

B. Dennis. My lord, I came upon a design to make clear the plot in general, as far as I have travelled, as in Ireland, France, Spain, Maryland, Virginia and England, and upon that account I was brought before a justice of the peace in Westminster, November last, this time twelvemonth, and examined before justice Warcup, a justice of the peace, and from thence to the committee of the House of Commons, of whom colonel Birch (I believe he is here) was chairman, and gave in my evidence, and being called upon at the trial of the earl of Stafford, I was commended, as I suppose to the earl of Shaftesbury, and upon the account he sent me word of it, by William Hetherington, who was then very intimate with the earl of Shaftesbury, to my knowledge; and William Hetherington came to me several times, and he precisely was my maintainer at that time, that is, to find me whatever I wanted, and provide me my lodging, and carry me to some place where accomodation might be more better for me. Upon this account one time the earl of Shaftesbury sent to me desiring that I would wait upon him at his own house. I came to him, and there in the gallery of his own house, walking very slowly, he told me what I gave in of the plot in general was very good and sufficient, but as to the queen and the duke of York, that I should speak more home and positive against them; at least, that I might be a corroboration to others in what they swore against them. This was all at that present time, that the earl of Shaftesbury spake to me, and he desired me to go home to his lodgings. With that I went home, and within a month, it may be, or thereabouts, he sent for me again, by the same William Hetherington, and William Hetherington told me, that the earl of Shaftesbury would speak with me. So I came and waited upon his lordship at his own house, and says he, Mr. Dennis, I understand that you are a clergyman. Yes, my lord, said I. And, says he, I would advise you to take a black gown, and I will prefer you to a benefice, till such time as this business is over; and, says he, at the end of this business I will not fail to prefer you to a better, and in the mean time I would advise you to take a black gown; and this was a little as I remember, after the parliament was dissolved at Oxford; and he sent a gentleman out of his own house along with me, to a Doctor of Divinity living hard by Lincoln's-Inn-Fields, Dr. Burnet by name, as I remember, and the gentleman acquainted the Doctor what I was, and about what occasion I came there; so the Doctor indeed discoursed with me very familiarly, and rendered thanks to the earl for recommending me into his conversation rather than another's. What discourse we had then was nothing to the matter, it was about matters of conscience and re-

ligion. But Mr. Colledge, that was the Joiner here in town, and executed afterwards, being familiar with me, brought me to one Mr. Ferguson a minister, as I suppose of the Presbyterian form, for he goes in their garb as near as I can tell, and Mr. Ferguson at our first meeting was in Richard's coffee-house, in an upper room one pair of stairs, and in some company; and Colledge going to him brought him aside, and spake to him concerning me, and he came to me apart, and discoursed with me: From whence he brought me to a bookseller's shop, and bought for me the articles of the church of England, and in all these discourses there was a hand, as Colledge told me, of the earl of Shaftesbury, who did procure him, and sent to Dr. Burnet to bring me that way. I do not deny neither, that I had an inclination before I left Ireland, and when I was in Spain, and when I was in France, for to become a protestant, according to the laws and rules of the church of England. The force of what I have to say is this, The earl of Shaftesbury one day after all these things were past, and after the parliament were dissolved at Oxford, discoursing with me in his own house, major Manly being in the same room then, who lives beyond Tower-hill, he asked me what was the present occasion I came to him there? And it was pretty early in the morning, and the earl had a barber to trim him in his room. I told him my occasion was then, that I was something low in money, that I did a little want money at that time, and did not know to whom to speak for any thing but his lordship, and said, I came to tell you so. Well, said he, Mr. Dennis, I have appointed Mr. Rowse, John Rowse, whom you know, for to give you and maintain you in money; go to him especially once a week, and he will give you money, and said he, Mr. Dennis, what is the number of your name in the country, as near as you can tell, how many are you? My lord, said I, to tell you exactly what number they be of, I cannot at present, but within a little time I may tell you. I believe really there may be upon the matter 3 or 400 able men of my name, in the county where I was born. Says the earl of Shaftesbury, Mr Dennis, I would very willingly have you advise those of your name, and those of your friends for to be in readiness, whenever occasion shall serve, and to stand by, if occasion should be, for to assist the commonwealth of England; for we do really intend to have England under a commonwealth and no crown; and, says he, we intend to live as we see Holland does; that is, to have a commonwealth and to have no supreme head, particular man, says he, or king, nor owe obedience to a crown; and, says he, we will extirpate the king, and all his family as near as we can; and Mr. Dennis, says he, I do admire that your nation should be such fools as they are, for it is very certain that king James, queen Elizabeth, king Charles the first, says he, and the king that now is, does wrong you to very destruction; and, says he, if you had been under a commonwealth, the commonwealth would take more pity of your nation, and the gentry of your nation, than any of them do now, in this time wherein the king governs, and upon this I do count the Irish fools. This is all that I can say.

L. C. J. The king's counsel declare they will call no more witnesses, for they think they have called enough already, and there are several of them that do swear words that are treasonable in themselves, if you do desire to ask any of the witnesses any thing, you shall have them all called one by one.

Foreman. My lord, we will walk up again, and consider what questions to ask, and come again presently.

Mr. *Papillon.* It seems they will call no more witnesses than these.

L. C. J. Not against the earl of Shaftesbury, being you are charged only with that.

Mr. *Papillon.* It is so; my lord, but we pray we may be satisfied about the statute upon which the indictment is grounded, and that we may hear it read before we go up, because your lordship speaks of two different statutes, the 25th of Edward, and you mention the statute of the 13th of this king; your lordship in your discourse to the jury mentioned them both, we pray your lordship to acquaint us upon what statute it is grounded, whether upon both or one of them.

L. C. J. Look ye, gentlemen, this is grounded upon the statute of this king, though there is enough to find an indictment of treason upon the statute of the 25th of Edward the third. That which is treason within the statute of the 25th of Edward the third, is treason within this statute, so this is the more copious statute; for as I told you before, this statute has enlarged that of Edward the third in a great many particulars; and therefore, look ye, gentlemen, always consider this, when one statute contains the matter of another, and enlarges it, the indictment is always upon the last statute, that being the more copious statute: But you are to consider both.

L. C. J. North. The indictment is *contra formam statut'*, and it being *contra formam statut'*, it may be understood, *statutorum* or *statuti*, so that all statutes that may be the foundation of this indictment you may go upon.

Jury. We desire to know whether any of these witnesses stand indicted, or no?

L. C. J. Look you, gentlemen, don't talk of this, but consider with yourselves, an examination of proofs concerning the credibility of the witnesses is not properly before you at this time; for I must tell you, and inform you as to that, you are not to examine properly here concerning the credibility of the witnesses, that is not to be proved or controverted here before you, that is matter upon a trial by the petty jury, for there the king will be heard for to defend the credit of his witnesses, if there be any thing that can be objected against

them; it is proper for the prisoner to do that, you are only to see whether the statute be satisfied, in having matter that is treasonable, and having it witnessed by two men, by two witnesses, who are intended *prima facie* credible, unless you of your own knowledge know the contrary; for otherwise, you must consider what a disadvantage this would be in all such cases, if the credibility of the witnesses should be examined before the grand jury, where the king is not present, nor in a possibility of defending the credit of his witnesses; nor is the prisoner or the party indicted present, that is a proper objection when he comes upon his trial; for all men are intended credible, till there are objections against them, and till their credits come to be examined one side and the other.

Mr. *Papillon.* My lord, if your lordship thinks good, I will beg this; I desire your lordship's pardon, whether your lordship doth not think that we are within the compass of our own understanding and consciences to give our judgment?

L. C. J. Your own understanding and consciences, yes; but look ye, gentlemen——

Mr. *Papillon.* If we are not left to consider the credibility of the witnesses, we cannot satisfy our consciences.

L. C. J. Look ye, gentlemen, you are to go according to the evidence of the witnesses; you are to consider of the case according to the things alledged and proved, unless you know any thing yourselves: But if any of you know any thing of your own knowledge, that you ought to take into consideration, no doubt of it.

Jury. Very well, my lord.

L. C. J. The Grand Jury are to hear nothing, but the evidence against the prisoner; therefore for you to enter into proofs, or expect any here, concerning the credit of the witnesses, it is impossible for you to do justice at that rate.

The Jury withdrew, and the Court adjourned till three o'clock.

L. C. J. Let the witnesses be brought in one by one.

Foreman. We will first ask a question of Mr. Gwyn.

Foreman. Who put up the papers?

Gwyn. I put up the papers myself.

Foreman. Who went in with you?

Gwyn. None but my lord's servants, I think, were there: But, I put up the papers myself.

Foreman. Pray, Sir, whose hand writing is that paper of?

Gwyn. Indeed, Sir, I cannot tell.

Foreman. How did it come into my lord Shaftesbury's closet?

Gwyn. My lord, this is a strange question. Indeed, Sir, I cannot tell; all the papers that I found in that closet I put into that bag.

L. C. J. To satisfy the jury, was the paper in the closet before you came there?

Gwyn. My lord, it was certainly there, for there I found it. I do not know the particular paper, but all the papers in that bag were there.

L. C. J. From whom had you the key?

Gwyn. From my lord Shaftesbury.

Foreman. Do not you know, Sir, there was a discourse in the parliament of an Association?

Gwyn. Sir, I was not of the last parliament. Sir, I know nothing of it.

Foreman. You have not heard then, that there was such a thing in parliament concerning an Association?

Gwyn. I have heard of an Association talked of.

Foreman. Mr. Secretary, I would ask you some questions: If you did not know of a debate in parliament of an Association?

Secretary. I was not present at the debate; but there was a talk in town of an Association.

Foreman. Did not you hear of it in parliament?

Secretary. Indeed there was an answer to a message from the House of Commons that had something in it that did strongly imply an Association; but this particular Association I do not remember to have heard proposed.

Foreman. Do not you remember in the House of Commons, Sir, it was read upon occasion of that bill?

Secretary. I heard such a thing spoke of; but at the reading of it I was not present, to the best of my remembrance.

Foreman. What date, Sir, was the warrant for my lord Shaftesbury's commitment?

Secretary. I refer myself to the warrant, for that I do not know the date.

L. C. J. Mr. Secretary, you must speak about the time that it was.

Secretary. I was the man that had the honour to sign that warrant by which the Serjeant at Arms did apprehend my lord Shaftesbury, but what day of the month I do not remember; and therefore I refer myself, if you please, to the warrant, and to the Serjeant at Arms.

Foreman. What month was it?

Secretary. Sir.

Foreman. About what month?

Secretary. July.

Foreman. The beginning of July?

Secretary. Sir, I do not remember the day precisely; for I did not foresee that question would be asked me; but I refer myself to the warrant, and that is beyond all doubt.

Foreman. I suppose all these witnesses that are examined, were examined before the Committee?

Secretary. Sir, they were examined, and I was present at the examination.

Foreman. All of them?

Secretary. I do not know whether all of them; but I am sure I was at the examination of several of them.

Foreman. How many, Sir?

Secretary. I cannot tell truly how many.

Foreman. Call Mr. Booth.

Officer. He is not here, the tipstaff has him somewhere.

Foreman. Is that witness a prisoner?

L. C. J. Booth is a prisoner.

Foreman. Then call Mr. Turbervile.

Mr. *Papillon.* Is Mr. Turbervile there?

Officer. Here is Mr. Booth come now.

Mr. *Godfrey.* Put Turbervile out again.

Foreman. Mr. Booth, you told me, of a discourse that passed between the lord Shaftesbury and yourself, we desire to know where it was, and when?

Booth. It was in Thanet-house, Sir, where he lived, about a week or ten days before the parliament sat at Oxford.

Foreman. The precise time?

Booth. I cannot be more precise.

Foreman. Who introduced you?

Booth. I think one Mr. Wilson led me into the chamber.

Foreman. Who was present when the discourse was?

Booth. None but he and I, Sir.

L. C. J. If we have these noises, we will have every one of you put out of court.

Att. Gen. Richardson, Richardson, pray turn them all out; they are brought in on purpose.

Booth. It was not the first, second, nor third time that I had waited upon the lord of Shaftesbury.

Foreman. In what room was it that my lord spake those words to you?

Booth. It was in the room he usually sits in, on the left-hand as we came out of the long gallery, I think we passed through a room before it, wainscotted about, as I remember, and hung. I have been in that room with him four or five times, I am sure.

Foreman. After this discourse with you, how long was it before you spake of it to any body else?

Booth. Truly I think I did not publish this discourse that my lord and I had, from the time it was, till within this seven or eight weeks

Foreman. You were never examined before then as a witness?

Booth. No, Sir, I never was, nor no body will pretend it, I suppose.

Foreman. To whom, Sir, did you give your first information?

Booth. Sir, I sent my first information in writing to the lords in the council.

Foreman. By whose hand?

Booth. By the hand of Walter Banes.

Foreman. You had several discourses with him; had you easy admission, or was it with difficulty you came into his company?

Booth. I was admitted by the influence of captain Wilkinson at first, and ever after went with him, and had easy admittance and familiarity with him.

Foreman. Was he with you every time?

Booth. No, not every time; he was not this time with me.

Foreman. Did he talk to this purpose every time?

Booth. Something to this purpose he did talk every time, but not so fully; for I was first acquainted with this business of Oxford by captain Wilkinson, and I had a great desire to understand it from my lord's own mouth, because I would be satisfied in my lord's interest as well as his conduct.

Foreman. Pray, Sir, what education have you had?

Booth. I have had the education of a gentleman, an academical education.

Foreman. Were you ever in orders?

Booth. Yes.

Foreman. Do you own yourself to be in orders still?

Booth. How do you mean to be in orders? I tell you I was in orders; but I am not now beneficed.

Foreman. Do you officiate as a minister?

Booth. No.

Foreman. Were you ever an attorney's clerk?—*Booth.* Never.

Foreman. Or a justice's clerk?

Booth. Never, nor to no mortal.

Foreman. Were you ever indicted for felony?—*Booth.* No.

L. C. J. That is a question not to be asked by any juryman of any witness whatsoever: no man is bound to discover any thing of that nature, that is criminal, concerning himself.

Foreman. If it be pardoned, my lord, he may.

L. C. J. Pardoned or not pardoned, he is not bound to accuse himself, nor to fix a scandal on himself.

Booth. No, my lord, 'Nemo tenetur seipsum 'prodere.'

L. C. J. Sir, we must not suffer such questions; I will tell you the reason: it is proper for a prisoner that stands upon his justification to object it, but then the prisoner must prove it: it lies upon him to prove it.

Mr. *Papillon.* Mr. Booth, you told us of 30 men that were listed under captain Wilkinson, do you know any more of them?

Booth. I never directly conversed with any other.

Mr. *Papillon.* Did you know any more of them?

Booth. No, not directly I did not, but only by captain Wilkinson's information.

Mr. *Papillon.* How many stories was that room where you talked with my lord?

Booth. One pair of stairs, as I remember.

Mr *Godfrey.* Was it the right-hand as you came in?—*Booth.* I think so.

Mr. *Godfrey.* Was it the right-hand or the left?

Booth. I went into the long gallery first, and staid there about a quarter, or half an hour; and I remember very well I looked upon some maps that were there, to divert myself a while; and when I was called in, went out of the gallery on the left-hand, and went through another room before I came into my lord's room.

Foreman. Did you never hear my lord speak treason in any house but his own?

Booth. I never had occasion to hear this discourse from my lord, but in his own house: I never waited upon him in any other house.

Foreman. Was you never desired to be a witness against my lord Shaftesbury?

Booth. Not till I intimated something of it.

Foreman. Who was that to?

Booth. That was to Mr. Banes; I told you before so.

Foreman. And what then?

Booth. When he told me of this business with the Yorkshire attorney, Brownrig, I did say again, I did not know what my lord had done, as to any thing of Irishmen, but I was sure there was something as to Englishmen, as to that purpose.

Foreman. Did he propose any reward, or any thing of that nature?

Booth. Not a farthing; for I think he had no commission to do it.

Foreman. Are you acquainted with one Callaghan and Downing, two Irishmen?

Booth. No.

Mr. *Godfrey.* Were you never in their company?—*Booth.* Not that I know of.

Mr. *Godfrey.* Did you ever hear their names?

Booth. I do not know that I have.

Foreman. Were you in their company lately?

Booth. Not as I know of. I do not remember either their names, or their persons, nor do I know them from other men.

Foreman. Do you know one Mr. Shelden?

Booth. No.

Foreman. Do you know one Mr. Marriot?

Booth. No, Sir: I have heard of one Marriot that did belong to my lord duke of Norfolk.

Foreman. When were you in his company?

Booth. Never that I know of.

Foreman. Has nobody discoursed you from him?—*Booth.* No, nobody.

Foreman. Did you never hear of any witnesses he sent to his tenants?

Booth. I have heard from Banes about Brownrig, about Irish witnesses.

Mr. *Godfrey.* Did you never hear of any Irish witnesses sent down by Mr. Marriot to the isle of Ely?

L. C. J. We gave you all the liberty in the world, hoping you would ask pertinent questions, but these are trifles. I did not expect that any wise men would have asked these questions. Mr. Godfrey, was it to the purpose, whether Mr. Marriot sent any Irish witnesses to his tenant, or no? What is that to this business.

Foreman. My lord, I have it under the hand of the clerk of the council.

Booth. Pray, Sir, did any inform you that I had any correspondence with this man?

L. C. J. Nay, Sir, you must ask no questions.

Mr. *Godfrey.* Mr. Booth, do you go under no other name but Booth?

Booth. No, nor never did in my life.

Booth. My lord, I cannot go in safety here for the tumult.

L. C. J. Let officers secure him: Mr. Sheriff, look to him, that the man be secure and safe; I will require him at your hands else.

Sheriff *Pilkinton.* What should I do?

L. C. J. Send your officers to protect him, as becomes you, that he may be secured from the rabble here.

Mr. *Turbervile.*

Foreman. Mr. Turbervile, when you had this discourse with my lord Shaftesbury, who was present with you?

Turbervile. One of his servants; truly I cannot tell his name.

Foreman. Nobody else?

Turb. I know the name of none of his servants, but Mr. Sheppard; I cannot remember any body else.

Foreman. Did he carry you up to my lord?

Turb. It was he, I think, told me I might go in: I was in the dining-room.

Foreman. What time was this?

Turb. In the morning.

Foreman. What time was it when you had this discourse with my lord Shaftesbury?

Turb. It was in February.

Foreman. What time in February?

Turb. About the beginning; I cannot tell exactly to a day.

Foreman. How long was this before you communicated this to any body?

Turb. It was about the 4th of July.

Foreman. Then you concealed it from February to July: Who did you communicate it to first of all?

Turb. The first deposition I gave was to Mr. Secretary.

Foreman. Which Secretary?

Turb. Secretary Jenkins.

Foreman. Pray, what room was it you had this discourse in?

Turb. Sir, it was the room at the upper end of the dining-room; I think they call it the dining room; at the upper end of the room, and turns on the left-hand, where he lay.

Foreman. Did you meet with no body about the beginning of July, after my lord's commitment, and tell them, when you were challenged and told you were to be a witness against him, as you were alive you knew no such thing?

Att. Gen. My lord, this is not to be allowed: This is private instructions which the jury are not to take.

Foreman. No, Sir, it is not private instructions. Did you not speak such words to William Herbert?

L. C. J. Have you had any information concerning this to Mr. Herbert?

Foreman. My lord, I have, a long time ago. My lord, such a person did tell me so and so, and set down the day; and he then said he was very angry with him for it.

L. C. J. Look ye, gentlemen, what discourse you take up at random in every coffee-house, is that fit to be brought in when treason is in question against the king's life? Are these coffee-house discourses, do you think, ground enough for you to cavil at persons, because you have heard this discourse in a coffee-house?

Foreman. My lord, I never was in a coffee-house in my life with Mr. Herbert; but he declared this to me some months ago.

L. C. J. And you think this is ground enough for you against him?

Mr. *Papillon.* My lord, we only ask this question, Whether he hath not contradicted this, or said the contrary to any body else?

Turb. I do not remember that ever I spake one word to Mr. Herbert in my life; and I can give you one reason: For I was discarded by all people of my lord's interest at that time? And if I had given under my hand that I had known nothing against him, I believe I might have been in their favour as much as before.

Mr. *Papillon.* Were not you one that petitioned to the common-council in London?

Turb. I did, Sir.

Mr. *Papillon.* And did not you declare then, that you were tempted to witness against your conscience?

Turb. I believe I never read the petition: It was drawn by the order of Mr. Colledge, by a man that lives about Guildhall; by a scrivener about Guildhall; and I signed that petition, but never read it, nor knew what was in it.

L. C. J. Mr. Richardson, any you officers; watch by those men that make a noise, and bring me in one to make an example.

Turb. My lord, I go in danger of my life, for the people threaten to stone me to death, and I cannot go safe to my lodging.

Mr. *Papillon.* What was your design in signing that petition? What did you look for?

Turb. The design was, that the city should take care of us.

Mr. *Papillon.* Were you in a poor condition?

Turb. Truly I was not very poor, though I was not over full of money.

Mr. *Papillon.* It is a strange thing that you should petition for relief, if you were not in want.

Turb. We were told by some members of the House of Commons, that there was a vote in the House of Commons ready to pass, that the city should advance money for the support of the witnesses, and if we would petition that they would answer the design of the parliament.

Mr. *Papillon.* What members were they?

Turb. It was a member of the House of Commons that told me so, I will assure you; two of them.

Mr. *Papillon.* Did never any body move you, or desire you to be a witness in this case against my lord Shaftesbury?

Turb. Nobody in my life. When I came to speak the truth of what I knew, I did it voluntarily.

Mr. *Papillon.* You did it voluntarily?

Turb. I did, I will assure you.

Mr. *Papillon.* Do you know any thing more than what you have said here?

Turb. No, not one tittle.

Mr. *Papillon.* Mr. Turbervile. I desire to be satisfied in one thing, whether my lord Shaftesbury was committed before or after your information?

Turb. Truly, Sir, I cannot tell positively, as to that point; but I believe it was before; I cannot tell.

Mr. *Papillon.* Did you hear my lord speak these words in any other room or place?

Turb. No, indeed, I did not.

Mr. *Papillon.* It was about the 4th of July, you say, your depositions were taken?

Turb. About that time; I suppose the 4th of July—I hope your lordship will take care that we be not knocked on the head.

L. C. J. That we give in charge to Mr. Sheriff; and see you do take care of the king's witnesses at your peril. It is a reflection, not only upon the government of the city to suffer these disorders, but upon the whole kingdom; therefore, Mr. Sheriff, look the witnesses come by no hurt.

Mr. *John Smith.*

Mr. *Papillon.* Mr. Smith, the jury ask you a question, whether or no you did not use to go by the name of Barry?

Smith. Sir, what names I have gone by is not pertinent to this purpose; I tell you I have gone by several names, as all popish priests do.

Mr. *Papillon.* Did you never go by the name of Barry?

Smith. It may be I might; I have gone by several names, as all popish priests do.

L. C. J. Did you ever go by the name of Barry?

Smith. I did, my lord; it is usual for popish priests so to do.

Mr. *Papillon.* What religion are you of, Mr. Smith?

Smith. I am a Protestant, Sir.

Mr. *Papillon.* How long have you been a Protestant?—*Smith.* Many years.

Mr. *Papillon.* When were you first converted?—*Smith.* First converted?

Mr. *Papillon.* Ay, to the Protestant religion: you say you have been one many years?

Smith. I have been a Protestant, and was perverted to the popish religion, and afterwards became a Protestant again.

L. C. J. Bring in one of those men that make the noise. Cannot you bring in one of them?

Mr. *Papillon.* When did you receive the Sacrament?

Smith. I believe not above three months ago, as the rector of Bow Church will inform you: I have it under the church-wardens hands in other places in London.

Mr. *Papillon.* Have you been desired to be a witness, or did you do it voluntarily?

Smith. Never desired, I declare it; I did it voluntarily myself.

Mr. *Papillon.* When did you give in your evidence first?

Smith. Truly I cannot exactly tell when I gave it in; I did not keep an account of it.

Mr. *Papillon.* What month?

Smith. I cannot tell.

Mr. *Papillon.* Was it before my lord was committed, or after?

Smith. I believe it might be a little after. Whether it was before or after, I cannot exactly tell.

Mr. *Papillon.* To whom did you give your information?

Smith. My lord, they commanded the people to stone us to death.

L. C. J. Who did?

Smith. Several persons: and when we were at the tavern, Dr. Oates's man came out and gave the rabble a bottle of wine, and bid them knock us down.

L. C. J. Do you know what the man's name is?

Dr *Oates.* I know nothing of it, my lord.

L. C. J. What is your man's name?

Oates. I keep half a dozen men, my lord.

L. C. J. I hope you keep no men to affront the king's witnesses?

Oates. No, my lord, it is a mistake, I know nothing of it; we went thither to refresh ourselves.

Mr. *Papillon.* Mr. Smith, who did you give your information to?

Smith. What information?

Mr. *Papillon.* The first information.

Smith. My lord, am I to answer to these questions?

L. C. J. Aye, answer them; tell them.

Smith. My lord, the information I gave in to secretary Jenkins; but I gave notice long before of what I intended to do to other persons.

Mr. *Papillon.* When did you hear these words; speak to the time exactly?

Smith. Which words do you ask?

Mr. *Papillon.* Those you mentioned even now.

Smith. Sir, if you please, I know you take all in short-hand; if you ask me what words, I will tell you; for if I do not express myself in the same words as before, you will take hold of me.

L. C. J. I will tell you this; this may be an ill question, for he told you, he had discoursed my lord Shaftesbury at a great many times, and that at some times he said these words, at other times other words, and for you to catch him upon a question, it doth not shew a fair inclination.

Mr. *Papillon.* My lord, under your lordship's favour, we only desire to discover the truth, we are not for catches.

L. C. J. Ask him then, which of the words you would have him declare the time of, and he will tell you?

Mr. *Papillon.* Let him speak his own words, it was about the time when Hetherington went thither.

Smith. Truly, I will answer that as punctually as I can; the month or day I cannot well tell, but the person that came from me was major Manly; and he came to Bethel's club; what time that was, I cannot say; but if you please to inform yourselves of those gentlemen that I name, I believe they will tell you Mr. Bethel was there present, and knew very well I went to my lord Shaftesbury that night, and returned to the club again.

Mr. *Godfrey.* Was it in the evening or the morning?

Smith. Mr. Godfrey, clubs are usually at night, I suppose; you know that was.

Mr. *Papillon.* Where did you see my lord Shaftesbury?

Smith. It was in his dining-room.

Mr. *Papillon.* Did you hear these words in any other place, or at any other time, or any treasonable words against the king?

L. C. J. Look you, gentlemen, he told you of several other words at several other times.

Mr. *Papillon.* But he said all at his house, my lord.

L. C. J. Ay, but at several times.

Smith. I know, Mr. Attorney, what the gentlemen would be at very well.

L. C. J. Answer them whether you did hear him speak any words that you conceive treasonable at any other time?

Smith. I did not, indeed.

Mr. *Papillon.* In another place?

Smith. I do say I did not.

Mr. *Papillon.* Did you petition to the common council?—*Smith.* No, Sir, I never did.

Mr. *Papillon.* Are you an Englishman or an Irishman?

Smith. That is no matter, no more than if I were a Frenchman or a Dutchman.

L. C. J. Give them an account whether you are an Englishman or an Irishman?

Smith. My lord, I beg your lordship's pardon for that; if I were an Irishman, whether thereupon my evidence would be prejudiced.

L. C. J. Look you, Mr. Smith, I do hope the gentlemen of the jury have more discretion among them all, than to think that an Irishman is not a good witness, I hope they are not such persons.

Smith. My lord, if you please; whilst I was in the city amongst them, I never petitioned to the city: I never had a farthing from them, nor ever spake to any for it: I never had any occasion for it; but if I had, it is probable I have enough in England, and other places, without being beholden to your common-council.

L. C. J. Will you ask him any more questions?—*Jury.* No, no.

Mr. *Papillon.* Is Mr. Smith gone? I would ask him one word: we would fain know what allowance you have, or what you receive, if you have any allowance from any body?

Smith. From whom?

Mr. *Papillon.* Nay, I know not from whom: I ask whether you have any from any body?

L. C. J. Look ye, gentlemen, is that a question that is pertinent? I wonder you will go to such questions: we allowed you to ask questions yourselves, because we look upon you as men of reason.

Mr. *Papillon.* My lord, I do not know but it may be a proper question to ask him, if he have any allowance from any man upon this account?

L. C. J. Upon what account?

Mr. *Papillon.* Upon this account: If he says he has none, it is an answer.

L. C. J. Do you intend your question, whether he is bribed to give evidence? If you mean so, speak plain.

Mr. *Papillon.* We ask if he have any allowance?

Smith. You do not ask me how the 6 or 700*l.* was made up.

L. C. J. You that are upon your oaths should have a care what you do.

Bryan Haynes.

Mr. *Papillon.* Mr. Haynes, when did you give in your information upon this matter?

Haynes. Against the earl of Shaftesbury, Sir?

Mr. *Papillon.* Ay.

Haynes. The day that I was taken by the messenger.

Mr. *Papillon.* That was before my lord was committed, was it not?

Haynes. Yes, Sir, it was before my lord was committed.

Mr. *Papillon.* Did you ever make any other information to a justice of the peace?

Haynes. Not of my lord of Shaftesbury.

Mr. *Papillon.* Nor touching this matter?

Haynes. No, not any information upon oath: I may have discoursed with a justice of the peace.

Mr. *Papillon.* Did not you give in an information of a design against the earl of Shaftesbury?

Haynes. To none but Secretary Jenkins.

Mr. *Papillon.* You understand the question; whether you did give no information of a design against my lord Shaftesbury to some justice of the peace?

Haynes. No, no, to none but Mr. Secretary Jenkins.

L. C. J You do not observe his question: did you ever give to any justice any information of a design against my lord Shaftesbury?

Haynes. Yes, my lord, I did, to sir George Treby; I made affidavit before him.

Mr. *Papillon.* When was that?

Haynes. I think it was in March last.

Mr. *Papillon.* What was that design against my lord Shaftesbury?

Haynes. The design was what Mr. Fitzgerald told me; he told me he gave under his hand to the king, that the earl of Shaftesbury did resolve to set the crown upon his own head, or otherwise to turn the kingdom into a commonwealth.

Mr. *Papillon.* Fitz-gerald told you this, and so you made affidavit of it?

Haynes. Yes, before sir George Treby.

Mr. *Papillon.* What time?

Haynes. It was before the parliament met at Oxford

Mr. *Papillon.* So you say the words were: when were the words spoken that you mentioned?

Haynes. The words against my lord?

Mr. *Papillon.* Ay.

Haynes. He spake them to me a little before I made affidavit: I cannot tell positively the time?

Mr. *Papillon.* That was before his commitment.

Haynes. Yes, yes, my lord was committed in June last; this affidavit was made in March last, before the Recorder of London.

L. C. J. North. When you ask him about the information of the design against my lord Shaftesbury, he says that was in March last; and when you ask him about the evidence he gives now, that was the same day he was apprehended by the messenger.

Mr. *Papillon.* About June you say it was, that you say you gave in the information against my lord Shaftesbury?

Haynes. The information I made against the lord Shaftesbury was in June last, the 28th, as I take it, of June last.

Mr. *Papillon.* Where was it you had this discourse?

Haynes. I had several conferences with my lord.

Mr. *Papillon.* Did he every time say the same?

Haynes. The last time I spake with him was in Ironmonger-Lane: For Whitaker told me he would speak with me, and he would fain have me explain myself what I did mean by the tall man I mentioned in the Narrative; and I went to the house, and they told me he was there, and I sent up a note, and he desired me to come up; but I sent word I did not care to come up; because I would not be known; and so he sent me word to meet him after dinner; and when I came, my name is Haynes, my lord, said I; and I led his lordship by the hand and went in there. I had, I believe, a whole hour's discourse with him: and pray, my lord, said I, among other questions, what religion is the king of? Truly, says he, Mr. Haynes, he hath no more religion than an horse; for, saith he, they say, Sir, he was inclined to popery when he came first to England; says he, he had a tincture of Popery, and was much inclined that way; but since he was degenerated from all the principles of christianity, for he is just like a perfect beast.

Mr. *Papillon.* This, you say, was in Ironmonger-Lane.

Haynes. Ay, Sir, at a pastry-cook's shop.

Mr. *Papillon.* What time was it?

Haynes. After dinner in the afternoon.

Mr. *Papillon.* In June, or when?

Haynes. I cannot tell what time positively; it was about the time of the Trial of Fitzharris.

Mr. *Papillon.* Was it the same time he spake about the duke of Buckingham?

Haynes. No, no.

Mr. *Papillon.* When was that?

Haynes. That was when I was with him at his own house, and desired him not to expose me.

Mr. *Papillon.* What time?

Haynes. I cannot tell, Sir, for I never thought I should be called to an account for it, and I cannot keep an almanack in my head; and I desired them not to expose me to the king's fury, for I heard the king was displeased with me. No, says he, you are mistaken, this is the best opportunity we can have; and if he will not give you a pardon, we will raise the whole kingdom against him in arms; and then he makes himself the master and author of the Plot, and consequently he must expect to be ruined, unless he grant you a pardon.

Mr. *Papillon.* Did you ever hear any other words than what you have now testifie

Haynes. Yes, Sir, for I discoursed with l in Ironmonger-lane a great while, and told l that our only and best way to have our c of the king, was to raise a rebellion in Irela and that I had relations and friends, and co get discontented persons enough, and his lo ship would do the work here.

Mr. *Papillon.* What, did you propound rebellion in Ireland?

Haynes. I offered to go beyond sea, and that now was the best time to raise a rebellion in Ireland; and he said that was not the bes way, for they had other means to take, and so the discourse was waved.

Mr. *Papillon.* And is that all?

Haynes. That is all I remember now.

Mr. *Papillon.* Do you know of any othe place or time?

Haynes. I was with him at his house.

Mr. *Papillon.* Were you ever a witness fo my lady Wyndham or against her,

Haynes. No, sir; but she arrested me, be cause I said I lay with her.

John Macnamarra.

Mr. *Papillon.* Mr. Macnamarra, when wa it you had this discourse with my lord Shaftes bury, what is the time, as near as you remem ber?

Mac. In March and April last, Sir.

Mr. *Papillon.* Twice then, you do speak of?

Mac. Yes, Sir.

Mr. *Papillon.* Which is that that was in April?

Mac. That was the last; the last discourse was in April.

Mr. *Papillon.* To what purpose was that?

Mac. My lord said the king deserved to be deposed as much as king Richard the second did.

Mr. *Papillon.* In April you say?

Mac. In April.

Mr. *Papillon.* When did you give the information of this?

Mac. I cannot exactly tell Sir.

Mr. *Papillon.* Repeat what you said.

Mac. That the king deserved to be deposed as much as king Richard the second, and that he took the dutchess of Mazarine's advice in every particular, which was the worst of womankind.

Mr. *Papillon.* What time in April was this?

Mac. It was in the beginning of April.

Mr. *Papillon.* Where?

Mac. In his own house.

Mr. *Papillon.* Who was present?

Mac. There was Mr. Ivy by.

Mr. *Papillon.* When did you make information of this?

Mac. I cannot tell, it was a good while ago.

Mr. *Papillon.* Was it before his commitment?

Mac. Yes, Sir, it was.

Mr. *Papillon.* To whom did you give information?

Mac. To the secretary of state, Sir.

Mr. *Papillon.* Which of them?

Mac. Mr. Secretary Jenkins, Sir.

Mr. *Papillon.* Did not you petition the common-council, Sir, for relief?

Mac. Yes, Sir, I signed a petition that was drawn up, but I did not see it till it was brought me to sign.

Mr. *Papillon.* Did you read it?

Mac. No, I never read it neither.

Mr. *Papillon.* Nor don't know what is in it?

Mac. No, nor don't know the contents of it.

Mr. *Papillon.* My lord, in that petition they say, they were tempted to swear against their consciences, and, that some of the witnesses had made shipwreck of their consciences; we ask them now, and they say, they do not know what was in the petition: If we should ask them who tempted them, and who those witnesses were, that made shipwreck of their consciences; it would signify nothing; for since they do not know what was in the petition, it is in vain to ask them any more.

Mac. For my part, my lord, I never saw it till it was brought to me to be signed, and do not know the contents of it: But I heard Mr. Colledge, that was executed at Oxford, was concerned in promoting the petition, by my lord Shaftesbury's advice.

Dennis Macnamarra.

Mr. *Papillon.* Dennis Macnamarra, tell us how you were introduced to my lord Shaftesbury when you had this discourse?

D. Mac. By my brother, Sir.

Mr. *Papillon.* What, he that was here last?

D. Mac. Yes, Sir.

Mr. *Papillon.* He introduced you?

D. Mac. Yes, Sir.

Mr. *Papillon.* When was it?

D. Mac. It was in March last; the latter end of March or the beginning of April.

Mr. *Papillon.* Cannot you tell which of the months?

D. Mac. No, I cannot be positive in it.

Mr. *Papillon.* Who was by?

D. Mac. There was Mr. Ivy.

Mr. *Papillon.* Nobody but Mr. Ivy?

D. Mac. Nobody but Mr. Ivy and my brother.

Mr. *Papillon.* Where was it?

D. Mac. It was in his own dining room.

Mr. *Papillon.* Were none of his servants in the room?—*D. Mac.* Not that I know of.

Mr. *Papillon.* Are you sure none of his servants were there?—*D. Mac.* Not that I know of.

Mr. *Papillon.* Did you hear any thing else at any other time?—*D. Mac.* No.

Mr. *Papillon.* Nor in any other place?

D. Mac. No

Mr. *Papillon.* When did you give in this information?

D. Mac. I gave it in a good while ago; Sir, I cannot be positive.

Mr. *Papillon.* Was it before my lord was committed?—*D. Mac.* Yes a great while.

Mr. *Papillon.* To whom did you give it?

D. Mac. I gave it to the secretary of state.

Jury. Cannot you remember how long it was before?

D. Mac. No, I cannot at the present.

Mr. *Papillon.* Which of the secretaries?

D. Mac. Secretary Jenkins.

Mr. *Papillon.* My lord, I only propose, whether we may not ask whether he had not a pardon? For it would be satisfaction to us, for some reason.

L. C. J. North. Look you here, gentlemen, when the person makes exceptions to the witnesses, then it is proper, but here are no exceptions to the witnesses.

Mr. *Papillon.* My lord, we make no exceptions, but we must satisfy our consciences, my lord, that we must do, and that is very much, as we find the credibility of the witnesses.

L. C. J. North. Gentlemen, what do you mean that he should have a pardon for?

Mr. *Papillon.* For crimes.

L. C. J. North. You must not ask him to accuse himself.

Mr. *Papillon.* If he hath a pardon he is *in statu quo*: suppose, my lord, some of them have been guilty of poisoning, some of felony, some of robbing on the highway, we do but ask them if they be pardoned?

L. C. J. North. A man must not be impeached but where he may answer for it.

Mr. *Papillon.* My lord, if you do not give us leave, we must forbear then.

L. C. J. North. I do not think it proper to ask.

Edward Ivy.

Mr. *Papillon.* The discourse that you had with my lord Shaftesbury, when was it, at what time?

Ivy. It was a little after the sitting of the parliament at Oxford.

Mr. *Papillon.* Was it more times than one?

Ivy. Yes, Sir, several times.

Mr. *Papillon.* All the same discourse?

Ivy. No, not the same discourse.

Mr. *Papillon.* The words that you spoke of, when was that?

Ivy. That was after the sitting of the parliament at Oxford.

Mr. *Papillon.* About what time was it?

Ivy. It was about the latter end of March or the beginning of April.

Mr. *Papillon.* When did you make information of this?

Ivy. I cannot be positive in that neither.

Mr. *Papillon.* Before my Lord's commitment or after?—*Ivy.* A while before.

Mr. *Papillon.* To whom did you give it?

Ivy. To the secretary of state.

Foreman. Who was present when my lord Shaftesbury spake those words?

Ivy. Both the Macnamarras, as I remember.

Foreman. Who else?

Ivy. Truly, I do not remember any else privy to our discourse; neither am I certain, that both the Macnamarras were there; one of them was there I am sure of it.

Foreman. What was the reason you concealed this information so long? Had you no inducement to make it at that time? How came you to do it then and not before? What was the reason? You say it was the latter end of April and May; my lord was not committed for a good while after; here was two months time?

Ivy. I am not certain how long a time it was before, but I made it as soon as I could.

Foreman. I ask you whether you know any thing either of words or treasonable actions, or any thing of my lord Shaftesbury, spoken or acted at any other time or place?

Ivy. No, I have declared what I know as to the particulars.

Bernard Dennis.

Mr. *Papillon.* Mr. Dennis, in the morning you told me something about the discourse you had with my lord Shaftesbury, tell me when it was?

Dennis. It was in April, four or five days after the parliament was dissolved at Oxford.

Mr. *Papillon.* In the beginning?

Dennis. In March, after the parliament was dissolved at Oxford.

Mr. *Papillon.* It was in March, and where?

Dennis. In his own house, here in this town, four or five days after the parliament was dissolved at Oxford, immediately after he came home, I do not think he was at home three days before.

Mr. *Papillon.* Who was present with you then?

Dennis. There was in the room Mr. Sheppard, his gentleman.

Mr. *Papillon.* Who else?

Dennis. Some of his servants, his pages I suppose, but whether they did hear this or no, I cannot tell.

Mr. *Papillon.* Did my lord whisper it, or speak out?

Dennis. My lord is not a man of an high voice, but of mediocrite voice.

Mr. *Papillon.* Did he whisper it in your ear?

Dennis. No, I was just by him.

Mr. *Papillon.* Who was in the room besides?—*Dennis.* Nobody, only his servants.

Mr. *Papillon.* When did you make this information?

Dennis. I made it in the month of June.

Mr. *Papillon.* In the month of June?

Dennis. Yes, Sir.

Mr. *Papillon.* Before my lord was committed, or after?—*Dennis.* Before.

Mr. *Papillon.* Who did you make it to?

Dennis. I made my information to the secretary of state.

Mr. *Papillon.* Which of them?

Dennis. Secretary Jenkins.

Mr. *Papillon.* Why did you conceal it so long?

Dennis. Because I was in the city so long.

Mr. *Papillon.* Did you ever go about to muster your 400 men you had in Ireland, I ask you whether you did or no?

Dennis. Upon my word I did advise some of them to be ready.

Mr. *Papillon.* And did you provide them with arms?

Dennis. Not I, Sir, I was not able to do it.

Mr. *Papillon.* What religion are you of?

Dennis. I am a protestant.

Mr. *Papillon.* How long have you been a protestant?

Dennis. I have been a protestant since February last. And this I must confess, that when I was in Spain and France, my resolution was to be a protestant.

Mr. *Godfrey.* Mr. Dennis, pray who was in the room when you were there?

Dennis. The earl of Shaftesbury, Sir.

Mr. *Godfrey.* Who else?

Dennis. Mr. Sheppard.

Mr. *Godfrey.* Who else?

Dennis. I cannot name them.

L. C. J. Mr. Godfrey, when another man asks a question, you should consider what is said, and not ask the same question over and over again.

Mr. *Papillon.* In what place in his house?

Dennis. In his own chamber, in the great chamber, I do not know whether you call it the hall or the parlour.

Mr. *Papillon.* Was it above stairs?

Dennis. Yes, it was above stairs, my lord does not use to speak with any below stairs.

Mr. *Papillon.* Is this all that you know? Have you heard my lord say any treasonable words in any other place, or at any other time?

Dennis. In the long gallery at his own house, at another time.

Mr. *Pap.* Why did not you say so before?

Dennis. I did say so before. In the long gallery he told me he would have a commonwealth in England, and extirpate the crown of England and the king of England.

Mr. *Pap.* Is that all? Speak all your knowledge.

Dennis. He said, we should all Irishmen conform ourselves to a commonwealth, and by that we should get our estates again,

Mr. *Papillon.* I ask you if this is all you have to say?

L. C. J. Do you remember any more?

Mr. *Papillon.* More than you said in the morning?

Dennis. He said he would extirpate the king, and make England a commonwealth, and that we were fools and silly folks that did not comply ourselves to their factious party, and that we should get our estates, and that he would get me a black gown and benefice in the mean time; and when all things were done, he would prefer me to a better; and not only myself, but all that were of my name, and would stick to me.

Mr. *Pap.* Is this all?—*Dennis.* This is all.

Mr. *Pap.* Then you have nothing more?

Dennis. I never spake to him but in his own house.

Mr. *Papillon.* All your kindred are papists, are not they?

Dennis. No, Sir, I cannot say so, but most of them are.

L. C. J. (North.) Who can say that? That question nobody can answer.

L. C. J. Look ye, gentlemen, now you have asked these questions, you had best go and consider what evidence is delivered, and weigh well all those things that have been said to you; and you must consider your duty; you are to enquire here, whether it be fitting for the king to call my lord Shaftesbury to question upon this account of treasonable words.

Mr. *Pap.* My lord, we desire, before we go, that either the law may be read, or we may have the statute book up with us.

L. C. J. The statute book was never denied [qy. desired] but you shall have the law read here: First the statute of the 25th of Edward the 3d, and then this last statute.

L. C. J. (North.) I would say one thing because I observed that some of you asked the question, whether the parliament did not debate about an Association? Whether it related to that paper or no, I am not certain; I hope you will consider that paper well; for my part, I must needs say for myself, I heard of it, but I never heard it read before, and never heard the contents of it; but it seems to me to shew what those officers were to do, for the ends of this Association; and one of those ends, as I remember (gentlemen, I refer you to the paper, and hope you will consider it, you are men of understanding) I thought that one of those ends was to destroy the mercenary forces in and about the cities of London and Westminster, and that the government was to be by the major part of the members of parliament in the sitting of parliament, not with the king, but the major part of the members of parliament. Gentlemen, I may mistake, for I profess I speak only out of memory; but it seems to me to be of [illegible] and there is great matter to

it, it being found under lock and key in his study: But I suppose my lord Shaftesbury may give an account of it, but there is great presumption upon it; it doth not import to be an Association by act of parliament.

Att. Gen. When the parliament was prorogued or dissolved, then the major part of the members in each county engage themselves to follow their command and obey their order.

L. C. J. (North.) Gentlemen, I hope you will consider your oaths, and give all things their due weight.

L. C. J. Will you have the statute read?

Jury. We will read it above.

The Jury withdrew to consider the evidence, and returned the bill *Ignoramus*: Upon which the people fell a hollowing and shouting.*

Att. Gen. My lord, let it be recorded this hollowing and hooping in a court of justice.

* Upon the acquittal of Wm. Stone, who was tried for High Treason, January 29, 1796, (See the Case, *post.*), some persons in court clapped their hands and huzzaed. Whereupon one Richard Thompson, who had been observed by lord Kenyon, C. J. to take part in this irregular, indecorous, and contemptuous conduct, was by him fined in the sum of 20*l.* and compelled forthwith to pay the same. [See, too, 1 Blackst. Comm. 126.] It may be noticed, that in the cases of lord Shaftesbury now before us, of Thompson, Pain, and Farewell, A. D. 1682; and of the Seven Bishops, A. D. 1688, *infra*, no punishment was inflicted on the persons who violated the decorum of the court, though in the first of these cases Dalrymple (Memoirs, part 1, book 1, p. 4) tells us, on the authority, as he says, of a letter in the Paper Office from sir Leoline Jenkins to the prince of Orange, of date 25th November, 1681: "The acclamations in court for Shaftesbury's acquittal lasted an hour;" and upon the last occasion, Reresby tells us, that "Westminster-hall, the Palace-yards, and all the streets about, were thronged with an infinite people, whose loud shouts and joyful acclamations, upon hearing the bishops were acquitted, were a very rebellion in noise, though very far from so, either in fact or intention." And Henry, the second earl of Clarendon says, "there was a most wonderful shout, that one would have thought the hall had cracked."

"The sheriff of every county is bound to return to every session of the peace, and every commission of oyer and Terminer, and of general gaol delivery, twenty four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded them. They ought to be freeholders, but to what amount is uncertain: which seems to be *casus omissus*, and as proper to be supplied by the legislature as the qualifications of the petit jury; which were formerly equally vague and uncertain, but are now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel, are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty three; that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described, so early as the laws of Ethelred. 'Exeant seniores duodecim thani, et praefectus 'cum eis, et jurent super sanctuarium quod 'eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxium celare.' In the time of king Richard the first (according to Hoveden) the process of electing the grand jury, ordained by that prince, was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient; but the traces of this institution still remain, in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury however ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine, that might be applied to very oppressive purposes." 4 Blackst. Comm. 302.

See also 4 Blackst. Comm. 126, and Mr. Christian's Note. But query, whether a grand jury should not require for the finding of an Indictment such proofs as if uncontradicted would satisfy them that he was guilty (See the Stat. 5 Eliz. c. 1.); and this thus not merely for the sake of the person accused, but also for the sake of public justice, which may be defeated by proceeding to trial before sufficient evidence is collected. This case of lord Shaftesbury gave occasion for the publication of a spirited and learned tract, intitled "The Security of Englishmen's Lives, or the Trust, Power and Duty of the Grand Juries of England explained according to the fundamentals of the English government, and the Declarations of the same made in Parliament by many statutes."

In 1 Fountainhall's Decisions, 188, (Case of James Douglas, July 11th, 1682,) is a passage

in which notice is taken of the London 'Ignoramus Juries.' It seems to shew that these *Ignoramus* findings had very extensive influence, and in other respects it may be found to be neither unamusing nor uninstructive:

"The king's Advocate finding he had mistaken himself, raged and swore and railed at sir David Thoirs; and studied to irritate the criminal lords against him, as if he had harangued to reproach the court and their interlocutor; and denied that all probation needed to be in presence of the assize, so as to be re-iterated; and instanced, where one is persued for forging false writes, all that is produced to the jury is only the lords of session their decreet of improbation, whereon, without leading the witnesses which were the ground of that decreet, the assize instantly finds him guilty, though there be no more there but the clerk's assertion; and he threatened the assizers with an assize of error, if they became like the seditious 'Ignoramus Juries' at London; and that he would infallibly prosecute them, and get them severely punished, as he had done lately with some cleansing assizers of Somervil of Urats, in 1681; and if there were any need, 'ex superabundanti,' he would yet lead the clerk of the court and his servant John Anderson, and the lords on the bench, as witnesses, that they all heard the pannel confess the fact, and saw him subscribe that paper; and it was yet time, seeing 'in criminalibus nunquam concluditur.' —But the maxim is 'nunquam contra reum,' and so is in favours of the pannel, that his defences are receivable at any time. If he had led that probation in due time, the assize would have been rendered inexcusable, and would have had no pretence whereupon to have cleansed him. But this being omitted; when they inclose, the most of them were merchants and writers in Edinburgh: They considered with themselves, that though the evidences of his burning that chamber were great, so that few doubted of its truth, yet seeing he was to lay down his life on another account, viz. for his murder, (so he was not to escape,) and that all the design here was a covetous inhancing of his estate, and defrauding his poor sisters thereof; and that they by the Advocate's oversight had a latitude to find it not sufficiently proven to them; they upon thir narrow grounds do by their verdict cleanse and assoilzie him from the whole contents of the libel of treason. The Advocate stormed and swore he would have them all imprisoned, (yet he never raised a summons of error against them;) and fined and declared infamous; and that the next assizers he should chuse, should be Linlithgow's soldiers, to curb the fanaticks. But thir transports of passion were smiled at, and were judged of no great service to his majesty's government."

The following passages extracted from Narcissus Luttrell's MS. "Brief Historical Relation of State Affairs," in the library of All Souls' Colledge, Oxford, have relation to the Juries of London and Middlesex:

"May 9th, 1682. The lord Shaftesbury having some time since arrested Mr. Cradock, mercer, in Pater-Noster Row, in an action of *Scandalum magnatum* for 5,000*l.* damages for words spoken, Mr. Cradock by his counsel moved the Court of King's-bench, the first day of this term for the changing the venue, that the trial might be in an indifferent county, and not in London or Middlesex; it was put off till the 5th inst. and then put off till the 10th, at which day the defendants' counsel produced several affidavits, that his lordship had constantly resided in London or Middlesex, and particularly at this time, in London. That he had been concerned in trade in the city, was free thereof, and particularly also of the Skinners' Company, of which Mr. Sheriff Pilkington was master; and that there was great intimacy between him and the said sheriff; for which reasons the deponents believed the defendant could have no indifferent trial: they also cited several precedents, in which venues had been changed in the case of Scandalum magnatum, and therefore prayed it might be so in this. On the other side, the counsel for his lordship urged, that the action was brought in the right place where the words were spoken; and that his lordship, as a nobleman, had the privilege to lay his action where he would, and spoke several things against the affidavits: but the court were unanimously of opinion, that an indifferent trial could not be had in London or Middlesex, and therefore ordered it to be in another county, and gave his lordship the choice of which he would; on which the lord Shaftesbury (who was then in court) said he would rather let his action fall than try it elsewhere, whereon the court told him, that that confirmed them in their opinion."

"May 13th. The lord Shaftesbury having brought a writ of conspiracy against Mr. Graham, principal of Clifford's-inn, and laid it in London; the said Mr. Graham having moved once or twice the court of King's-bench that the venue might be laid in another county, it came on again the 16th to be debated, when the defendant's counsel, who were Mr. Attorney General, Mr. Solicitor, sir George Jefferies, sir Francis Withins, and Mr. Sanders, and Mr. North produced several affidavits in his behalf, viz. that what he did in relation to the indictment of his lordship was by order of the king's counsel; that the plaintiff had resided in and about the city of London, for several years past, and had thereby contracted a great interest, that he had great dealings in the city, and was free of the Company of Skinners, whereof that sheriff was Master; that he was intimately acquainted with him, and that if any of the witnesses who were against his lordship at his indictment, should in this case appear for the defendant, they would certainly be knocked on the head, they narrowly

escaping it then, and then the defendants' own oath, that if any such conspiracy was, it arose in the county of Surrey, and not where the action was laid: the plaintiff's counsel insisted that the action was well laid, and it being a local action, it could not be altered from the place where the plaintiff had laid it: but the court, on consideration of the whole matter, thought the defendant could have no indifferent trial in London or Middlesex, and therefore ordered the venue to be changed; but gave his lordship leave to lay it in any other county.

"The 16th, also, Mr. Samuel Harris and Mr. Richard Janeway, came to be tried at Guildhall, in London; the first for printing and publishing that treasonable and seditious libel called 'Treason in Grain;' for which Fitzharris was hanged; the other for publishing seditious news: the evidence was pretty plain, but especially against the first, yet the jury were pleased to find them both Not Guilty.

"Mr. Sheriff Bethel having some time since brought an action of scandal against one Mr. Harvey, for saying of him that he should speak these words, 'that rather than 'the old king should have wanted an exe-'cutioner, he would have done it himself," Mr. Harvey having moved the Court of Exchequer to change the venue from London to any other county for want of an indifferent trial, it was the 20th ordered accordingly.

"May 29th. The earl of Shaftesbury brought a Scan. Mag. against Mr. Justice Warcup, Mr. Ivy, and others of the Irish evidence, and laid it in London; but they, by their counsel moving the Court of King's-bench, to change the venue (on the same reasons as Cradock, Graham, &c. had done before) they had it granted accordingly."

"April, 1683. This Lent Assizes, at the town of Derby, which Mr. Baron Gregory went, there was a bill preferred against one for being a priest, into the Grand-jury; who were knights of the new order of Addressers and violent Tories, but they were pleased to return thereon 'Ignoramus;' but the judge knowing the evidence to be plain, sent them out to consider of it again, which they did, and brought in 'Ignoramus' again. Upon this, the judge told them, for the satisfaction of the country, he would examine the witnesses in open court, which being done, the same jury, upon the same evidence on which they found before two 'Ignoramuses,' found now 'Billa Vera.'"

Kennett, after relating the fate of Colledge, proceeds thus;

"It was proposed to make an example of a peer as well as of a poor commoner; My lord Shaftesbury was a person most odious to the court, and the more so, because his lordship (with several other peers) had entered a protestation against the Lords rejecting the impeachment of Fitzharris; and upon the dissolution of the parliament, returned immediately to London, as if he intended there to influence the city against the court. Soon after his return, one Bryan Haynes came to him and assured him he could give great light in the matter of sir Edmundbury Godfrey's murder, if he might have his pardon. The earl endeavoured to get one, but it could not be obtained. Haynes being taken and carried before the council, hoped to get favour, by accusing the earl of attempting to suborn him to do it; and on the information of this Irish evidence, the lord Shaftesbury was apprehended at his house in Aldersgate street, and on the 2d of July committed to the Tower, for high-treason; and capt. Wilkinson, who had waited on the earl to Oxford (among other friends and followers) was now tempted to charge this upon his lordship, as a design of sedition and treason: but Wilkinson, though a prisoner for debt in the King's-bench, resisted all their temptations and offers, and would not be drawn in to be an evidence. The earl, after his commitment, presented several petitions for a trial, or bail, according to the Habeas Corpus act; but he could not be heard, till November the 24th, and then a bill of high-treason was preferred to the grand-jury at the Sessions house in the Old-Bailey. Mr. Blaithwaite and Mr. Gwynne swore, That the papers produced in court were taken in the lord Shaftesbury's house: and sir Leoline Jenkins deposed, That one of them, which was a project of an association, was the same paper, unaltered, that Mr. Blaithwaite gave him. But this writing (saith sir John Hawles) was no manner of evidence of treason, admitting what the witnesses swore as to the finding of it, to be true; because it was not proved that it was composed or prosecuted by the earl of Shaftesbury, or by his order. Two Macnamarras and one Booth, swore, That capt. Wilkinson was to have been captain of a troop of horse in the army which the lord Shaftesbury was to raise. One Turbervile swore, That the lord Shaftesbury said about February last, that there was little good to be done to the king, as long as his guards were about him. One Smith gave evidence, that the earl should say, if the king should offer any violence to the parliament at Oxford, he would meet with a strong opposition. And one Haynes swore to these words spoken by the earl, the duke of Buckingham has as much right to the Crown, as any Stuart in England. But the jury (of whom sir Samuel Barnardiston was fore-man) considered of the depositions of capt. Wilkinson, made before the king, giving a large account of the intrigue carried on by Booth, to engage him to be an evidence against the earl; and knew Booth to be a fellow of infamous character, who had been condemned for clipping and coining: nor had they reason to believe any thing said by Turbervile, Smith, or Haynes; and there was so much of their falshoods and of their designs to perjure themselves, proved against them in Colledge's trial, that they therefore brought in an Ignoramus. Upon which sir John Hawles makes this remark*; the grand-jury (though some of them

afterwards smarted for it, upon other pretences) did like honest, understanding gentlemen: and had they done otherwise, to avoid the ignominy of being called (though in truth it was an honour to be) an Ignoramus-jury, they had justly deserved the reproach, which since has lighted on other juries; such as Mr. Cornish's, and the like. The people were generally so well satisfied, that the spite of the papists was grounded on the lord Shaftesbury's apparent zeal for the religion and liberties, that they publicly rejoiced in his deliverance, and made bonfires that evening in several parts of the city. Graham (who was the solicitor against him, and had managed the Irish evidence) had much ado to escape the fury of the multitude; and the judges (as they themselves confessed in Graham's trial) were affronted as they sate on the bench. The earl being cleared by the grand-jury, moved to be discharged, but could not obtain it till the end of the next term. When he was at liberty, he prosecuted Graham and his accusers, as his declaration sets forth, for conspiring to indict him of high-treason, for which they solicited Wilkinson to give false testimony against the said earl, &c. The defendants moved, that they might not be tried in London, because the sheriffs, Mr. Pilkington and Mr. Shute, were the lord Shaftesbury's friends. The judges allowed their plea; but the earl would not try his cause elsewhere."

The Case of lord Shaftesbury v. Graham and Craddock, is reported, Skinn. 40. 1 Vent. 363. 2 Jon. 192. 2 Show. 197. Mr. Leach, in his edition of the last of these books, has referred to several cases respecting the changing of the venue. To other cases on the same subject, he has referred in the Case of Thompson v. sir William Scroggs, 2 Show. 176. That was an action against sir William Scroggs for a battery committed in Suffolk; which sir Bartholomew Shower tells us in conclusion, "Mr. Thompson forgave and desisted on a treat given by sir William Scroggs," &c.

The following Account of this Proceeding against Lord SHAFTESBURY and of what afterwards befel him, is extracted from "Rawleigh Redivivus, or the Life and Death of the Right Hon. Anthony late Earl of Shaftesbury." Second Edition; printed in 1683.

"NOT long after the dissolution of the Oxford-parliament, one Brian Hans came to his lordship, pretending to be some gentleman of quality, and that he could make very considerable discoveries of the popish plot, and the murder of sir Edmundbury Godfrey: and desired his lordship in order thereunto to procure him a blank pardon, being very unwilling, as he pretended, to have his name known, until he had his pardon procured for him. The earl, who was always ready to serve his majesty and the Protestant interest, and supposing that this could be no inconsiderable piece of service, to discover the murder of the aforesaid knight more fully than had been hitherto done, which must necessarily give a greater light into the plot; he endeavoured to get him one, but it could not be obtained. And not long after, this pretended gentleman of quality dwindled into a mean and obscure wretch, and of a pretended evidence of the real Popish Plot, degenerated into a blustering witness of a fictitious Protestant one. For being apprehended, and carried before the council, instead of discovering any thing about the death of sir Edmundbury Godfrey, he accused his lordship and others of having endeavoured to suborn him to do it. Whereupon Mr. Rouse a gentleman who had been sometime employed by sir Thomas Player in paying of the army which had been disbanded not long before; and Mr. Colledge, who had attended some of the parliament-men to Oxford, and Saturday, July the 2nd 1681, in the morning, his lordship was apprehended by a messenger, by virtue of a warrant from the council, and his papers all seized and carried to Whitehall, where the king likewise arrived from Windsor, about ten of the clock; and then he was examined before his majesty and the council; some of the judges likewise were present. His lordship knowing himself clear of what was laid to his charge, boldly affirmed and solemnly protested his innocency, adding as it was reported, that were he guilty of those crimes whereof he was accused, he was certainly a mad man, and had thereby rendered himself more fit for Bedlam, than the Tower, whither upon the sequel he was committed close prisoner for High Treason, and conveyed thither by water, in a barge: and the king returned the same day to Windsor. And now the better to prepare peoples minds to believe what he was to be charged withal, the Jesuit and condemned priests in Newgate, and some other of the popish crew, privately dispersed divers hellish and lying pamphlets, wherein they maliciously aspersed him with conspiring treason against his majesty; one whereof, which was somewhat more impudent and mischievous than the rest, and was called, Articles against the earl of Shaftesbury, was dispensed with some privacy and caution. The articles were as follows:

1. 'That he imagined to compass and procure the death of the king, the subversion o the government, and the known laws of the land, by reducing this antient monarchy into a republic.

2. 'That he used great endeavours to possess 'the people that his majesty was a papist, and 'designed to introduce popery and arbitrary 'power; and to that end had promoted several 'seditious and treasonable libels against his 'majesty's person and government, purposely 'to bring his majesty into an odium and con'tempt with his loving subjects.

3. 'That he endeavoured to levy war against 'the king, both in England and Ireland, and 'bring blood-shed and confusion upon his ma'jesty's good people, under pretence of prose'cuting the Popish Plot, and preserving the 'protestant religion, the liberty and property 'of the subject, as he and his confederates have 'done in the late rebellion.

4. 'That he endeavoured to render the 'church of England as ridiculous as popery, 'and defamed all his majesty's officers both 'by land and sea, and all others, who out of a 'due sense of loyalty adhere to the crown, stil'ing them tories, tantivies, masqueraders, &c. 'purposely to frighten them from their duty, 'and wean them from their sovereign, to ad'here to him and his faction.

5. 'That he countenanced, harboured, and 'hired persons to swear against the queen, and 'his royal highness.

6. 'That he procured several sums of money 'to be raised and collected to carry on those 'most abominable designs.'

"And to represent him as monstrously unnatural and bloody as themselves; and render him hateful and detestable to all men who would be so brainless as to believe the silly and ridiculous shams; the articler adds in the close of his libel, this strange and improbable rodomontado, that when the sergeant at arms apprehended him, he desired him to eat something before he appeared before the king and council: whereupon, says the libeller, his lordship answered, 'I have no stomach to eat unless I could get a roasted Irishman.'

"The Sessions of the Peace for London and Middlesex beginning on the Wednesday following he presented a petition to the court, desiring to be brought to a speedy trial, or else admitted to bail. Upon the 8th Stephen Colledge had an Indictment presented against him to the grand Jury, who were all of them substantial men; and after having heard all that could be said on both sides, they returned an Ignoramus upon the bill: but being removed to Oxford, and tried there, was found guilty, and was accordingly condemned and executed; and a forged paper presented and published by one Thompson a printer, and supposed to be writ by some Jesuit, who are always so good at inventing of shams, called, his last speech, wherein he was made to confess all that he was charged with, although it afterwards appeared that he absolutely denied he was any way guilty, affirming his innocency to his last breath. August 31, his lordship presented another petition to the judges at the sessions at the Old-Bailey, desiring that he might be either tried or bailed, pursuant to the act of Habeas Corpus; to which the court returned answer, That being charged with no crime in that court, and being prisoners in the Tower, they could take no cognizance of them; but they must seek their relief at the King's-bench bar, the next term. Great preparations were made for his trial, and abundance of witnesses procured; and Mr. Samuel Wilson, a gentleman belonging to his lordship, was likewise committed to prison, for speaking some treasonable words, as was sworn by some of those evidences. Now you must know, this Wilson was the gentleman whom his lordship intrusted to attend the council when his papers were looked over, and take away those which were returned, and indorse the rest with his own name; and that the paper said to be found in the earl's closet, purporting an Association, was not indorsed by him.

"In the mean time, notwithstanding they had abundance of witnesses, yet they desired to have some whose port and figure in the world might procure them the greater credit, and thereby render them the more capable of accomplishing their end in the earl's ruin; and, as they imagined, fortune offered them the most likely and favourable opportunity that could possibly be desired or wished for, by the following accident. Captain Henry Wilkinson, a gentleman that had always espoused the royal interest, and had hazarded his life, and impaired his estate in the service of his prince, having a desire to settle in the island of Carolina, applied himself to the proprietors for an employment in that country; and had, upon the account of his loyalty to his majesty, a promise made him of being employed as governor under the proprietors by his lordship, who was one of the chief proprietors, to whom upon the account of his great judgment and discretion, the rest had committed the whole management. The captain having obtained this promise, hired two ships to convey himself and family, and what other persons were to go with him thither, whereof one of them was a relation of mine. Upon this, one Booth, a person well born, but by his wicked and profligate life, had wasted his patrimony, lost all his employments, and rendered himself very indigent and necessitous, applied himself to the captain, desired to go with him to Carolina; and withal prefixed a time for coming on board, and engaged to bring with him about sixteen servants or upwards. This was easily promised, but not so easily performed: servants and companions enough he might have had, who had, like himself, reduced themselves to poverty and distress, and would for that reason have been glad of such an opportunity of being freed from the scorn and contempt of their acquaintance, and the dread of a gaol: but how to pay for their passage, or employ them when they came there, he knew no more than the man in the moon. But after a little consideration, he resolved of the following adventure to supply that difficulty: he first forged letters, as directed to him from persons of quality, desiring

him to buy them several rich goods of mercers, drapers, upholsterers, &c. and then he went with those letters to some tradesmen, with whom he had for that purpose procured some kind of acquaintance, shews them the letters, tells them, if they would use him well, he would buy the goods of them: you shall, says he, have your money as soon as I have acquainted the persons that I have bought the goods, and can receive an answer from them again. After this manner he went to Mr. Halford a mercer in the Strand, with a pretended letter from the lady Ogle, now duchess of Somerset; wherein he was ordered to buy her several curious flowered silks, and other rich goods, to the value of between two and three hundred pounds: that Mr. Halford might give the better credit to the business, he procured the gentleman's brother to go with him. And for your brother's sake, Sir, said he, I have a very great kindness for you, and would rather you should take my money than any other man: adding, that he expected shortly to be steward to the duke of Norfolk, and then he would endeavour to procure him the custom of that family. But supposing the shop to be too public, and therefore not safe enough to treat in, he invited him to the Kings-Arms tavern, and there discoursed the business. I have not all the goods you mention, in my shop, says Halford, but in a day or two I can get them: pray do, says he. You may be sure Halford, imagining he had gotten a brave customer, applied himself with double diligence to procure the goods against the time appointed; but the merchant he bought them of knowing they were goods he did not usually deal in, especially such quantities, he asked him who they were for? Whereupon Halford told him the whole story. You had best have a care you are not cheated, says he, I do not like the business; however, you may do as you find occasion. At the time appointed he came to see the goods, and liked them very well, and intended they should have been the cheapest that ever he bought. But Halford being thus cautioned, told him the goods came to a great deal of money; that he was a young beginner, and could not conveniently trust him for them; but if he would pay him ready money, he would, to oblige him, sell him cheaper than he should buy at any other shop. Sir, said Booth, I am content, I will come and fetch the goods, and pay you ready money; but never came near him more. After the same manner he went to Mr. John Ridges an upholsterer, who lives in St. James's near St. James's house, and hath a shop likewise in Long-lane in the City; but came off with the like success. My design of brevity will not permit me to mention all his tricks of this nature, nor how he served the taylor in Field-lane.

"These disappointments rendered him unable to perform his promise to the captain, and wholly diverted his thoughts from Carolina, accounting it a vain thing to go thither, being thus unhappily disappointed of his cargo: and the Captain being so disappointed by him and others of his passengers, and having had two ships lie so long at his own charges to attend them, had thereby contracted some debts, for which he was arrested, and his ship and goods seized on. When he was first arrested he was sent to the Compter, but quickly after removed himself to the King's-bench. This accident created new thoughts in Booth's working brain, and put him upon a new project for the repairing of his broken fortunes, and the making himself amends for his late disappointment. The earl of Shaftesbury committed the other day to the Tower for high-treason, and Wilkinson, who was upon his commendation to have gone deputy-governor of Carolina, in the King's-bench for debt; and can I contrive to get no advantage thereby? Yes, in spight of fate, and maugre all the powers of Heaven and Hell, I will attempt it; I will set up for an evidence myself, and will so manage the matter, that I will procure him to be one too: his poverty and loss, and the sorrows of a gaol, will undoubtedly dispose him to a compliance with my motion. But therein the mercenary wretch reckoned without his host, and found himself wofully deceived in the idle imagination that every man's conscience was as much vitiated and depraved as his own, and would adventure upon the most vile and abominable practices whatsoever, in hope thereby to free themselves from those pinching necessities which they were involved in; and by failing in that enterprize, learned the true difference between being impoverished by the want of success in trade or merchandize, and the being undone by profuseness and debauchery.

"Before he adventured to address himself to the captain about the business, he sent others to break the matter to him, relating the particular circumstances the captain was at that time under, and instructing him how to behave themselves towards him. Being thus instructed, Octob. 8, 1681, Bains visited the captain in the King's bench, where, after some compliments and preparatory discourse, to make way for, and dispose the captain to comply with what he had to offer, he proceeded to tell him, that he must needs know something of the earl of Shaftesbury's design against the king, and persuading him to discover it to him; and promised if he would do so, he would procure him a pardon, and a great reward. The captain answered, He knew nothing by his lordship, but that he was a very loyal person. So soon as he was gone, the captain acquainted major James with what Bains had offered; and the major presently took his pen and ink, and wrote it down in his pocket-book. Two or three days after, Booth adventured to try his own fortune; and that he might prove more successful than his forerunner, procured leave for the captain to go out of the prison to Booth's lodging at Mr. Weaver's in the Rules, where they entertained him with a noble and splendid treat; and assured him, if he would be an evidence against

the earl, he should have 500*l.* per ann. settled upon him and his heirs as a reward; or if he liked 1,000*l.* in ready money better, he should have so much paid him down: and finding him still untractable, they persuaded his wife to use her interest with him, and endeavour to prevail with him, and work him to a compliance with what they desired, telling her, she might thereby be made for ever. But when all this, and many other contrivances failed them, they gave in an information of high treason against him to the king and council, by whose order he was brought before them, and straitly examined concerning what he knew of a Plot against the king, and to have seized on his person at Oxford. The captain persisted in his own innocency, and affirmed he knew no such thing by the lord Shaftesbury, or any other. Then Booth swore high treason against him, and deposed that Wilkinson was to have been captain of a troop of horse consisting of fifty men, which were to be employed in seizing the king at Oxford, when th parliament sat there: and to gain the greater credit to his oath, and make the thing more probable, he affirmed himself was listed under him as one of them; although to my knowledge, and the knowledge of many more, the gentleman at that very time when the parliament met at Oxford, and this was pretended to be done, was busily employed in the aforesaid affair of providing for his voyage to Carolina.

"The captain, upon this deposition, was committed back again to the King's-bench prison, where he acquainted the mayor with what had passed at the council; and he writ that down likewise as he had done the rest. and the captain willing to expose the villany, and prevent the mischief of his mercenary breath, published an account of the whole matter to the world, to which I refer the reader for further satisfaction.

"His lordship having continued in the Tower from July, till the latter end of November, without obtaining a trial, his majesty then issued out a commission of Oyer and Terminer, to be held at the Old-Bailey on the 24th, of that month, when an indictment of high treason against his lordship was preferred to the Grand-jury summoned upon that occasion, which was the most substantial of any that had been known for a long time before. The Court being set, and the jury sworn, the witnesses gave in the like evidence to the Court as they had formerly done to the council. They generally swore much to the same purposes; and Booth was one of the chief evidences, who declared upon oath, that the earl told him, that he and others had considered with themselves, it was necessary for them to have guards at Oxford; and that he had for that reason provided fifty gentlemen, and had intrusted captain Wilkinson with the command and management of them; that he himself was listed as one of them, (yet could name none of the rest) and that he had thereupon bought himself a very good stone-horse, with other accoutrements for the said service; and that captain Wilkinson promised to furnish his man with a horse. Now, that the world may the better judge of the truth or falseness of what this man swore in the face of so great an assembly, and from thence argue the validity of the other evidences, I have transcribed verbatim an advertisement, which was thereupon published the next week in Janeway's Intelligence, Number 65.

'Whereas upon Thursday last, an indictment was preferred to the Grand-jury at the Old-Bailey against the right honourable the earl of Shaftesbury, and whereas Mr. Booth was produced as one of the evidences, who swore in open Court, that captain Wilkinson was engaged with the said earl against his majesty and the government, and that the said captain was to command a troop of horse to be mounted with fifty gentlemen, and that the said Mr. Booth had listed himself as one of the troop. Also the said Mr. Booth made oath, that he had bought himself a good stone-horse, and other accoutrements for the said service, and captain Wilkinson was to furnish his man with a horse.

'This is therefore to give notice, that if any one can make it appear, that Mr. Booth bought any such horse, with his marks and colour, and who he bought him of about March last, or that he had any such horse within that time, and what stable he was kept at, shall have, upon good proof made thereof to the said captain Wilkinson, five guineas paid him for a reward of his pains.

'Also if any person can make appear, that the said captain Wilkinson hath bought or had any horse, gelding, or mare, for these two years last past, or ever hath been upon the back of any for the same space of time, saving one gelding which he borrowed to ride to Wickam, when the members of the last parliament went to Oxford; or that ever captain Wilkinson hath been nearer Oxford these 20 years, than the said town of Wickam, upon proof thereof, he shall have five guineas for his reward. 'HENRY WILKINSON.'

"It is worthy of every man's consideration, that this was not delayed till the thing was worn out of mind, but published whilst it was yet hot and fresh in every man's memory; and that therefore if any such horse had been bought and kept by Booth, either the person who sold him, or those who were present at the buying of him, or the inn-keeper where he stood, or the ostler that looked to him, or some one or other who must undoubtedly have seen him ride, or at least the person to whom he afterwards sold him, would certainly, either out of a principle of love and loyalty to his majesty, to detect the impudence of the captain in publishing this declaration, to vindicate the honour and reputation of Booth, to despite the earl and render him the more guilty, or else out of love and desire of the five guineas, have appeared and given evidence thereof. The same may be said of the

captain's horse; and therefore it must be granted, that neither the one nor the other had any horse at all: and if so, how improbable a story it is, that the captain should command a troop of horse, when at that same time he had not a horse to ride on, nor never had been in twenty years at the place where this troop was to be commanded. And yet upon the evidence of this man, and others of the like temper, some men would have had his lordship found guilty, and convicted of no less crime than high-treason? railing against and vilifying the grand jury for doing otherwise.

"After a full hearing of all that the witnesses had to say, the jury thought themselves obliged to return an Ignoramus, upon the bill; which occasioned a general joy and satisfaction, as plainly appeared by the many bone-fires which were that night made almost in every street, and at several country towns, upon hearing the news thereof.

"The earl being thus cleared by the grand jury, moved to be discharged, but could not obtain it till the 13th of February following; and then both he and several others who were prisoners upon the account of this imaginary plot, were released. And having thus gained his liberty, he arrested several persons, whereof some of them were evidences against him, in an action of conspiracy, and one Cradock and others in an action of scandalum magnatum; but was not able to bring any of them to a trial. For on the 4th of May, being the first day of the term, Cradock, whose trial was expected to be brought on first, moved by his counsel, that the trial might not be in London or Middlesex, but in some other county; upon which motion the court ordered, That on Friday following the earl should shew cause, why it should not be tried in another county. Accordingly his lordship appeared in court himself, and declared it was his desire to have it tried by indifferent jury, but only desired to have it tried that term by a Middlesex jury; asserting, that an indifferent jury might as well be had there, as in any county in England. On the 12th the like motion was made in the behalf of Graham: whereupon his lordship finding he could not have it tried in London, and not willing it should be tried in any other county, in regard an address of abhorrence against a certain paper said to be found in his lordship's closet, importing an association, was preferred in most counties; declared, that since he could not have the undoubted privilege of a peer, to lay his action in any county in England, he would remit it at present, and wait till he had a better opportunity to revive it.

"After this, his lordship continued at his house in Aldersgate-street until the November following, and then he went over to Holland. The seas were somewhat tempestuous: and some who went over in company with the same ship, were cast away; but the providence of God ordered that to save his life, which is often the loss of others; viz. an unskilful pilot, who being not well acquainted with the haven, and withal somewhat timorous, would not be persuaded to venture in till he had a calmer sea. As soon as he arrived, and was known, he was visited by some of the states, and others of the greatest quality, who welcomed him into that country, and congratulated his having so happily escaped the danger of the seas.

"The earl, not long after his arrival, took a spacious house in Amsterdam, where he intended to reside; he was to pay for it a yearly rent of 150*l.* per annum: but before the house was furnished and fitted for his use, his usual distemper, the gout, seized him, and handled him with great violence for some days, and then it began to wear away, and the earl was indifferently recovered; but suddenly and unexpectedly returning again, and getting into his stomach, he fell into a dangerous relapse, which proved mortal, and terminated in his death."

Remarks on the Earl of SHAFTESBURY'S Grand Jury. By Sir JOHN HAWLES, Solicitor General in the Reign of William III.

THE next person* questioned was the earl of Shaftesbury, against whom a bill of high-treason was preferred to the grand jury, at the sessions-house, on the 24th day of November 1681. The evidence was publicly given in court, and was this; Mr. Blathwaite swore he found the papers then produced in a velvet bag in the great trunk, which was taken by Mr. Gwynne in the lord Shaftesbury's house. Mr. Gwynne swore all the papers in the velvet bag, when he delivered them to Mr. Blathwaite, were taken by him in the lord Shaftesbury's house: sir Leoline Jenkins swore, the paper produced was the paper delivered him by Mr. Blathwaite, and it was unaltered. Then the paper was read, the effect of which was a project of an association signed by no person, and whose hand-writing it was, none knew. John Booth swore, that he was engaged to captain Wilkinson, who pretended to have a commission from the lord Shaftesbury and several others to go for Carolina; he was about that time introduced into the earl's acquaintance by the captain, where was a discourse about Carolina business; he was four or five times between Christmas and March, with the earl and the captain: that the captain told him he was to command 50 men to be the earl's guard at Oxon, and would have had him

* See the Remarks at the end of Fitz-harris's and Colledge's Cases, *ante*, pp. 429, 723.

to be one: That if the king did not consent to several acts of parliament and other things, they were to purge the guards and court of several persons; and though the captain told him that first, afterwards he heard the earl say the same things, particularly about a week or ten days before the parliament sat at Oxon, he gave some intimation of this to Walter Banes, and then writ it down, and sent it to the council sealed in a cover. Turbervile swore, that the lord Shaftesbury said about February, there was but little good to be done with the king as long as the guards were about him. Smith testified a great deal of discourse between him and the lord Shaftesbury of something said reflecting on the king; and that he should say, that if the king should offer any violence to the parliament at Oxford, he would meet with a strong opposition, for that the gentlemen who came out of the country, came well provided with horse and arms to oppose, and that they might lawfully do it, if he offered any violence to them whilst they sat. Haynes swore, that the earl said if the king did not give Haynes his pardon, he and others would raise the kingdom against him; that Haynes gave the earl an exact account of transactions since king Charles the First's coming to the crown, and that the earl said the duke of Buckingham had as much right to the crown as any Stuart in England. John Macnamarra said, the earl said, the king was Popishly affected, and took the same methods his father did, which brought his father's head to the block, and they would bring his thither; and this was said in the presence of Ivey, and he thought of his brother; and said, the king deserved to be deposed as much as king Richard the Second. Dennis Macnamarra likewise testified the last words, and that it was the latter end of March, or beginning of April. Ivey said, the earl said, if the king denied Haynes a pardon, they would rise upon him and force him to give one, and that they designed to depose him and set up another in his stead. Bernard Dennis said, he had a great deal of discourse with the earl, who bid him speak to his friends in Ireland to be in a readiness to assist the Commonwealth of England, for they intended to have England under a Commonwealth, and extirpate the king and his family.

Then the court told the jury the indictment was grounded on the statute of king Charles the Second, but they ought to consider both of that statute, as also the 25th of Edward 3.

The question is, Whether the grand jury ought to have found the bill on this evidence. First it ought to be considered, what the duty of a grand jury is; and I think it is not what the Chief Justice (sir Francis Pemberton,) said, to consider only whether there be probable ground for the king to call the person accused to an account, much less do I think that the reason of finding a bill by the grand jury was for the honour of the king, or decency of the matter, lest persons accused should be called to an account by the king where there is no kind of suspicion of the crime committed by them, as the court said, (which last matter was never assigned as a reason of finding a bill by the grand jury before) but I take the reason of a grand jury to be this, that no man for a capital matter shall ever be questioned by the king, unless a grand jury take it on their oaths that they believe the matter of the accusation true; I put an emphasis on the words questioned by the king.

It is true, it is generally said that the business of a grand jury, in capital matters, is *in favorem vitæ*; but that taken simply is not true, for then what reason can be assigned why a man shall be arraigned on an appeal of murder, robbery, or the like, which touches his life, as much as an indictment of those crimes, without having the matter of the appeal first found to be true by a grand jury? But the true reason of a grand jury is the vast inequality of the plaintiff and defendant, which in an indictment is always between the king and his subjects; and that doth not hold in an appeal, which is always between subject and subject: and therefore the law in an indictment hath given a privilege to the defendant, which it hath done in no other prosecution, on purpose, if it were possible, to make them equal in the prosecutions and defence, that equal justice may be done between both. It considers the judges, witnesses, and jury are more likely to be influenced by the king than the defendant; the judges as having been made by him, and as it is in his power to turn them out, punish, or prefer, or reward them higher; and though there are no just causes for them to strain the law, yet there are such causes, which in all ages have taken place, and probably always will. This was the reason of running prerogative so high in the judgment of high-treason before the stat. of Ed. 3, that no man, as that statute says, knew what was not high-treason: This was the reason of expounding that statute oftentimes between the making of it, and the making of the statute of queen Mary, that people were at as great a loss, till the last statute, as they were before the making of the first; and even since the statute of queen Mary, the exposition on the statute of Ed. 3, has been so extravagant and various, that people are at this day as much at a loss to know what is not high-treason, as they were before the statute of Ed. 3. Nor was it, nor is it, possible, but that the great power of enriching, honouring, rewarding, and punishing lodged in the king, always had, and yet must have an influence on the witnesses and jury; and therefore it is that the law has ordered, that at the king's prosecution, no man shall be criminally questioned, unless a grand jury, upon their own knowledge, or upon the evidence given them, shall give a verdict, that they really believe the accusation is true.

I own, of late days, they have said the duty of the grand jury is to find, whether the accusation be probable or no. But that saying is

warranted by no positive law, or ancient authority; and therefore the duty of the grand jury must be founded in the oath administered to them, which is as strict as the oath administered to the petit jury: and to say the truth, the verdict of the petit jury takes credit from the verdict of the grand jury; which is not only the reason of the difference in the names of the two juries, but is likewise the reason why an attaint for a false verdict doth not lie against a petit jury.

The oath of the grand jury, is, 'To present 'the truth, the whole truth, and nothing but 'the truth:' The oath of the petit jury is, 'well and truly to try, and true deliverance 'make, between the King and the prisoner at 'the bar, &c.' which signifies the same thing as to present the truth, &c. It is true, some reasons have been offered, which, if considered, are words without sense; as that the presentment of the grand jury is but in order to bring the prisoner to his trial, and he not before the grand jury to make his defence himself: but that can be no reason why probabilities should satisfy the jury, because it doth not answer the design of the law, which will have a man convicted by the positive oaths of two juries, consisting of more than twenty four, in all indictments.

Next, why is a grand jury composed of more substantial and understanding men than a petit jury, if their business be mere formality, or a matter of less weight than the business of a petit jury? In the last place, why less evidence is required to convict a man in his absence, than is required to convict him if present? It is far from an argument, that less evidence is required to convict one if absent, than if present, that it seems to me that more evidence should be required to do it. Men may, and often do make very fair stories in the absence of a person accused, that when present, he easily answers; and there being no positive law for the direction of a grand jury in that matter, a grand juryman is excusable, nay, it is his duty to give a verdict according to the plain understanding of the words of his oath, which is to present the truth, as far as he is convinced of it; and that truth must be found according to his knowledge, or as it is represented to him by witnesses.

And as for the witnesses, they must be persons of credit; and all persons are supposed to be so, unless the grand jury know the contrary, or have been so credibly informed. It is true, a grand jury ought not to believe coffee-hous stories, or light stories; but common fame by credible persons, which is *Vox Populi*, ought to prejudice them against a witness, so as to disbelieve him: and it is no answer to say, as the Chief Justice in this case said, that the credibility of the witness is not to be considered by the grand jury, because the king is not present to defend the credit of his witnesses: though the fact in that case was not true, for the king's attorney, solicitor and counsel were present, and I think the king is no otherwise present at any criminal prosecution; and the jury knew by Colledge's trial, and by Wilkinson's depositions before the king, that the evidence of all the witnesses produced, except what were to the paper, was questioned, but even that was afterwards quitted by the court, when it would not be swallowed by the grand jury: for afterwards the court told them, that if they of their own knowledge knew any thing against the witnesses, they might consider of it, but not of what they were credibly informed by others. And, besides the credibility of the witnesses, the possibility or probability of the thing sworn is to be considered by the grand jury; an impossible thing they ought not to believe, though sworn to by never so many credible witnesses, and a very improbable thing they cannot positively on their oaths swear they believe.

And not only the fact, but what the crime of the fact alledged in the Bill of Indictment, the grand jury, as far as they are capable of judging matter of law, ought to consider; so they were told in the charge given them. It is true, if they were ignorant in the law, and the court in their directions misled them, as if the court should tell them stealing a horse is high-treason, and the grand jury find it accordingly, it is excusable in the grand jury, though punishable in the court. But wrong directions by the court, in finding a fact where there is no evidence, do not excuse the jury.

Now, to examine the matter in hand by these rules, could any person who knew my lord Shaftesbury, or that had heard of, or believed his character to be what it was, believe that it was possible for him to discourse with the witnesses at the rate they swore, to some of them at the first, to others of them the second time he saw them; to discourse of matters of policy with Booth at one time, and afterwards with Haynes, and afterwards with Macnamarra, fellows of so little sense, that he would have been ashamed to have entertained them in the meanest office about him; and yet, as they pretended, he makes them his privadoes in the secret, of not so much what he would have had them, but of what he intended himself to do?

Who could believe any thing Turbervile, Smith, or Haynes should say, where there was so much of their falshood, and of their designs to swear falsly, proved against them in Colledge's trial; Or of Ivey, and the three Macnamarra's after that trial, who though they were n. produced at it, because the king's counsel by Colledge's notes saw he was able to falsify them, yet some witnesses in that trial proved their design of swearing falsly?

Who could believe Booth's story of listing so many men under Wilkinson, to be at my lord Shaftesbury's dispose at Oxon, after Colledge's trial, and after what Wilkinson had testified to the king and council, though not then proved to the grand-jury?

A judge indeed cannot take notice of any

thing not proved (though he may and ought to be a witness, if he knew any thing material of the matter tried before him and others); but a grand-jury may take notice of any thing they know or believe. The passages at Colledge's trial were pretty notorious, being authentically published by Fra. North, and the examination of Wilkinson by as authentic a paper.

It was unaccountable, that the witnesses concealed what they heard the earl speak so long, of which none of them pretended to give any reason; nor was it any excuse to those who signed a petition to the city, in which they suggested they were tempted to swear against their consciences, to say they knew not what was in the petition: He that sets his hand to a thing as if he assented to it, but doth not, is a man of falshood. Suppose one sets his hand to a bond, said to be sealed and delivered, not having seen it sealed and delivered, is not he guilty of little less than forgery? But admitting the witnesses had sworn truth, yet the jury ought not to have found the bill; for they ought to find the bill true according to all the material circumstances of it, as well as the substance of it, which was High-treason. One material circumstance of it was, that it was said to be High-treason within the statute of Charles 2. And that made another circumstance of the indictment material, which was the time when that treason was committed; because by that statute the prosecutions of treason on that statute ought to be within six months after it is committed, and the indictment ought to be within three months after the prosecution; and he being imprisoned in July, and the bill suggesting that the supposed treason was committed the 18th of March before, and divers other times, both before and after, which might be interpreted to have been after the prisoner's commitment; had the jury found the bill as laid, they had found the treason to have been committed, not only within the time the prosecution by that statute ought to be, but also within the time the indictment ought to have been preferred; whereas in truth the earl had been imprisoned above three months before the indictment preferred, and there was no evidence of any treason committed by him after his imprisonment, and therefore the finding the bill as laid had been injurious, to bring a man in question for his life on that statute, whereas by law he ought not to have been.

For it was resolved in Colledge's case, that the prosecution for treason on that statute ought to be within six months, and the indictment within three months, though the court was of another opinion in the lord Russel's trial.

And that this indictment was on that statute, was expressly said to the grand jury, and upon good reason; for the court in their charge said, that the intention of levying war, or designing to imprison the king, was not treason, till the statute of Charles the Second; though in the lord Russel's trial it was held to be treason by the statute of Edw. 3, and therefore the time of the treason committed was material to be found by the jury.

As for the writing found in the earl's study, it was no manner of evidence of treason, admitting what the witnesses swore as to the finding it to be   because it was not proved that it was prosecuted or composed by the earl of Shaftesbury, or by his order, and that piece of evidence was in that particular a mere original.

In Fitzharris's case, it was proved the libel was composed by his direction; Colonel Sidney's book was proved to be like his hand; it was pretended that Colledge said he was the author of the Raree-Shew, and no example of this evidence was ever made use of before.

Neither was it evidence of treason as to the matter, for there was not one word against the present king, but his successor, if he should be such a person.

It is true, one of the king's counsel said that one passage in it was that they would join to destroy the mercenary forces about London, and thence inferred it was downright levying war against the king and his guards; whereas there is not any such word or thing in the paper as he pretended to cite: and if it had been in the paper, it would have been but evidence of a treason within the statute of the late king. And then the time of writing it ought to have appeared; and if that had been cleared, yet for the above reasons it was no evidence: and the grand-jury, though some of them afterwards smarted for it upon other pretences, did like honest understanding gentlemen; and had they done otherwise, to avoid the ignominy of being called, though in truth it was an honour to be, an Ignoramus jury, they had justly deserved the reproach which since have lighted on other juries, such as Mr. Cornish's, and the like. And having spoken of this Ignoramus jury, for which, two of them, if not more, were afterwards upon other pretences severely handled; I think fit to say something of the sufferings of one, for being in a preceding Ignoramus jury, because it was a mere novelty; and that was Mr. Wilmer.

284. The Trial of the Earl of ARGYLE,* in Scotland, for Treason: 33 CHARLES II. A. D. 1681.

[The Account of this Trial published in former Editions appears to have been extracted from "The CASE of the Earl of ARGYLE: or, an exact and full Account of his Trial, Escape, and Sentence. As likewise a Relation of several Matters of Fact, for better clearing of the said Case:" contained in a volume, entitled, "State Tracts, being a further Collection, &c. from the year 1660 to 1689," published in London in 1692; which Case I conjecture was written by sir James Stewart (See 4 Laing's History of Scotland, 119, edition of 1804). The Introduction to this "Case" is as follows:

Sir; EDINBURGH, *May* 30, 1682.

"The Case of the late earl of Argyle, which, even before the process led against him, you was earnest to know, was at first, I thought, so plain, that I needed not, and grew afterwards so exceedingly mysterious, that I could not, for some time, give you so perfect an account of it, as I wished: but this time being still no less proper, the exactness of my narrative will, I hope, excuse all delays.

"The design against him being now so clear, and the grounds founded on so slender, that to satisfy all unbiassed persons of his integrity, there needs no more, but barely to represent matter of fact; I should think shame to spend so many words, either on arguments, or relation, were it not lest to strangers some mystery might still be suspected to remain concealed: and therefore to make plain what they can hardly believe, though we clearly see it.

At his royal highness's arrival in Scotland, the earl was one of the first to wait upon him,

* He was the son of Archibald marquis of Argyle, who at Scone, in the year 1650, placed the crown upon the head of Charles the 2nd, and who, as Laing expresses it, had reason afterwards to complain that his own head was the ungenerous forfeit. [See the proceedings against him, A. D. 1661, vol. 5, p. 1369, of this Collection; in the Note to which, p. 1372, reference is by an error of the press made to p. 347 instead of p. 437, of the 3rd volume of Laing's History of Scotland.]

"The main business of this parliament was the act concerning the new test that was proposed. It had been promised in the beginning of the session, that as soon as an act for maintaining the succession should pass they should have all the security that they could desire for the Protestant religion. So, many zealous men began to call for some more effectual security for their religion: upon which a test was proposed for all that should be capable of any office in church or state, or of electing or being elected members of parliament, that they should adhere firmly to the Protestant religion; to which the court party added, the condemning of all resistance in any sort, or under any pretence, the renouncing the Covenant, and an obligation to defend all the king's rights and prerogatives, and that they should never meet to treat of any matter civil or ecclesiastical but by the king's permission, and never endeavour any alteration in the government in church or state: and they were to swear all this according to the literal sense of the words. The test was thus loaded at first to make the other side grow weary of the motion and let it fall, which they would willingly have done. But the duke was made to apprehend, that he would find such a test as this prove much for his service: so it seems, that article of the Protestant religion was forgiven for the service that was expected from the other parts of the test. There was a hot debate upon the imposing it on all that might elect or be elected members of parliament: it was said, that was the most essential of all the privileges of the subjects, therefore they ought not to be limited in it. The bishops were earnest for this which they thought would secure them for ever from a Presbyterian parliament. It was carried in the vote And that made many of the court more zealous than ever for carrying through the act. Some proposed that there should be two tests: One for papists with higher incapacities: And another for presbyterians with milder censures. But that was rejected with much scorn, some making their court by saying, they were more in danger from the presbyterians than from the papists: And it was reported that Paterson then bishop of Edinburgh, said to the Duke, that he thought the two religions, popish and protestant, were so equally stated in his mind, that a few grains of loyalty in which the protestants had the better of the papists turned the balance with him. Another clause in the bill was liable to great objections; all the royal family were excepted out of it. Lord Argyle spoke zealously against this: He said, the only danger we could apprehend as to popery was, if any of the royal family should happen to be perverted: Therefore he thought it was better to have no act at all than such a clause in it. Some few seconded him: But it was carried without any considerable opposition. The nicest point of all was, what definition or standard should be made for fixing the sense of so general a term, as the protestant religion. Dalrymple proposed the confession of faith agreed on in the year 1559, and enacted in 1567, which was the only confession of faith that had then the sanction of a law. That was a book so worn out of use, that scarce any one in the

and until the meeting of our last parliament, the world believed, the earl was as much in his highness's favour, as any intrusted in his majesty's affairs in this kingdom.

"When it was resolved, and his majesty moved to call the parliament, the earl was in the country, and at the opening of it, he appeared as forward as any in his majesty's, and his highness's service, but it had not sat many days when a change was noticed in his highness, and the earl observed to decline in his highness's favour.

"In the beginning of the parliament, the earl was appointed one of the Lords of the Articles, to prepare matters for the parliament, and named by his highness to be one of

whole parliament had ever read it: None of the bishops had, as appeared afterwards. For these last 30 years the only confession of faith that was read in Scotland, was that which the assembly of divines at Westminster, A. D. 1648, had set out, which the Scottish Kirk had set up instead of the old one: And the bishops had left it in possession, though the authority that enacted it is annulled. So here a book was made the matter of an oath, (for they were to swear that they would adhere to the protestant religion, as it was declared in the confession of faith as it was enacted in the year 1567,) that contained a large system of religion, that was not so much as known to those that enacted it: Yet the bishops went all into it. Dalrymple, who had read it, thought there were propositions in it, which being considered better of would make the test be let fall: For in it the repressing of tyranny is reckoned a duty incumbent on good subjects. And the confession being made after the Scots had deposed the queen regent, and it being ratified in parliament after they had forced their queen Mary to resign, it was very plain what they who made and enacted this confession meant by the repressing of tyranny. But the duke and his party set it on so earnestly, that upon one day's debate the act passed, though only by a majority of seven voices. There was some appearance of security to the protestant religion by this test: But the prerogative of the crown in ecclesiastical matters had been raised so high by duke Lauderdale's act, that the obliging all people to maintain that with the rest of the prerogative, might have made way for every thing. All ecclesiastical courts subsisted now by this test only upon the king's permission, and at his discretion.

"The parliament of Scotland was dissolved soon after this act passed: And Hyde was sent down from the king to the duke immediately upon it. It was given out, that he was sent by the king to press the duke upon this victory to shew, that what ill usage could not extort from him he would now do of his own accord, and return to the church of England. I was assured, that my lord Halifax had prevailed with the king to write to him to that purpose: The letter was writ, but was not sent: But lord Hyde had it in charge to manage it as a message. How much of this is true I cannot tell: One thing is certain, if it was true it had no effect.

"As soon as the test with the confession of faith was printed, there was a universal murmuring among the best of the clergy. Many were against the swearing to a system made up of so many propositions, of which some were at least doubtful; though it was found to be much more moderate in many points, than could have been well expected considering the heat of that time. There was a limitation put on the duty of subjects in the article, by which they were required not to resist any whom God had placed in authority in these words, 'while 'they pass not the bounds of their office:' And in another they condemn those who resist the supreme power doing that thing which appertaineth to his charge. These were propositions now of a very ill sound: They were also highly offended at the great extent of the prerogative in the point of supremacy, by which the king turned bishops out at pleasure by a letter. It was hard enough to bear this: But it seemed intolerable to oblige men by oath to maintain it. The king might by a proclamation put down even episcopacy itself, as the law then stood: And by this oath they would be bound to maintain that. All meeting in synods, or for ordinations, were hereafter to be held only by permission: So that all the visible ways of preserving religion depended now wholly on the king's good pleasure; And they saw that this would be a very feeble tenure under a popish king. The being tied to all this by oath seemed very hard. And when a church was yet in so imperfect a state without liturgy or discipline, it was a strange imposition to make people swear never to endeavour any alteration either in church or state. Some or all of these exceptions did run so generally through the whole body of the clergy, that they were all shaking in their resolutions. To prevent this, an explanation was drawn by bishop Paterson, and passed in council. It was by it declared, that it was not meant that those who took the test should be bound to every article in the confession of faith, but only in so far as it contained the doctrine upon which the protestant churches had settled the reformation: And that the test did not cut off those rights, which were acknowledged to have been in the primitive church for 300 years after Christ: And an assurance was given, that the king intended never to change the government of the church. By this it was pretended, that the greatest difficulties were now removed. But to this it was answered, that they were to swear they took the oath in the literal sense of the words. So that, if this explanation was not conform to the literal sense, they would be perjured who took it upon this explanation. The imposers of an oath could only declare the sense of it: But that could not be done by any other, much less by a lower authority, such as the privy council's was confessed to be. Yet

a Committee of the Articles for religion, which, by the custom of all Scots parliaments, and his majesty's instructions to his commissioner, at this time, was the first thing treated of: in this committee there was an act prepared for securing the Protestant religion; which act did ratify the act approving the Confession of Faith, and also the act containing the Coronation Oath, appointed by several standing acts of parliament, to be taken by all our kings, and regents, before their entry to the exercise of the government.

"This act was drawn somewhat less binding upon the successor, as to his own profession, but full as strictly tying him to maintain the

when men are to be undone if they do not submit to a hard law, they willingly catch at any thing that seems to resolve their doubts.

"About eighty of the most learned and pious of their clergy left all rather than comply with the terms of this law: And these were noted to be the best preachers, and the most zealous enemies to Popery, that belonged to that church. The bishops, who thought their refusing the test was a reproach to those who took it, treated them with much contempt, and put them to many hardships. About twenty of them came up to England: I found them men of excellent tempers, pious and learned, and I esteemed it no small happiness that I had then so much credit by the ill opinion they had of me at court, that by this means I got most of them to be well settled in England; where they have behaved themselves so worthily, that I have great reason to rejoice in being made an instrument to get so many good men, who suffered for their consciences, to be again well employed, and well provided for. Most of them were formed by Charteris, who had been always a great enemy to the imposing of books and systems as tests that must be signed and sworn by such as are admitted to serve in the church. He had been for some years divinity professor at Edinburgh, where he had formed the minds of many of the young clergy both to an excellent temper and to a set of very good principles. He upon this retired, and lived private for some years: He writ to me, and gave me an account of this breach, that was like to be in the church; and desired, that I would try by all the methods I could think of to stop the proceedings upon the test. But the king had put the affairs of Scotland so entirely in the duke's hands, and the bishops here were so pleased with those clauses in the test that renounced the covenant and all endeavours for any alteration in church and state, that I saw it was in vain to make any attempt at court.

"Upon this matter an incident of great importance happened: The earl of Argyle was a privy counsellor, and one of the commissioners of the treasury: So when the time limited was near lapsing he was forced to declare himself. He had once resolved to retire from all employments, but his engagements with duke Lauderdale's party, and the entanglements of his own affairs, overcame that. His main objection lay to that part which obliged them to endeavour no alteration in the government in church or state, which he thought was a limitation of the legislature. He desired leave to explain himself in that point: And he continued always to affirm, that the duke was satisfied with that which he proposed: So being called on the next day at the council table to take the test, he said, he did not think that the parliament did intend an oath that should have any contradictions in one part of it to another; therefore he took the test, as it was consistent with itself: (This related to the absolute loyalty in the test, and the limitations that were on it in the confession:) And he added, that he did not intend to bind himself up by it from doing any thing in his station for the amending of any thing in church or state, so far as was consistent with the Protestant religion and the duty of a good subject: And he took that as a part of his oath. The thing past, and he sat that day in council; and went next day to the treasury chamber, where he repeated the same words. Some officious people upon this came, and suggested to the duke, that great advantake might be taken against him from these words. So at the treasury chamber he was desired to write them down, and give them to the clerk, which he did, and was immediately made a prisoner in the castle of Edinburgh upon it. It was said, this was high treason, and the assuming to himself the legislative power, in his giving a sense of an act of parliament, and making that a part of his oath. It was also said that his saying, that he did not think the parliament intended an oath that did contradict itself, was a tacit way of saying that he did think it, and was a defaming and a spreading lies of the proceedings of parliament, which was capital. The liberty that he reserved to himself was likewise called treasonable, in assuming a power to act against law: These were such apparent stretches, that for some days it was believed all this was done only to affright him to a more absolute submission, and to surrender up some of those great jurisdictions over the Highlands that were in his family. He desired he might be admitted to speak with the duke in private: But that was refused. He had let his old correspondence with me fall for some years: But I thought it became me in this extremity to serve him all I could. And I prevailed with lord Halifax to speak so oft to the king about it, that it came to be known: And lord Argyle writ me some letters of thanks upon it. Duke Lauderdale was still in a firm friendship with him, and tried his whole strength with the king to preserve him: But he was sinking both in body and mind, and was like to be cast off in his old age. Upon which I also prevailed with lord Halifax to offer him his service, for which duke Lauderdale sent me very kind messages. I thought these were the only returns that I ought to make

Protestant religion, in the public profession thereof, and to put the laws concerning it in execution, and also appointing a further test, beside the former, to exclude papists from places of public trust; and because the fines of such as should act, without taking the test, appeared no better then discharged, if falling in the hands of a Popish successor, and some accounting any limitation worse than an exclusion, and all being content to put no limitation on the crown, so it might consist with the safety, and security of the Protestant religion, it was ordained, that all such fines, and forfaultures should appertain the one half to the informers, and the other half should be bestowed on pious uses, according to certain rules expressed in the act.

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him for all the injuries he had done me, thus to serve him and his friends in distress. But the duke of York took this, as he did every thing from me, by the worst handle possible. He said, I would reconcile myself to the greatest enemies I had in opposition to him. Upon this it was not thought fit upon many accounts that I should go and see duke Lauderdale, which I had intended to do. It was well known I had done him acts of friendship: So the scandal of being in enmity with him was over: For a Christian is no man's enemy: And he will always study to overcome evil with good.

"Lord Argyle was brought to a trial for the words he had spoke. The fact was certain: So the debate lay in a point of law, what guilt could be made out of his words. Lockhart pleaded three hours for him, and shewed so manifestly that his words had no sort of criminousness, much less of treason in them, that, if his cause had not been judged before his trial, no harm could have come to him. The court that was to judge the point of law (or the relevancy of the libel as it is called in Scotland) consisted of a justice general, the justice clerk, and of five judges. The justice general does not vote, unless the court is equally divided. One of the judges was deaf, and so old that he could not sit all the while the trial lasted, but went home and to bed. The other four were equally divided: So the old judge was sent for: And he turned it against lord Argyle. The jury was only to find the fact proved: But yet they were officious, and found it treason: and to make a shew of impartiality, whereas in the libel he was charged with perjury for taking the oath falsly, they acquitted him of the perjury. No sentence in our age was more universally cried out on than this. All people spoke of it, and of the duke who drove it on, with horror: All that was said to lessen that was, that duke Lauderdale had restored the family with such an extended jurisdiction that he was really the master of all the highlands: So that it was fit to attaint him, that by a new restoring him these grants might be better limited. This, as the duke wrote to the king, was all he intended by it, as lord Halifax assured me. But lord Argyle was made believe, that the duke intended to proceed to execution. Some more of the guards were ordered to come to Edinburgh. Rooms were also fitted for him in the common jail, to which peers use to be removed a few days before their execution. And a person of quality, whom lord Argyle never named, affirmed to him on his honour, that he heard one who was in great favour say to the duke, The thing must be done, and that it would be easier to satisfy the king about it after it was done, than to obtain his leave for doing it. It is certain, many of the Scottish nobility did believe that it was intended he should die.

"Upon these reasons lord Argyle made his escape out of the Castle in a disguise. Others suspected those stories were sent to him on purpose to frighten him to make his escape; as that which would justify further severities against him. He came to London, and lurked for some months there. It was thought I was in his secret. But though I knew one that knew it, and saw many papers that he then writ, giving an account of all that matter, yet I abhorred lying: and it was not easy to have kept out of the danger of that, if I had seen him, or known where he was: so I avoided it by not seeing him. One that saw him knew him, and went, and told the king of it: but he would have no search made for him, and retained still very good thoughts of him. In one of lord Argyle's papers he writ, that, if ever he was admitted to speak with the king, he could convince him how much he merited at his hands by that which had drawn the Duke's indignation on him. He that shewed me this explained it, that at the duke's first being in Scotland, when he apprehended that the king might have consented to the exclusion; he tried to engage lord Argyle to stick to him in that case; who told him, he would always be true to the king, and likewise to him when it should come to his turn to be king, but that he would go no farther, nor engage himself in case the king and he should quarrel.

"I had lived many years in great friendship with the earl of Perth: I lived with him as a father with a son for above twelve years: and he had really the submissions of a child to me. So, he having been on lord Argyle's jury, I writ him a letter about it with the freedom that I thought became me: he, to merit at the duke's hands, shewed it to him, as he himself confessed to me. I could very easily forgive him, but could not esteem him much after so unworthy an action. He was then aspiring to great preferment, and so sacrificed me to obtain favour: but he made greater sacrifices afterwards. The duke now seemed to triumph in Scotland. All stooped to him. The presbyterian party was much depressed. The best of the clergy were turned out. Yet, with all this, he was now more hated there than ever. Lord Argyle's business made him be looked on

"But this act, being no wise pleasing to some, it was laid aside, and the committee discharged any more to meet, and instead of this act, there was brought in to the parliament, at the same time, with the act of succession, a short act ratifying all former acts made for the security of the Protestant religion, which is the first of the printed acts of this parliament.

"At the passing of this act, the earl proposed that these words, 'And all acts against Popery,' might be added, which was opposed as one that would prove a terrible master when all should come into his hands." 1 Burnet, 515.

Laing's Account is very valuable for the reflections interwoven in it:

"The act of succession had passed, on the promise of the two brothers to grant every security for the protestant faith which the parliament should require; but the performance of this public and solemn assurance does no credit to the sincerity of James. When demanded so loudly that it could no longer be withheld, the security of the protestant religion was insidiously converted into a test of passive obedience, for the security of the throne. A declaration from persons in office, of their adherence to the protestant religion, was at first proposed. The court party subjoined a recognition of the supremacy, a disavowal of the covenant, and an obligation never to assemble in order to deliberate on civil or ecclesiastical affairs, without the king's permission; never to rise in arms without his authority, nor otherwise to endeavour an alteration of government in church or state. The oath was to be received under the penalty of confiscation, and to be sworn according to its literal acceptation, by all persons in civil, military, or ecclesiastical offices; the king's legitimate brothers or sons excepted: and as the test was meant to incapacitate the presbyterians, it was extended to the whole body of electors, and members elected to serve in parliament. [Fountainhall's Memoirs, MS. Burnet, ii. 329.]

"Such a violent invasion of their privileges excited fierce debates. The presbyterians would have dispensed with the security of religion, to avoid a test which the duke urged as a political engine, and which the bishops regarded as a salutary expedient for the preservation of their order, against the danger to be apprehended from a presbyterian parliament. Lord Belhaven observed that, however secure from the effects of innovations which themselves might attempt, they had no provision to preserve their religion against a popish or fanatical successor; but the words were no sooner uttered than he was sent to the Castle. Argyle, with more moderation, deplored the frequency of religious oaths, but opposed the exemption of the royal family, as a permission, if not an encouragement, for men to depart from the national church. If an exemption were to be made, he proposed that it should be expressly confined to the duke; but when the latter rose to resist the motion, Argyle declared in conclusion, that the exception was pernicious to the protestant faith, and notwithstanding a previous intimation which he had given, that he would oppose whatsoever was adverse to religion, his words were observed to produce a deep and indelible impression upon James. But the opposition to the test was ineffectual, nor was a delay admitted for a single night. As it was difficult to ascertain, or to define with accuracy what was the precise standard of the protestant religion, Dalrymple, the president, suggested as the rule of faith, the earliest confession of the first reformers, framed to expose the errors of popery, and to justify their resistance to the queen regent; and ratified by the first parliament of James 6. when Mary was compelled to resign her crown. It was artfully proposed as irreconcileable to the test, and had been disused so long to make way for the Westminster confession, that the contents of it were unknown to the illiterate prelates; and were adopted without being understood or even read. The test was accordingly framed, and approved by a majority of seven votes. It appeared when examined, to be a mass of the most absurd contradictions. A long inconsistent oath was prescribed, to adhere according to this obsolete confession, to the protestant faith, yet by the recognition of supremacy, to conform to whatsoever religion the king might appoint; to maintain the former presbyterian discipline, yet to attempt no alteration in the present episcopal form of the church; to abjure the doctrines, and to renounce the right of resistance, but at the same time, as a religious duty incumbent by the confession upon good subjects, to repress the tyranny and to resist the oppression of kings. No sincere presbyterian could subscribe the oath. None of the episcopal persuasion could assent conscientiously to the confession of faith. A papist could accept of neither But when both were conjoined, and when every explication different from the literal sense was disavowed, it was impossible, without perjury, either to receive the test or to reconcile the contradictory terms in which it was framed. [Burnet, 331. Fountainhall's Mem. MS. Dec. i. 149. Wodrow, ii. 195. Argyle's Case, p. 3, written by sir James Stewart.]

"The parliament concluded with little credit to the reputation of James. Whatever were his moral or his private qualities, it was observed that he inherited all the obstinacy, and the same species of political insincerity, which his father possessed; but, in the management of parliament, discovered little capacity for the nice conduct of public affairs. [Fountainhall's Dec. 1. 157.] To evade the promise of an additional security for the protestant faith, he deceived and endeavoured to entangle the presbyterians in an ensnaring test. From his own violence, he was over-reached by Dalrymple, and the oath intended to exclude

by the advocate, and some of the clergy, as unnecessary, but the motion being seconded by sir George Lockhart, and the then president of the session, now turned out, it was yielded to, and added without a vote, and this act being still not thought sufficient, and several members desiring other additions, and other acts, a promise was made by his royal highness, in open parliament, that time, and opportunity, should be given, to bring in any other act, which should be thought necessary for further securing the

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the presbyterians, was rendered adverse and equally irreconcileable to every religious persuasion and sect. A test contradicted throughout by the confession of faith, was expected to be abandoned; but the court party was inured to political oaths. The duke was determined not to forego the political advantages of a test from which he was relieved himself; a strange example of the nature of persecution, and of his character, in exacting from the presbyterians an acknowledgment of the ecclesiastical supremacy of the crown, which his own religion disavowed, and did not permit him to subscribe. The established clergy were the first to dissent.

"The earl of Argyle, when required by the duke to subscribe the test, was admonished privately, by the bishop of Edinburgh, not to ruin an ancient family, nor to augment the resentment which his opposition had kindled. In the late parliament an attempt had been made, with the duke's concurrence, to divest him of his family jurisdictions and estate. A special commission was proposed, instead of the ordinary judicatures, in order to examine, or rather to resume the gift of his father's forfeiture; he was refused access to the king for protection; he was displaced with Dalrymple from the court of session; and no doubt can remain of the duke's intention to ruin a potent nobleman, whose implicit and unreserved support he despaired to obtain. Argyle, aware of the danger, would have resigned his employments; but on obtaining the duke's approbation, he accepted the test as a privy counsellor, with an explanation. His explanation was graciously received. He resumed his seat on the duke's invitation, but declined to vote on the general explanation which the council pronounced that day upon the test. Next day, he was required in council to renew the oath, as a commissioner of treasury, and when he referred to his former explanation, it was clamorously demanded. Alarmed at this eager importunity, he acknowledged, but refused to subscribe the explanation, and was immediately displaced from the council board. A few days afterwards he was enjoined to enter prisoner in the castle, and was accused of leasing-making, perjury and treason; of depraving the laws, and assuming the legislative powers of the state. [Wodrow, 3. 7. &c. Burnet, 2. 335.]

"No man could believe, that the ministerial cabal was so bold and flagitious, or that the duke was of such a ductile or tyrannical disposition, as to persist in a judicial trial, in order to deprive Argyle of his honours, his estate, and life. Nothing farther was apprehended at first than a design to extort, by menaces, a more ample submission: the surrender of his jurisdictions, and a part of his estates. Eight advocates, who signed an opinion that the explanation was legal, were severely threatened; the assistance of Lockhart was thrice prohibited, and was only granted from an apprehension that Argyle, if deprived of the benefit of counsel, might refuse to plead. The iniquity of the whole trial is manifest; but it is proper, and often profitable in history, to investigate the minute particulars, and to record the infamy of each judge, as a warning to others, and as a wholesome example to future times. When Argyle was arraigned at the bar of the justiciary court, his explanation of the test was perverted throughout. That the parliament never meant to impose contradictory oaths, was converted by Mackenzie, the king's advocate, into a tacit, defamatory implication, that such contradictory oaths were actually imposed by parliament: That he took the oath as far as it was consistent with itself and with the Protestant religion, implied, maliciously, that it was consistent with neither: That he was not thereby precluded from such alterations as he thought advantageous to the church or state, released from every obligation contained in the test: And that he understood this to be a part of his oath, transferred the legislative power of the estates to himself. By means of such miserable comments, leasing-making, perjury, and treason were deduced from a perversion of the most innocent words. The pleadings are extant, and the arguments of Lockhart reflect dishonour on the public accuser and infamy on the court. He demonstrated to the secret conviction of the judges themselves, that the explanation, far from amounting to treason, was not even criminal; and that the particular expressions were of the most innocent import, necessary to disburden the conscience from perjury, and strictly legal. But the question had been already prejudged in council. The court was adjourned; but the judges continued sitting till midnight, to determine on the relevancy of the libel, whether in point of law the explanation of the test was sufficient to constitute those crimes which the indictment contained. Collington, an old cavalier, and Harcarse, a just and learned judge, prolonged the deliberations on the indictment, and opposed its relevancy, which was supported by Newton and Forret, the former instruments of Lauderdale's corruption. Queensberry, who presided as justice general, had himself received the test with an explanation; and in this delicate situation, when the judges were equally divided on the question, his private conviction was sufficiently attested by his refusal to give a decisive vote, or forfeit the preferment and favour of court by the acquittal of Argyle. To

Protestant religion: but though several persons, both before and after passing the act for the test (here subjoined) did give in memorials, and overtures, yet they were never suffered to be read, either in articles, or parliament, but in place of all, this act for the test was still obtruded, and nothing of that nature suffered to be heard, after once that act past, though even at passing it the promise was renewed.

"As for the test, it was first brought into the parliament without mentioning the Con-

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relieve him from this disgraceful dilemma, Nairn, a superannuated judge, whose attendance had been long dispensed with, was roused from his bed at midnight; and the proceedings were read over, as he had not heard the debate; but he dropped asleep till awakened for his vote. The interlocutor was pronounced next day, in the strict forms of unsubstantial justice: Unconscious of this midnight divan, Argyle and his counsel were overwhelmed with surprise and despair. They declined any challenge of the jurors, or examination of the witnesses; or disdained to renew an unavailing defence. The jury asserted their full share of infamy, in this iniquitous transaction. Montrose, the chancellor or foreman, dishonoured the reputation derived from his grandfather, in order to avenge his death; and of eleven peers and four commoners, seven were privy-counsellors, personal enemies, deeply engaged in the prosecution of Argyle. From a gross affectation of impartiality, they acquitted him of perjury in receiving the oath in a false acceptation, but found by an unanimous verdict, that he was guilty of treason and leasing making to their full extent. [Burnet. Argyle's Case, ii. 5. 8. 88.]

"It is in vain for apologetical historians to pretend, and in vain for James to assert in his Memoirs, that nothing more was intended than to wrest some dangerous jurisdictions out of the hands of Argyle. A man, who has perverted the course of justice, in order to acquire an undue power over another's life, has no claim to credit for the motives which it may be convenient to assert when his victim has escaped. Argyle had already offered to surrender those jurisdictions, unconditionally, to the king. The design was to ruin the head of the presbyterian party, and to divide the estates among the duke's friends. Whatever were their original designs against his life, his execution, if sentence were once pronounced, was a single additional step which their safety might require, and which the duke's authority was sufficient to sustain. When convicted formerly of the same fictitious crimes, he was preserved by Lauderdale, whose influence had now declined, and he discovered that no favour was to be expected at court. On the return of his messenger, he was informed of the king's instructions, that the sentence should be pronounced and the execution suspended; but every circumstance seemed to announce that his death was resolved. The military were ordered to town, and his guards were doubled: apartments were provided for his reception in the public gaol, to which peers were usually removed from the castle before execution; and the dark and ambiguous expressions of the duke and his creatures implied that his execution was necessary, and that it would be easier to satisfy the king when the deed was done, than to procure his previous consent. Whether these insinuations were employed to intimidate Argyle, he escaped that evening in the train of his daughter in law, the lady Sophia Lindsay, disguised as her page. Sentence of attainder was immediately pronounced. His honours, estate and life, were forfeited in his absence: his arms were reversed and torn; his posterity was incapacitated; and a large reward offered for his head. Notwithstanding a general alarm, and a vigilant pursuit, he was conducted to London, by Veitch a clergyman, through unfrequented roads; and Charles, who possessed not the common justice to pardon and restore him, had the generosity not to enquire after the place of his retreat. [Argyle's Case, 121. 1 Burnet. Wodrow, ii. 213; Fount. Dec. i. 167.]

"Never was a sentence productive of more execration and horror; never, perhaps, was a sentence more flagitiously obtained, than the attainder of Argyle. Even the episcopal party, whom James had attached to his person and interest, were indignant at the shameless prostitution of justice, and the depravity of the prime nobility, who had descended to the basest offices, in order to accomplish the ruin of an ancient house. But the presbyterians were struck with consternation and despair. The most obnoxious of such as had opposed the test, and among these the earl of London, Dalrymple the late president, Stewart an advocate, Fletcher of Salton, retired to the continent. The duke of Hamilton, and the proprietors of twenty sheriffships, or extensive regalities, rather than receive a test so pernicious to Argyle, suffered their hereditary jurisdictions to lapse and revert to the crown. [Wodrow, ii. 225.] From the horror and antipathy which the sentence inspired, the presbyterians became ever afterwards irreconcileable to James. He allowed them, they said, to continue protestants, but if they once ventured to assert their faith, not the most uniform nor meritorious services could atone for a single act of opposition or of zeal. [Fount. Mem. MS.] Their fears were communicated to those who had urged his exclusion with such violence in England, and whom the dissolution of the last parliament of Charles had left unprotected; and Argyle's Case, which was printed in London, produced a deep impression on the public mind. From the coincidence of the two events, his attainder, at the duke's instigation, was compared with the acquittal of Shaftesbury, against whom it appeared that the king himself had condescended to solicit evidence, if not to practise the arts of subornation. [Ralph, 1, 639.]

fession of Faith, and, after several hours debate, for adding the Confession of Faith, and many other additions, and alterations, it was past at the first presenting, albeit it was earnestly prest, by near half the parliament, that it might be delayed till next morning, the draught being so much changed and interlined, that many, even of the most engaged in the debate, did not sufficiently understand it, and though they took notes, knew not precisely how it stood. And this was indeed the earl's case in particular, and the cause why, in voting, he did forbear either to approve, or disapprove.

"His part in the debate was, that in the entry of it, he said, that he thought, as few oaths should be required as could be, and these as short and clear as possible: that it was his humble opinion, that a very small alteration in these acts, which had been used these 20 years, might serve, for it was manifest, and he attested the whole parliament upon it, that the oath of allegiance, and declaration, had effectually debarred all fanatics from getting into places of trust, all that time: it was true some papists had swallowed the oath of allegiance, and therefore a word or two only of addition, to guard against them, was all he judged necessary.

"And thereafter, where in the close of the act, the king's sons, and brothers, were intended to be dispensed with from taking the test, he opposed the exception, and said, it was our happiness that king and people were of one religion, and that they were so by law: that he hoped the parliament would do nothing to loose what was fast, nor open a gap for the royal family to differ in religion, their example was of great consequence, one of them was as a thousand, and would draw the more followers, if once it appeared to the people that it were honourable, and a privilege to be of another religion: and therefore he wished, if any exception were, it might be particular for his royal highness; but his highness himself opposing this, the earl concluded with his fear, that if this exception did pass, it would do more

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There was nothing similar to the corruption of the peers and jurors of Argyle; except the venal evidence which was allotted in England to the vilest of mankind. But the exclusionists anticipated their own destruction, from the attempt to ruin the two protestant earls; and if such were the first fruits of the duke's administration in Scotland, what was to be expected from his tyrannical disposition when he should ascend the throne? What, but the most sanguinary reign of proscription and terror? the fear of which was productive of extensive conspiracies, in which the patriots of each kingdom were involved." 4 Laing's Scotland, 116.

The following passage, in what Macpherson published under the title of "The Life of King James the Second, written by himself," (see the Introduction to Clarendon's Case, vol. 6, p. 291, of this Collection), contains the assertion in the Memoirs of James, to which Mr. Laing alludes:

"Dec. 18, 1681. Letters sent in form, for passing sentence on Argyle; but not to be put in execution till further orders.

"It was neither the king's, nor the duke's intentions to take away either the life or estate of Argyle. But to make use of that occasion to get him more under their power, and to forfeit certain jurisdictions and superiorities which he and his predecessors had surreptitiously obtained and most tyrannically exercised. The king respited his sentence. He was glad to get those superiorities and offices, which he thought too great for any one subject, out of such bad hands. He escaped by means of his daughter. Some of the council advised that she should be publicly whipped through the streets of Edinburgh. The duke prevented it, and said, smiling, 'That they were not used 'to deal so cruelly with ladies in his country.' But notwithstanding the duke designed no real harm to Argyle, his enemies were too watchful to let slip any opportunity of decrying his conduct. The duke and duchess of Lauderdale had a great share in these false reports. They interceded vehemently in favour of Argyle's son the lord Lorne. This the duke was no less ready to concur in, than the king to grant, only desired, that in settling the estate, due regard should be had, and provision made for the younger children. But the duchess of Lauderdale pressed hard for having all the offices, except justiciary, confirmed to Lorne. The duke urged for a signature and disposition of the estate, for the payment of all just creditors, with moderate donatives to such as Argyle had ruined by his tyranny, the surplusage being intended to descend to his family. The king refused to see Lorne, but with the duke's consent."

"The disgusting case," says Mr. Fox, "with which James, (in his Memoirs, Macpherson's State Papers, I. 123), speaks of Argyle's case, his pretence, that he put his life in jeopardy only with a view to seize his property, seem to destroy all notions of this prince's having had any honour or conscience; nor after this, can we give much credit to the declaration, that Argyle's life was not aimed at."

Roger Coke says: "The next day, after the earl's sentence, viz. December the 14th, the council gave the king notice of it, and expected his further pleasure, now the work is done to his hand: but it seems his highness was very impatient till he had the earl's blood; for, he said, 'If the express from the king came not 'timously, he would take upon himself what 'was to be done;' by which you may see what an ascendancy the duke had over the king: however, the earl upon the 16th petitioned the duke that he might send a Petition to the king, which was refused." Vol. 2, p. 295.

hurt to the Protestant religion than all the rest of that act, and many other acts, could do good.

"Whilst these acts, about religion, were in agitation, his highness told the earl one day in private, to beware of himself, for the earl of Errol, and others, were to give in a bill to the parliament, to get him made liable to some debts they pretended to be cautioners in for his father, and that those that were most forward in his majesty's service must be had a care of: the earl said, he knew there was no ground for any such bill, and he hoped neither the earl of Errol, nor any other, should have any advantage of him, upon any head relating to his majesty's service. His highness told others likewise, he had given the earl good advice.

'But shortly after the above-mentioned debates, there were two bills given into the meeting of the Articles, against the earl, one by the earl of Errol, the other by his majesty's advocate, who alledged he did it by command, for otherwise he acknowledged it was without his line. The earl of Errol's claim was, that the earl of Argyle might be declared liable to relieve him, and others, of a debt, wherein, they alledged, they stood bound as cautioners, for the late marquis of Argyle, the earl's father. To which the earl answered, that he had not got his father's whole estate, but only a part of it, and that expressly burdened with all the debts he was liable to pay; whereof this pretended debt was none, and that the marquis of Huntly, who at that time was owing to the marquis of Argyle 35,000*l.* sterl. had got 4,000*l.* sterl. of yearly rent, out of the marquis of Argyle's forfaulture, without the burden of any debt; so that both by law, and equity, the earl could not be liable, the marquis of Huntly, and not he, having got that which should bear this relief, and which should indeed have paid the far greatest part of the marquis of Argyle's debt, the same having been undertaken for Huntly by Argyle, either as cautioner for Huntly, or to raise money to pay his debt: besides that the earl of Errol can never make it appear, that he, or his predecessors, were bound, for the marquis of Argyle, in the third part of the sums he acclaims; yet some were much inclined to believe Errol on his bare assertion.

His majesty's advocate's claim was, to take from the earl his heritable offices of sheriff, &c. especially that of justice-general of Argyle-shire, the Isles, and other places, which last is nevertheless only a part of the general justiciary of all Scotland, granted to his predecessors, some hundred years ago, for honourable and onerous causes, and constantly enjoyed by them until expressly surrendered, in his late majesty's hands, for a new grant of the above-mentioned Justiciary of Argyle, &c. And this new grant was also confirmed by many acts of parliament, and particularly by his majesty's royal father, of blessed memory, in the parliament holden by him Anno 1633. As likewise by his majesty that now is (whom God long preserve) his new gift and charter, after several debates before him in Anno 1663, and 1672. Which new gifts and charters were again ratified by a special instruction from his majesty in the parliament 1672. So that albeit several late gifts of regality granted to the marquis of Athol, marquis of Queensberry, and others, may be questioned, because granted since the acts of parliament discharging all such gifts in time coming, yet the earl of Argyle's rights are good, as being both of a far different nature, and granted long before the said acts of parliament, and in effect the earl his rights are rather confirmed by these prohibitive acts, because both anterior to, and excepted from them, as appears by the act Salvo Jure 1633. Wherein the earl's rights are particularly and fully excepted in the body of the printed act.

"When these things appeared so plain as not to be answered, it was alledged that upon the forfaulture of the late marquis of Argyle, his estate was annexed to the crown; and so could not be gifted to the earl by his majesty, (wherein they soon discovered a design to forfault him, if any pretence could be found) but the act of forfaulture being read, and containing no such thing, but on the contrary a clear power left to his majesty to dispose of the whole, and the earl telling them plainly, that these that were most active to have his father forfaulted, were very far from desiring his estate to be annexed to the crown, seeing it was in expectation of gifts out of it they were so diligent, that pretence of the annexation was past from, but yet the design was no wise given over, for there was a proposition made, and a vote carried in the articles, that a committee should be appointed, with parliamentary power, to meet in the intervals of parliament, to determine all controversies could be moved against any of the earl's rights; which was a very extraordinary device, and plainly carried by extraordinary influences.

"Upon this the earl applied to the parliament, where this vote was to be brought, and having informed the members of his right, and the consequences of such a new judicature, he had good hope to get the vote reversed, when his royal highness on second thoughts judged it fit to put a stop to it, and excused himself, saying, it was his not being acquainted, and but lately in affairs, had made him go along with it, for he found it did plainly impugn his majesty's prerogative, and might be of ill consequence, and indeed it is plain enough. It would have exposed the marquis of Huntly's gift, which proceeded on the same forfaulture, as well as the earl of Argyle's, to the same, and far greater hazard, as some came to be

sensible, when they heard all. You see here at what rate the earl was pursued, and on what grounds, before his taking of the test came in hand.

'After the parliament was adjourned, there was a new design to apply to his majesty for a commission, of the same nature, for reviewing all the earl's rights, and to deprive him of his heritable offices, and, if possible, to burden him with more debts than his estate was worth. •

'Upon which, the earl waited on his highness, and informed him more particularly, offering to make it appear, by unquestionable rights and evidences, that his estate was not subject to any such review, as was intended, and that it might breed the earl great trouble, but could have no effect in law. To which his highness answered, That a review could do no hurt; the earl said, if a commission for a review were granted, something must be intended, and something must be done, and it was very like that some of these put into such a commission would be his enemies, at least small friends, and therefore intreated that if any intended to quarrel his rights, they and he and all their debates might be remitted to the ordinary judicatories: and indeed he had reason to desire it might be so, the ordinary judicatories being established by the ancient laws of the kingdom, not in order or with respect to particular causes, and persons, but for the general, equal and impartial administration of justice to all. Whereas the granting particular commissions, for trying and judging such and such cases, and persons, cannot but expose to the just contrary inconveniences, there being certainly a vast difference betwixt a man's finding a judge indifferently constitute, and his having one expressly and particularly appointed, for his single affair, who might possibly think himself commissionate, rather to serve a turn in an arbitrary way, than to administer fair justice: but all this prevailed not, only his highness said, the commission should not be expede until the earl knew the names of the persons insert in it: whereunto the earl answered, that there might be many persons, against whom he could make no legal exception, whom yet he might have very good reason to decline to be his particular judges, and to have his rights taken from the ordinary judges, and committed to their examination, and all he might possibly gain by excepting would be to irritate; adding that as to his heritable offices, he had undoubtedly right to them, and they were rather honourable, than of advantage, that his family had them for faithful services to the crown; and because they had served more faithfully than their neighbours, and been more useful than others, in keeping the country in peace, from thieves and robbers, therefore all the broken men and their patrons, were enemies to him, and his family, and desirous to have these offices out of his hand, but he resolved to do as he had always done, to put himself in his majesty's will, and if his majesty were resolved to have back all heritable offices, and should think fit after hearing him to have back his, his majesty should have them, either freely or for a just value: for though they rendered the earl no free yearly rent, as the earl used them, yet he might be a sufferer in the want of them, if the country were left open to thieves and robbers, which he hoped his majesty would repair. His rights (as he had said in parliament) were unquestionable, and often times confirmed; yet he was willing to surrender them all on his knee to his majesty, but was not willing to have them torn from him with an affront by any other.

"Upon this his highness was pleased, to allow the earl a time, to go to the country, to bring his papers, and he was put in hopes no commission should pass till his return, which was indeed observed.

"In the mean time, the earl did write to the earl of Murray, his majesty's secretary, that he might have leave, to wait upon his majesty, which his majesty did graciously and readily grant; the earl purposing, at his return to Edinburgh, to beg the same favour of his highness: but he found this motion more fatal to him than he could have at first expected so innocent a design could prove: for it was at first told him, he could not have access to kiss his majesty's hand without taking the test; then it dropt out, that it was ill taken, his majesty was at all addressed to, for leave to kiss his hand: and at length it became plain, that taking the test would not clear the way.

"As the earl was on his return to Edinburgh, to wait upon his highness, and come the length of Glasgow, he got the news, that the late president of the session, and he, were both turned out of it, and at his arrival at Edinburgh, several meetings of council were appointed only to occasion his taking of the test: but the earl having gone some miles out of town, was not present. At last a meeting of the council was appointed expressly, and one of the clerks ordered to warn the earl particularly to be present; whereof the earl being advertised before the clerk came to him, he waited on his highness, and had the honour of an opportunity after supper, to speak to his royal highness, in his bed-chamber: the earl told his highness, he was now returned, to make good his word, and to shew those writs and rights he had promised: but Sir (said the earl) I have heard by the way of alterations, and that I am turned out of the session: his highness said, it was so: the earl asked what next? His highness said, he knew no more. The earl said, he had never sought that, nor any place, and he knew that place was at his majesty's dispose, and it might soon be better filled: but said the earl, if it be to ex-

press a frown, it is the first I have had from his majesty this 30 years; I know I have enemies, but they shall never make me alter my duty, and resolution to serve his majesty; I have served his majesty in arms and in his judicatures, when I knew I had enemies on my right hand, and on my left, and I will do so still. But if any have power, to render his majesty or your highness jealous of me, it will make my service the more useless to both, and the less comfortable to myself: his highness said, he knew no more than what he had said; the earl then said, it was late, and he would wait on his highness some other time, about these matters: but the thing that at present presses (says the earl) is, that I hear one of the clerks of council is appointed to tell me to be at the council, to morrow, I conceive, to take the test; pray, what is the haste? may not I, with your highness's favour, have the time allowed by the act of parliament? His highness said, No. The earl urged it again, but in vain: and all the delay, he could obtain, was till Thursday the 3rd November, the next council day in course. The earl said he was the less fond of the test, that he found that some that refused it were still in favour, and others that had taken it turned out, as the register, at which his highness only laughed: but Sir, said the earl, how comes your highness to press the test so hastily? Sure there are some things in it your highness doth not over much like: then said his highness, angerly, and in a passion: most true, that test was brought into the parliament, without the confession of faith: but the late president caused put in the confession, which makes it such as no honest man can take it: the earl said he had the more reason to advise: whereby you may see, whether his highness then thought, the confession was to be sworn to in the test, or not.

"After this the earl waited several times on his highness, and made new attempts for the favour of a delay, but with no success: What passed in private, shall not be repeated except so far as is absolutely necessary to evince the earl his innocency, and to shew that in what he did he had no ill design, nor did in the least prevaricate, or give any offence willingly, but was ready to comply, as far as he could, with a good conscience: It was in this interval, that the earl spoke with the bishop of Edinburgh, and saw his vindication of the test, and all the explanations I here send you, only the council's explanation was not yet thought on: And that all the bishop did then urge the earl with, beyond what is his vindication, was to have a care of a noble family, and to tell him, that the opposing the exception of the king's sons, and brothers, from taking the test, had fired the kiln.

"At the last upon Wednesday, the second of November, late, the earl waited on his highness, and did in the most humble, and easy expressions he could devise, decline the present taking of the test; but if his highness would needs have a present answer, he begged his favour, that he would accept of his refusing it in private, which was denied again: Then, he said, if his highness would allow him time, to go home and consider, he would either give satisfaction, or the time prescribed by the act of parliament would elapse, and so he would go off in course and without noise. But this also his highness absolutely refused: Upon which the earl asked, what good his appearing in council, to refuse there, would do? His highness was pleased to answer, that he need not appear, but to employ some friend to speak for him; and his highness himself named one. This the earl yielded to, as the best of a bad choice, and said, he should either use the person named by his highness, or some other relation that were a counsellor, and in town: And, in compliance with his highness's pleasure, the next morning, the earl drew a letter, for a warrant to the same person his highness had named, for declaring his mind in council; wherein he expressed his constant resolution to continue a true protestant, and loyal subject, which were the true ends of the test: but the letter concluding on a delay of taking the oath, and his highness having given some indication, how little pleasing that office was to him, neither that friend, nor any other would, by any means, accept of it.

"Upon this the earl drew a second, and shorter letter, to any that should that day preside in council; but after much discourse, it being suggested, that an explanation would be allowed, and the shorter the better, the earl first drew one, suitable to his own thoughts; and it being thought too long, did instantly shorten it, and put it into his pocket, but withal said he would not offer it, till he knew his highness's pleasure, lest his highness might take it ill that any had prevailed more with him, than himself; and therefore the earl did refuse to go to the council, or out of his chamber, till he had his approbation. A little after a coach was sent for the earl, and it was told him, in the room without the council chamber, that the bishop of Edinburgh had spoke to his highness, and signified to him, that the earl was willing to take the test, with an explanation, and that the bishop said, it would be very kindly accepted. These were the express words, and then (and not till then) the earl went into the council, and delivered (that is, pronounced) his explanation close by his highness, and directly towards him; so loud and audible, that some in the furthest corner of the room acknowledged they heard it: whereupon the oath was administered, and the earl took it; and his highness with a well satisfied countenance, and the honour of a smile, commanded him to take his place;

And while he sat by his highness (which was his honour to do that day) his highness spake several times privately to him, and always very pleasantly.

"And the earl hath since protested to his friends, that he thinks his highness was, at the time, well pleased, though some others, that wished the earl out of the council, appeared surprised, and in some confusion.

"The first thing came to be treated of in council, after the earl had taken his seat, was the council's explanation, at that time intended, and resolved to be allowed to the clergy only, and no other, and withal not to be printed: To which the earl refused to vote, which was afterwards made a ground of challenge. A little after, it being the post night, the earl stept out, and went to his lodging, and though he acknowledges, he did not decline to give some friends an account of what had past, yet he was so far from spreading copies of his explanation, at taking the oath, that he flatly refused to give a kind, and discreet friend, then in his chamber, a copy of it, lest it might go abroad: And the words being few, and publicly spoke, it is not strange they might be almost perfectly repeated, as, it is known, the clerks pretended to do; but the king's advocate having past from the accusation of spreading, this is only mentioned to evidence how singly studious the earl was to satisfy his own conscience, and how tender of giving offence, for I can say truly for him, he was never heard to dissuade any to take the test, nor to disparage it, after it past in an act; only he refused to take it himself, without an explanation, which to stretch to a crime is beyond all example. I confess, he never cried it up as superexcellent, or divine, as some have done that can alter their tone, and decry it as much, whenever there shall be occasion.

"The next morning the earl waited on his highness, expecting yesternight's countenance, and indeed nothing less than what he met with; for beginning to speak with his highness in private, his highness interrupted him, and said he was not pleased with his explanation. The earl said, he did not presume to give it till his highness allowed him: His highness acknowledged, that the bishop of Edinburgh had told him, that the earl intended an explanation: But, says his highness, I thought it had been some short one, like earl Queensberry's: The earl answered that his highness heard what he said: His highness said, he did, but he was surprised: Then the earl said, he had said the same thing, in private to his highness, wherewith he, at that time, appeared satisfied: And the earl being about to say more, in his own vindication, his highness interrupting said, Well, it is past with you, but it shall pass so with no other, which words, the earl thought, did both confirm the council's acceptance, and his explanation, and sufficiently clear him from all offence, if he had incurred any.

"And whatever hath been his highness's resolution, or the earl's misfortune since, the earl is persuaded that his highness was resolved then to push the affair no further, for though some had still the same animosities, and prejudices against the earl, yet hitherto they had not adventured to undertake to extract, and forge such crimes, out of his words, as afterwards they did: And it was not, till private suggestions were made, that advocates were asked, as they were, if these words could be stretched to treason; and that (when the ablest denied) the king's advocate complied, and was ordered to draw the indictment, and some judges were engaged, and secured about it, as will appear, whenever his majesty thinks it his interest to take an exact trial of that whole affair.

"The earl did think, as I just now said, his highness saying, it was past as to him, was enough; he was resolved to say no more for justifying himself, but seeing he is so hardly pressed, and his life, and honour at the stake, it is hoped his highness will not disown what the earl hath hitherto so respectfully concealed, and is now no less necessary to be spoke out for his vindication. And that is, that besides that his highness did allow the earl to explain, and did hear his explanation in council, and approve it: The earl did twice in private, once before, and once after his oath in council, repeat, to his highness, the same words, that the treason is now founded on: viz. That the earl meant not to bind up himself, to wish, and endeavour, in a lawful way, and in his station, any alteration, he thought to the advantage of church and state, not repugnant to the protestant religion, and his loyalty: and that his highness was so far from charging them with treason, that he said, plainly, both times, the earl's scruples were unnecessary, and that the test did not bind him up as he imagined; adding further, the last time, that the earl had cheated himself, for notwithstanding the explanation, he had taken the test. To which the earl only answered, that then his highness should be satisfied. Now, after all this, that treason should be so earnestly searched for, and so groundlessly found, in those words, is it not strange beyond all example? Could it be treason for the earl to say, He will not bind up himself, where his highness says so oft, and so plainly, It was not intended that he, or any man, should be bound up?

'What passed the next day, after the earl had taken the test, and was received by the council, is also proper for you to know. The earl being to take it as one of the commissioners of the Treasury, it was commonly thought that he, and the other commissioners, were to take it in the Exchequer; but after ten of the clock, about two hours after the earl had parted from his highness, one told him there was a design upon him, to make him

swear once more before the council; And accordingly, at twelve there was an extraordinary council called in the Abbey, and there it was found, That the commissioners of Treasury, as officers of the Crown, were to take the test before the council; and it was told the earl that the Exchequer could not that day sit without him. And to make the matter more solemn, it was resolved that the council should meet that afternoon, and that his highness should be present: so as soon as they were met, the oath was tendered, and the earl offering to take it, and saying only these words, as before, the earl of Roxburgh, never heard to speak in council till then, stood up behind his highness's chair, and with clamour asked what was said: To whom his highness was pleased to turn and inform him; upon which Roxburgh, prepared for the purpose, desired, that what the earl of Argyle had said, the day before, might be repeated: Which the earl, seeing a design upon him, did at first decline, till he was peremptorily put to it by his highness, and he being ingenuous, and thinking no course more proper to prevent mistakes of words, he said he had a note of what he had said in his pocket, which his highness called for very earnestly, and commanded him to produce; which being done, and the paper read, so secure was the earl of his innocency, that he was willing upon the first motion, to sign it: but the then new president of the session, now chancellor, and the new register, could not agree, whether it was fit, or not, the treason not yet appearing, when read in council, as when they had talked of it in private; so the earl was removed, and then called in, and after these two had whetted and adjusted their inventions, he was desired positively to sign the paper he had given in. To which he answered, he meant well, and truly did see no ill in the paper, why he might not, and if the words did please them then, as they did when they were first pronounced, he would do it: but, if they found the least matter of displeasure in them, he would forbear: whereupon being again removed, and called in, he was told, he had not given the satisfaction required by the act of parliament, in taking the Test: and so could not sit in the council, and somewhat more was added, as if the matter drew deeper, but the particular words I do not know: to which the earl said, that he judged, all the parliament meant was to exclude refusers of the Test from places of trust: and if he were judged a refuser, he submitted, but could conceive no greater danger in the matter, for he had served his majesty faithfully within doors, and was resolved to do so without doors, and so he made his obeisance, and went out. Next morning being Saturday, November 5, the earl waited on his royal highness, and amongst other things, told his highness, he was strangely surprised, that the saying he could not bind up himself in his station and in a lawful way, &c. as was contained in that paper, was looked on as a crime, seeing he had said the same words to his highness formerly in private, without any offence, to which his highness gave no answer, but held his peace: which made the earl make bold, to put him to remember his own words, and to ask him, what he had said, when the earl formerly spoke to him: then his highness was pleased to say, he had forgot what he had said: to which the earl answered, the worse indeed for me; but Sir, here are the same words, I formerly said, without offence, what says your highness now? What ill is in them? Let me know and I will vindicate myself. And all his highness at this second time said, was, what hath been above remarked, that they were unnecessary words, that the earl scrupled needlessly, that he was not tied up by that oath, as he imagined; and after a pause added, as I have already told you, well you have cheated yourself, you have taken the Test: to which the earl replied, he hoped then his highness was satisfied, (as above) his highness then began to complain, that the earl, the little while he sat in council, after he had taken the oath, had not gone along to approve the council's explanation: the earl said he had not heard the debate: and therefore, it was reasonable, to excuse him from voting. His highness returned, a little warmly, that the earl knew the case well enough (which indeed was not unlike, and yet not at all strange, that the earl could not vote, for that explanation, seeing he could not but know, the parliament did intend the confession should be sworn: and that he himself had taken it in that sense, as all others had done, before that explanation past in council) but the earl replying nothing, his highness continued, that the earl and others had designed to bring trouble upon an handful of poor Catholics, that would live peaceably, however they were used, but it should light upon others.

"A little after, his highness commanded the earl not to go out of town, till he waited on him, which the earl said he should obey: but notwithstanding thereof one of the clerks of the council was sent to the earl, that same night, late, to intimate to him, not to go out of town, till the council should sit, upon the Tuesday thereafter.

"Upon Monday, the 7th of November, the earl waited on his highness again, and told him "he was surprised to get such a message from the council, after his highness had laid his own commands upon him, and asked what the council's meaning could be: his highness was pleased to say, he knew nothing, but referred all to themselves, at their meeting.

"Upon Tuesday, the 8th of November, when the council met, without ever calling the earl, an order was sent to him, by one of their clerks, to enter himself prisoner in the castle of Edinburgh, before twelve o'clock

the next day, with a warrant to the deputy governor, to keep him prisoner, wherein the word sure-firmance was struck out, which appeared to have been fairly writ: this order the earl received, and obeyed it, with great submission, entering all alone in an hackney-coach: and when some of his relations, and persons of quality offered to go along with him, he refused, saying, that if he were pursued at the instance of any other he would accept of their civility, but seeing he was pursued at the instance of his majesty's advocate, he would go, in the most humble way that he could think on, and have nobody concerned but himself.

'But all this did not hinder the council, to write to his majesty the letter hereafter insert, giving judgment, before trial, without any hearing, and seeking leave to proceed to a process, which they likewise proceeded in, before any return came, as likewise, about the very date of this letter, they emitted their explanation of the test: albeit in their letter, they assert, That they had been very careful not to suffer any to take the test with glosses and explanations.

'The earl, some days after his entering prisoner into the castle of Edinburgh, did write a letter to his royal highness, telling him, that he had obeyed his highness's, and the council's order, in entering prisoner in that place, that he had not written sooner, lest he might be thought too impatient of his punishment, which appeared to be the effects of an high displeasure, which, he hoped, he no wise deserved; that he was resolved to continue in all duty, and obedience to his majesty, and his royal highness, and never to fail in any profession thereof he had made; and begged to know what satisfaction was expected, and where, and how, he might live with his highness favour.

'This letter, at first, seemed to please, and, the earl heard, it did, but the only answer directly returned, was summons charging the earl, with leasing-making, and depraving of laws, before any return from his majesty; and after a return came another summons, with sound of trumpet, containing perjury and treason, added to the former crimes: notwithstanding all which, fair weather was made, and it was given out, and likewise intimated to the earl, by a particular message from one of the club, that no more was designed, but to humble the earl, and to take his heritable and other offices from him, and his family, and when his highness was told it was hard measure, by such a process and on such pretensions, to threaten life and fortune, his highness said, Life and fortune? God forbid!

'What happened after these things, and how the process was carried on, follows now in order: and for your more clear, and distinct information, I have sent you several very necessary and useful papers, with Indexes, &c."

Some other passages omitted in former Editions of the State Trials are here supplied.]

EDINBURGH, *November* 3, 1681.

His Royal Highness, &c.

Athol Præses,	Levingston,
Montrose,	Bishop of Edinburgh,
Argyle,	Elphinston,
Winton,	Rosse,
Linlithgow,	Dalziel,
Perth,	President of Session,
Strathmore,	Treasurer Deputy,
Roxburgh,	Register,
Ancram,	Advocate,
Airley,	Justice Clerk,
Balcarres,	Collintoun,
Lorn,	Lundie.

THIS day the earl of Argyle having first openly declared his sense, as you have it hereafter set down in his explication, took the Test as a privy-counsellor; and after he was called to, and had taken his place, the council's explication having been read and debated, was put to the vote, and passed, the earl not voting thereto.

EDINBURGH, *November* 3, 1681.

The Privy-Council's Explanation of the TEST.

Forasmuch as some have entertained jealousies and prejudices against the Oath and Test appointed to be taken by all persons in public trust, civil, ecclesiastical, or military, in this kingdom, by the sixth act of his majesty's third parliament;* as if thereby they were to swear to every proposition, or clause of the Confession of Faith therein mentioned; or that

* This Act was as follows:

"ACT anent RELIGION, and the TEST. At Edinburgh, the last day of August, 1681.

"The which day, our sovereign lord with his estates of parliament, considering that albeit, by many wholesome laws made by his royal grandfather, and father of glorious memory, and by himself, in this, and his other parliaments since his happy restoration, the Protestant religion is carefully asserted, established and secured, against popery and phanaticism: yet the restless adversaries of our religion, do not cease to propagate their errours, and to seduce his majesty's subjects from their duty to God, and loyalty, to his vice-gerent, and to overturn the established religion, by introducing their superstitions and delusions, into his church and kingdom. And knowing that nothing can more increase the numbers and confidence of papists, and shismatical dissenters from the established church, then the supine neglect of putting in execution the good laws provided against them, together with their hopes to insinuate themselves into offices and places of trust and public employment. Therefore, his majesty, from his princely and pious zeal, to maintain and preserve the protestant

invasion were made by it upon the intrinsic spiritual power of the church, or power of the keys, or as if the present episcopal government of this national church, by law established, were thereby exposed to the hazard of alteration or subversion: all which are far from the intention or design of the parliaments imposing this oath, and from the genuine sense

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religion, contained in the Confession of Faith, recorded in the first parliament of king James the Sixth, which is founded on, and agreeable to the written word of God; doeth, with advice and consent of his estates of parliament, require and command, all his officers, judges and magistrates, to put the laws made against popery and papish priests, Jesuits, and all persons of any other order in the popish church, especially against sayers and hearers of mass; venders and dispersers of forbidden books, and ressetters of popish priests, and excommunicate papists: as also, against all phanatick separatists from this national church; against preachers at house, or field conventicles, and the ressetters, and harbourers of preachers, who are intercommuned; against disorderly baptisms, and marriages, and irregular ordinations, and all other shismatical disorders, to full and vigorous execution, according to the tenor of the respective acts of parliament thereanent provided: and that his majesty's princely care to have these laws put in execution, against those enemies of the protestant religion, may the more clearly appear: he doeth, with advice and consent aforesaid, statut and ordain, that the ministers of each paroch, give up in October yearly, to their respective ordinaries, true and exact lists of all papists, and schismatical withdrawers from the public worship, in their respective paroches; which lists are to be subscribed by them, and that the bishops give in an double of the said lists subscribed by them, to the respective sheriffs, stewards, bailies of royalty, and regality, and magistrates of burghs, to the effect the said judges may proceed against them according to law: as also, the sheriffs, and other magistrates aforesaid, are hereby ordained to give an account to his majesty's privy council in December yearly, of their proceedings against those papists, and phanatical separatists, as they will be answerable at their highest peril. And that the diligences done by the sheriffs, bailies of regalities, and other magistrates foresaid, may be the better enquired into by the council, the bishops of the respective diocesses, are to send exact doubles of the list of the papists, and phanaticks, to the clerks of privy council, whereby the diligences of the sheriffs, and other judges foresaids, may be controlled and examined. And to cut off all hopes, from papists and phanaticks of their being imployed in offices and places of publick trust, it is here by statut and ordained, that the following oath shall be taken by all persons in offices and places of publick trust, civil, ecclesiastical, and military, especially by all members of parliament, and all electors of members of parliament, all privy counsellers, lords of session, members of exchequer, lords of justiciary, and other members of these courts; all officers of the crown, and state, all arch-bishops and bishops, and all preachers and ministers of the gospel whatsoever; all persons of this kingdom, named or to be named commissioners for the borders; all members of the commission for church affairs; all sheriffs, stewards, baillies of royalties and regalities, justices of the peace, officers of the mint, commissars and their deputs, their clerks and fiscals, all advocates and procurators before any of these courts; all writers to the signit, all publick nottars, and other persons imployed in writing or agenting: the Lyon king at arms, heraulds, pursevants, and messengers at arms; all collectours, subcollectours and fermourers of his majestie's customs and excise; all magistrats, deans of gild, councillers, and clerks of burghs royal and regality; all deacons of trades, and deacon conveeners in the saids burghs; all masters and doctors in universities, colledges, or schools; all chaplains in families, pedagogues to children, and all officers and souldiers in armies, forts, or militia, and all other persons in publick trust or office within this kingdom, who shall publickly swear, and subscribe the said oath as follows, viz. The arch-bishops, chief commander of the forces, and officers of the crown and state, and councellers, before the secret council: all the Lords of session, and all members of the colledge of justice, and others depending upon them, before the session; The lords of justiciary, and those depending upon that court, in the justice court: the Lords, and other members of exchequer, before the exchequer. All bishops, before the arch-bishops: all the inferiour clergy, commissars, masters and doctors of universities, and schools, chaplains and pedagogues, before the bishops of the respective diocesses: sheriffs, stewarts, bailies of royalty and regality, and those depending on these jurisdictions, before these respective courts: and provosts, bailies and others of the burgh, before the town council: all collectors, and fermourers of the king's customs and excise, before the exchequer; the commissioners of the borders, before the privy council: all justices of peace, before their conveener, and the officers of the mint before the general of the mint; and the officers of the forces, before the commander in chief; and common souldiers before their respective officers; the Lyon before the privy council; and heraulds, pursevants, and messengers at arms, before the Lyon. And his majesty, with consent foresaid statuts and ordains, that all those who presently possess or enjoy any of the foresaid offices, publick trusts, or imployments, shall take and subscribe the following oath, in one of the foresaid offices, in manner before prescribed, betwixt and the first of January next, which is to be recorded in the registers of the respective courts, and extracts thereof under the clerks hands, to be reported to his majesties privy

and meaning thereof: therefore his royal highness, his majesty's high commissioner, and lords of the privy-council, do allow, authorize, and impower the archbishops and bishops to administer this oath and test to the ministers, in their respective dioceses, in this express sense: (1.) That though the Confession of Faith, ratified in parliament 1567, was framed

council, betwixt this and the first of March next, 1682, and there after in any other courts, whereof they are judges or members, the first time they shall sit, or exerce in any of these respective courts: and ordains, that all who shall hereafter be promoted to, or imployed in any of the foresaids offices, trusts, or imployments shall at their entry into and before their exercing thereof, take and subscribe the said oath in manner foresaid, to be recorded in the registers of the respective courts, and reported to his majesties privy council within the space of forty days after their taking the same: and if any shall presume to exercise any of the said offices, or imployments, or any publick office, or trust, within this kingdom, (the king's lawful brothers and sons only excepted) until they take the oath foresaid, and subscribe it, to be recorded in the registers of the respective courts, they shall be declared incapable of all publick trust there after and further be punished with the loss of their moveables, and liferent escheat, the one half whereof to be given to the informer, and the other half to belong to his majesty, and his majesty, with advice foresaid, recommends to his privy council to see this act put to due and vigorous execution."

The TEST, containing the Oath to be taken by all Persons in public Trust.

"I solemnly swear, in the presence of the eternal God, whom I invoke as judge, and witness of the sincere intention of this my oath, That I own, and sincerely profess the true Protestant religion, contained in the Confession of Faith, recorded in the first parliament of king James the 6th, and that I believe the same to be founded on, and agreeable to the written word of God. And I promise and swear, that I shall adhere thereunto, during all the days of my life-time; and shall endeavour to educate my children therein; and shall never consent to any change or alteration contrary thereto, and that I disown and renounce all such principles, doctrines, or practices, whether popish or fanatical, which are contrary unto, and inconsistent with the said Protestant Religion, and Confession of Faith. And for testification of my obedience to my most gracious sovereign Charles the 2nd, I do affirm, and swear by this my solemn oath, that the king's majesty is the only supreme governor of this realm, over all persons, and in all causes, as well ecclesiastical as civil: and that no foreign prince, person, pope, prelate, state or potentate, hath, or ought to have any jurisdiction, power, superiority, pre-eminency, or authority, ecclesiastical or civil, within this realm. And therefore I do utterly renounce, and forsake all foreign jurisdictions, powers, superiorities, and authorities: and do promise, that from henceforth I shall bear faith, and true allegiance to the king's majesty, his heirs and lawful successors; and to my power shall assist and defend all rights, jurisdictions, prerogatives, privileges, preferments and authorities belonging to the king's majesty, his heirs and lawful successors. And I further affirm and swear by this my solemn oath, that I judge it unlawful for subjects, upon pretence of reformation, or any other pretence whatsoever, to enter into covenants or leagues, or to convocate, convene, or assemble in any councils, conventions or assemblies, to treat, consult, or determine in any matter of state, civil or ecclesiastic, without his majesty's special command, or express license had thereto; or to take up arms against the king, or these commissionate by him. And that I shall never so rise in arms, or enter into such covenants or assemblies: and that there lies no obligation on me from the National Covenant, or the Solemn League and Covenant (commonly so called) or any other manner of way whatsoever, to endeavour any change or alteration in the government, either in church or state, as it is now established by the laws of this kingdom. And I promise and swear, that I shall, with my utmost power, defend, assist and maintain his majesty's jurisdiction aforesaid against all deadly. And I shall never decline his majesty's power and jurisdiction, as I shall answer to God. And finally, I affirm and swear, that this my solemn oath is given in the plain genuine sense, and meaning of the words, without any equivocation, mental reservation, or any manner of evasion whatsoever; and that I shall not accept or use any dispensation from any creature whatsoever. So help me GOD."

The following was the Confession of Faith:

The CONFESSION of the FAITH and DOCTRINE, beleeved and professed by the Protestantes of Scotland, exhibited to the Estatis of the same in Parliament, and be their publick Votis authorized, as a Doctrine grounded upon the infallible word of God.

1. Of God.

We confesse and acknowledge ane onely God, to whom onelie we must cleave, whome onelie we must serve, whom onelie we must worship, and in whom onlie we must put our trust, who is eternal, infinit, unmeasurable, incomprehensible, omnipotent, invisible, ane in substance, and yet distinct in three personnis, the Father, the Sonne, and the Holie Ghost. Be whom we confesse and believe all thinges in heaven and earth, alswel visible as invisible, to have bene created, to be reteined in their being, and to be ruled and guyded be his inscrutable providence, to sik end, as his eternal wisdome, goodnes, and

in the infancy of reformation, and deserves its due praise, yet by the Test we do not swear to every proposition, or clause therein contained, but only to the true Protestant religion, founded on the word of God, contained in that Confession as it is opposed to popery and fanaticism. (2.) That by the Test, or any clause therein contained, no invasion or encroachment

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justice hes appoynted them, to the manifestation of his awin glorie.

2. Of the Creation of Man.

We confesse and acknawledge this our God to have created man, to wit, our first father Adam, to his awin image and similitude, to whome, he gave wisdome, lordship, justice, free-will, and cleir knowledge of himselfe, so that in the fraill nature of man, there culd be noted no imperfectioun. Fra quhilk honour and perfectioun, man and woman did bot he fall: the woman being deceived be the serpent, and man obeying the voyce of the woman, both conspyring against the soveraine majestie of God, who in expressed words had before threatened death, gif they presumed to eat of the forbidden tree.

3. Of Original Sinne.

Be quhilk transgressioun, commounlie called original sinne, wes the image of God utterlie defaced in man, and he and his posteritie of nature become enimies to God, slaves to Sathan, and servandis unto sin. In sameikle that death everlasting hes had, and sall have power and dominioun, over all that have not been, ar not, or sall not be regenerated from above, quhilk regeneratioun is wrocht by the power of the Holie Ghost, working in the hartes of the elect of God, ane assured faith in the promise of God, revealed to us in his word, be quhilk faith we apprehend Christ Jesus, with the graces and benefites promised in him.

4. Of the Revelation of the Promise.

For this we constantlie beleeve, that God after the feirful and horrible defection of man, fra his obedience, did seek Adam againe, call upon him, rebuke his sin, convict him of the same, and in the end made unto him ane most joyful promise, to wit, that the seed of the woman suld break down the serpent's head, that is, he suld destroy the works of the devil. Quhilk promise, as it was repeated, and made mair clear from time to time; so was it imbraced with joy, and maist consatntlie received of all the faithful, from Adam to Noe, from Noe to Abraham, from Abraham to David, and soforth to the incarnatioun of Christ Jesus, all (we meane the faithful fathers under the law) did see the joyful daie of Christ Jesus, and did rejoyce.

5. The Continuance, Increase and Preservatioun of the Kirk.

We maist constantly beleeve, that God preserved, instructed, multiplied, honoured, decered, and from death called to life, his Kirk in all ages fra Adam, till the coming of Christ Jesus in the flesh. For Abraham he called from his fathers cuntry, him he instructed, his seede he multiplied, the same he marveilouslie preserved, and mair marveilously delivered, from the bondage and tyrannie of Pharaoh, to them he gave his lawes, constitutions and ceremonies, them he possessed in the Land of Canaan, to them after Judges and after Saul, he gave David to be king, to whome he made promise, that of the fruite of his loynes suld ane sit for ever upon his regal seat. To this same people from time to time he sent prophets, to reduce them to the right way of their God: from the quhilk oftentimes they declined, be idolatry, and albeit that for their stubborne contempt of justice he was compelled to give them into the hands of their enemies, as befoir was threatned by the mouth of Moses, in sa meikle that the haly cittie was destroyed, the temple burnt with fire, and the haill land left desolate the space of lxx. zeirs: Zit of mercy did he reduce them again to Jerusalem, where the cittie and temple were re-edified, and they against all temptations and assaultes of Sathan, did abide till the Messias came, according to the promise.

6. Of the Incarnation of Christ Jesus.

Quhen the fulness of time came, God sent his sonne, his eternal wisdome, the substance of his awin glory in this warld, quha tuke the nature of manhead of the substance of woman, to wit of a virgine, and that be operatioun of the Holie Ghost: And so was borne the just seede of David, the angel of the great council of God, the very Messias promised whom we confesse and acknawledge Emmanuel, very God and very man, two perfit natures united, and joyned in one persoun. Be quhilk our confessioun we condemn the damnable and pestilent heresies of Arrius, Marcion, Eutyches, Nestorius, and sik uthers, as either did denie the eternitie of his God-head, or the veritie of his humaine nature, or confounded them, or zit divided them.

7. Why it behooved the Mediator to be very God and very Man.

We acknawledge and confesse, that this maist wonderous conjunction betwixt the God-head, and the Man-head in Christ Jesus, did proceed from the eternal and immutable decree of God, from quhilk all our salvation springs and depends.

8. Electioun.

For that same eternal God and Father, who of meere grace elected us in Christ Jesus his sonne, before the foundation of the warld was laide, appointed him to be our head, our brother, our pastor, and great bishop of our sauls. Bot because that the enimitie betwixt the justice of God and our sins was sik, that na flesh be itselfe culd, or might have attained unto God, it behooved that the Sonne of God suld descend unto us, and take himselfe a bodie of our bodie,

is made or intended upon the intrinsic spiritual power of the church, or power of the keys, as it was exercised by the apostles, and the most pure and primitive church in the first three centuries after Christ, and which is still reserved entirely to the church. (3.) That the Oath and Test is without any prejudice to the episcopal government of this national church,

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flesh of our flesh, and bone of our bones, and so become the Mediator betwixt God and man, giving power to so many as beleeve in him to be the sonnes of God, as himself dois witnesse I passe up to my Father, and unto zuir Father, to my God and unto zuir God. Be quhilk maist holie fraternitie, quhatsaever wee have tynt in Adam, is restored unto us againe. And for this cause, ar we not affrayed to call God our Father, not sa meikle because he hes created us (quhilk we have common with the reprobate) as for that, that he hes given to us his onely Sonne, to be our brother, and given unto us grace, to acknawledge and imbrace him for our onlie Mediatour, as before is said. It behooved farther the Messias and Redeemer to be very God, and very man, because he was to underlie the punishment due for our transgressions, and to present himselfe in the presence of his Father's judgement, as in our person, to suffer for our transgression and inobedience, be death to overcome him that was author of death. Bot because the onely God-head culd not suffer death, neither zit culd the onlie man-head overcome the samine, he joyned both togither in one persone, that the imbecillitie of the ane, suld suffer and be subject to death, (quhilk we had deserved.) And the infinit and invincible power of the uther, to wit, of the God-head; suld triumph and purchasse to us life, libertie, and perpetual victory: And so we confess, and maist undoubtedly beleeve.

9. Christ's Death, Passion and Burial.

That our lord Jesus offered himselfe a voluntary sacrifice unto his Father for us, that he suffered contradiction of sinners, that he was wounded and plagued for our transgressiouns, that hee being the clean innocent Lamb of God, was damned in the presence of an earthlie judge, that we suld be absolved befoir the tribunal seat of our God. That he suffered not onlie the cruel death of the crosse (quhilk was accursed be the sentence of God) bot also that hee suffered for a season the wrath of his Father, quhilk sinners had deserved. But zit we avow that he remained the only well beloved and blessed Sonne of his Father, even in the middest of his anguish and torment, quhilk hee suffered in body and saule, to make the full satisfaction for the sinnes of the people. After the quhilk we confesse and avow that there remaines na uther sacrifice for sinne, quhilk gif any affirme, we nathing doubt to avow, that they ar blasphemous against Christs death, and the everlasting purgation and satisfaction purchased to us be the same.

10. Resurrectioun.

We undoubtedlie believe, that in sameikle as it was impossible, that the dolours of death sulde reteine in bondage the author of life, that our Lord Jesus crucified, dead and buryed, quha descended into Hell, did ryse againe for our justification, and destroying of him quha was the author of death, brocht life againe to us, that were subject to death, and to the bondage of the same. We knaw that his resurrection was confirmed be the testimonie of his verie enimies, be the resurrection of the dead, quhais sepultures did oppen, and they did rise, and appeared to mony, within the cittie of Jerusalem. It was also confirmed be the testimonie of his angels, and be the senses and judgments of his apostles, and of uthers quha had conversation, and did eat and drink with him after his resurrection.

11. Ascension.

We nathing doubt, bot the self same bodie, quhilk was borne of the Virgine, was crucified, dead, and buried, and quhilk did rise againe did ascend into the heavens, for the accomplishment of all thinges: quhere in our names, and for our comfort, he hes received all power in heaven and earth, quhere he sittes at the richt hand of the Father inaugurate in his kingdome, Advocate and onelie Mediator for us. Quhilk glorie, honour and prerogative, he alone amonges the brethren sall possess, till that all his enemies be made his futestule, as that we undoubtedlie beleeve, they sall be in the final judgment: To the execution whereof we certainlie beleeve, that the same our Lord Jesus sall visiblie returne, as that he was sene to ascend. And then we firmely believe, that the time of refreshing and restitution of all things sall cum in sameikle that thir, that fra the beginning have suffered violence, injury and wrang for richteousness sake, sall inherit that blessed immortalitie promised fra the beginning. Bot contrariwise the stubborne, inobedient, cruel oppressours; filthie persons, idolaters, and all sortes of unfaithful, sall be cast in the dungeon of utter darknesse where the worme sall not die, nether zit their fyre sall be extinguished. The remembrance of quhilk day, and of the judgement to be executed in the same, is not onelie to us ane brydle, whereby our carnel lustes ar refrained, bot alswa sik inestimable comfort, that nether may the threatning of worldly princes, nether zit the feare of temporal death and present danger, move us to renounce and forsake that blessed societie, quhilk we the members have with our head and onlie Mediator Christ Jesus, whom we confesse and avow to be the Messias promised, the onelie Head of his Kirk, our just Lawgiver, our onelie hie Priest, Advocate and Mediator. In quhilk honours and offices, gif man or angel presume to intrude themself we utterlie detest and abhorre them, as blasphemous to our soveraine and supreme governor Christ Jesus.

which is declared by the first act of the second session of his majesty's first parliament, to be most agreeable to the word of God, and most suitable to monarchy, and which upon all occasions his majesty hath declared he will inviolably and unalterably preserve. And appoint the archbishops and bishops to require the ministers in their respective dioceses, with

12. Faith in the Holy Ghost.

This our faith and the assurance of the same, proceeds not fra flesh and blude, that is to say, fra na natural powers within us, bot is the inspiration of the Holy Ghost: whome we confesse God equal with the Father and with his Sonne, quha sanctifyis us, and brings us all in veritie to be his awin operation, without whome we sulde remaine for ever enimies to God, and ignorant of his Sonne Christ Jesus. For of nature we are so dead, so blind, and so perverse, that nether can we feill when we ar pricked, see the licht when it shines, nor assent to the will of God when it is reveiled, unless the spirit of the Lord Jesus quicken that quhilk is dead, remove the darknesse from our myndes, and bowe our stubburne hearts to the obedience of his blessed will. And so as we confesse that God the Father created us, when we were not; as his Sonne our Lord Jesus redeemed us, when wee were enimies to him: so also do confesse that the Holy Ghost doth sanctifie and regenerat us, without all respect of ony merite preceeding from us; be it before, or be it after our regeneration. To speak this ane thing zit mair plaine words: as we willingly spoyle ourselves of all honour, and gloir of our awin creation and redemption: so do we also of our regeneration and sanctification: for of ourselves we are not sufficient to think one gude thocht, bot he quha hes begun the wark in us, is onlie that continewis us in the same, to the praise, and glorie of his undeserved grace.

14. The Cause of Gude Warkes.

Sa that the cause of gude warkes, we confesse to be not our free will, bot the spirit of the Lord Jesus, who dwelling in our hearts be trewe faith, bringes furth sik warkes, as God hes prepared for us to walk in. For this we maist boldilie affirme, that blasphemy it is to say, that Christ abydes in the heartes of sik, as in whome there is no spirit of sanctification. And therefore we feir not to affirme, that murtherers, oppressers, cruel persecuters, adulterers, huremongers, filthy persouns, idolaters, drunkards, thieves, and all workers of iniquity, have nether trew faith, nether any portion of the spirit of the Lord Jesus, so long as obstinatlie they continew in their wickedness. For how soone that ever the spirit of the Lord Jesus (quhilk God's elect children receive be trew faith) taks possession in the heart of ony man so soone dois he regenerate and renew the same man. So that he beginnis to hait that quhilk before he loved, and begins to love that quhilk befoir he hated, and fra thine cummis that continual battel, quhilk is betwixt the flesh and the spirit in God's children; till the flesh and natural man, according to the awin corruption, lustes for thinges pleasand and delectable unto the self, and grudges in adversity, is lyfted up in prosperity, and at every moment is prone and reddie to offend the majestie of God. Bot the spirit of God, quhilk gives witnessing to our spirit, that we are the sonnes of God, makis us to resist filthie pleasures, and to groane in God's presence, for deliverance fra this bondage of corruption: and finally to triumph over sin that it reigne not in our mortal bodyis. This battel hes not the carnel men, being destitute of God's spirit, bot dois follow and obey sinne with greedines, and without repentance, even as the devil, and their corrupt lustes do prick them. Bot the sonnes of God, as before wes said, dois fecht against sinne, dos sob and murne, when they perceive themselves tempted in iniquitie: and gif they fall, they rise againe with earnest and unfeigned repentance, and thir thing is they do not be their awin power, bot the power of the Lord Jesus, without whome they were able to do nothing.

15. What warkes ar reputed gude befoir God.

We confesse and acknawledge, that God hes given to man his holy law, in quhilk not only ar forbidden all sik warkes as displeis and offend his Godlie Majestie, bot alswa ar commanded all sik as pleis him, and as he hes promised to rewaird. And thir warks be of twa sortes. The ane are done to the honour of God the uther to the profite of our nichtbouris: and both have the reveiled will of God for their assurance. To have ane God, to worschip and honour him, to call upon him in all our troubles, reverence his holy name, to heare his word, to believe the same, to communicate with his holy sacraments, are the warkes of the first tabill. To honour father, mother, princes and rulers and superiour powers; to love them, to support them, zea to obey their charges (not repugning to the commandment of God) to save the lives of innocents, to represse tyrannie, to defend the oppressed, to keepe our bodies cleane and halie, to live in sobernes and temperance, to deal justlie with all men both in word and deed; and finally to represse all appetite of our nichtbouris hurt, are the gude warkes of the secund tabill quhilk are maist pleising and acceptabil unto God, as the warkes that are commanded be himselfe. The contrary quhairof, is sinne maist odious, quhilk alwayes displeisis him, and provokes him to anger; As not to call upon alone, when we have need, nor to hear his word, with reverence, to contemne and despise it, to have or worschip idols, to maintene and defend idolatrie, lichtlie to esteem the reverend name of God, to prophane, abuse or contemne the Sacraments of Christ Jesus, to disobey or resist ony that God hes placed in authoritie (quhilk they passe not over the boundes of their office) to murther, or to consent thereto, to beare hatred, or to led innocent blude bee shed, gif wee may withstand it.

their first conveniency, to obey the law in swearing, and subscribing the aforesaid Oath and Test with certification, that the refusers shall be esteemed persons disaffected to the Protestant religion, and to his majesty's government; and that the punishment appointed by the foresaid sixth act of his majesty's third parliament, shall be impartially and without delay inflicted upon them. By me,

Pet. Menzeis.

And finally, the transgression of ony uther commandement in the first or the secund tabill: Wee confesse and affirme to be sinne, by the quhilk God's anger and displesure is kindled against the proud unthankful warld. So that gude warkes we affirme to be thir onlie, that are done in faith, and as God's commandement quha in his lawe hes expressed what the things be that pleis him. And evil warkis we affirme not only thir that expressedly ar done against God's commandment: bot thir alswa that in matteris of religion, and worschipping of God, hes na uther assurance bot the inventioun and opinioun of man, quhilk God fra the beginning hes ever rejected, as be the prophet Esay, and be our Maister Christ Jesus we ar taught in these words, In vain do they worschip me, teaching for doctrines the precepts of men.

16. The Perfectioun of the Law and the Imperfectioun of Man.

The lawe of God we confesse and acknawledge maist just, maist equal, maist halie, and maist perfite commanding thir thingis, quhilk being wrocht in perfectioun, were abill to give life, and abill to bring man to eternal felicitie. Bot our nature is sa corrupt, sa weake, and sa imperfite, that we ar never abill to fulfill the warkes of the law in perfectioun. Zea, gif we say we have na sinne, even after we are regenerated, we deceive ourselves, and the veritie of God is not in us. And therefore, it behovis us to apprehend Christ Jesus with his justice and satisfaction, quha is the end and accomplishment of the law, be quhome we ar set at this libertie, that the curse and malediction of God fall not upon us, albeit we fulfil not the same in all poyntes. For God the Father beholding us, in the body of his Son Christ Jesus, acceptis our imperfite obedience, as it were perfite, and covers our warks, quhilk ar defyled with mony spots, with the justice of his Sonne. We do not mean that we are so set at liberty, that wee awe na obedience to the law (for that wee before have plainly confessed) bot this we affirme, that na man in earth (Christ Jesus only except) hes given, gives, or sall give in worke, that obedience to the law, quhilk the law requiris. Bot when we have done all things, we must fall downe and unfeindly confesse, that we are unprofitable servands. And therefore, quhosoever boastis themselves of the merits of their awin workes, or put their trust in the works of Supererogation, boast themselves in that, quhilk is nocht, and put their trust in damnable idolatry.

17. Of the Kirk.

As we believe in ane God, Father, Sonne, and Halie Ghaist: so do we most constantly believe that from the beginning there hes bene and now is, and to the end of the warld sall be, ane Kirk, that is to say, ane company and multitude of men chosen of God, who richtly worship and embrace him, be trew faith in Christ Jesus, quha is the only head of the same Kirk, quhilk alswa is the bodie and spouse of Christ Jesus, quhilk Kirk is Catholike, that is, universal, because it conteinis the elect of all ages, of all realmes, nations, and toungues, be they of the Jewes or be they of the Gentiles, quha have communion and societie with God the Father, and with his son Christ Jesus, throw the sanctification of his Haly Spirit, and therefore it is called the communion, not of prophane personnes, bot of Sancts, quha as citizens of the heavenly Jerusalem, have ye fruitioun of the maist inestimable benefites to wit, of ane God, ane Lord Jesus, ane faith, and ane baptisme; out of the quhilk Kirk, there is nouther lyfe, nor eternal felicitie. And therefore we utterly abhorre the blasphemie of them that affirme, that men quhilk live according to equitie and justice, sall be saved, quhat religioun that ever they have professed, For as without Christ Jesus, there is nouther life nor salvation: So sall there none be participant thereof, bot sik as the Father hes given unto his Sonne Christ Jesus, and they that in time cum unto him, avowe his doctrine and believe into him, (we comprehend the children with the faithful parentes) this Kirk is invisible, knawen onelie to God, quha alane knawis, whom he hes chosen, and comprehends alsweil (as said is) the elect that be departed, commonly called the Kirk triumphant and that zit live, and fecht against sinne and Sathan, as sall live hereafter.

18. The Immortalitie of the Saules.

The elect departed are in peace and rest fra their labours, not that they sleep, and come to a certain oblivion, as some phantastickes do affirme; bot that they are delivered fra all feare and torment, and all temptatioun, to quhilk we and all God his elect are subject in this life, and therefore do beare the name of the Kirk militant; As contrariwise, the reprobate, and unfaithful departed have anguish, torment and paine, that cannot be expressed. Sa that neither are the ane or the uther in sik sleepe, that they feele not their torment, as the parable of Christ Jesus in the 16th. of Luke, his words to the thiefe, and thir wordes of the Saules crying under the altar: O Lord, thou that art righteous and just, how long sall thou not revenge our blude upon thir that dwellis in the earth, dois declair.

19. Of the Notes, be the quhilk the trew Kirk is decerned, fra the false, and quha sall be judge of the doctrine.

Because that Sathan, from the beginning has laboured to deck his pestilent synagoge with

November 4, 1681.

His Royal Highness, &c.

Montrose Præses,	Bishop of Edinburgh,
Perth,	Treasurer Deputy,
Ancram,	Lundie,
Levingston,	Linlithgow,
President of Session,	Roxburgh,
Advocate,	Balcarres,
Winton,	Elphinston,
Strathmore,	Register.
Airley,	

This day the earl of Argyle being about to take the Test, as a commissioner of the treasury, and having upon command produced a paper bearing the sense in which he took the Test, the preceding day, and in which he would take the same, as a commissioner of the treasury; upon consideration thereof, it was resolved, that he cannot sit in council, not having taken the Test in the sense and meaning of the act of parliament, and therefore was removed.

The Earl of ARGYLE'S Explication of the TEST when he took it.

I have considered the Test, and I am very desirous to give obedience as far as I can. I am

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the title of the Kirk of God, and hes enflamed the heartes of cruel murtherers to persecute trouble and molest the trew Kirk and members thereof, as Cain did Abel, Ismael Isaac, Esau Jacob, and the haill priesthead of the Jewes, Christ Jesus himselfe, and his Apostles after him. It is ane thing maist requisite, that the true Kirk be decerned fra the filthie synagogues be clear and perfite notes, least we being deceived, receive and embrace to our awin condemnatioun, the ane for the uther. The notes, signes, and assured takens, whereby the immaculate spouse of Christ Jesus is knawen fra the horrible harlot, the Kirk malignant: we affirme are neither antiquitie, title usurped, lineal descence, place appoynted, nor multitude of men approving an error: For Cain in age and title was preferred to Abel and Seth; Jerusalem had prerogative above all places of the earth, where also were the priests lineally descended fra Aaron, and greater number followed the scribes, pharisies, and priestes, then unfainedly beleeved and approve Christ Jesus and his doctrine: and zit as we suppose, no man of sound judgement, will grant that ony of the forenamed, were the Kirk of God. The notes therefore of the trew Kirk of God, we beleeve confesse and avow to be, first the trew preaching of the word of God, into the quhilk God has revealed himselfe unto us, as the writings of the prophets and Apostles dois declair. Secondly the right administration of the sacraments of Christ Jesus, quhilk mon be annexed unto the word and promise of God, to seale and confirme the same in our heartes. Last, ecclesiastical discipline uprightlie ministred, as God his word prescribes, whereby vice is repressed and vertew nurished. Wheresoever then thir former notes are seene, and of ony time continue (be the number never so fewe about two or three) there without all doubt is the trew Kirk of Christ: who according unto his promise, is in the midst of them. Not that universal, of quhilk we have before spoken, bot particular sik as was in Corinthus, Galatia, Ephesus, and uther places, in quhilk the ministrie was planted be Paul, and were of himselfe named the Kirks of God: and sik Kirks, we the inhabitantis, of the realme of Scotland, professoris of Christ Jesus, professis our selfis to have in our citties, townes, and places reformed, for the doctrine taucht in our Kirkes, conteined in the written word of God, to wit, in buiks of the Auld, and New Testamentis, in those buikes we meane, quilk of the ancient have been reputed canonical. In the quhilk we affirme, that all thingis necessary to be beleeved for the salvation of mankinde, is sufficiently expressed The interpretatioun quhairof, wee confesse, neither appertaines to private, nor publick persone, neither zit to any Kirk, for ony preheminence, or prerogative personallie or locallie, quhilk ane hes above ane uther, bot appertaines to the Spirit of God, be the quhilk also the Scripture was written When controversie then happenis for the right understanding of ony place or sentence of scripture, or for the reformation of ony abuse within the Kirk of God, we ought not sa meikle to luke what men before us have said or done, as unto that quhilk the Halie Ghaist uniformelie speakes, within the body of the scriptures, and unto that quhilk Christ Jesus himselfe did, and commanded to be done. For this is ane thing universallie granted, that the Spirite of God, quhilk is the Spirite of unitie, is in nathing contrarious unto himselfe. Gif then the interpretation, determination, or sentence of any doctor, Kirk, or councel, repugne to the plaine word of God, written in ony uther place of the Scripture, it is ane thing maist certaine, that there is not the true understanding and meaning of the Halie Ghaist, although that counsels, realmes, and nationes have approved and received the same. For we dare not receive nor admit ony interpretation, quhilk repugnes to ony principal poynt of our faith or to ony other plaine text of Scripture, or zit unto the rule of charitie.

20. The Authoritie of the Scriptures.

As we beleeve and confesse the Scriptures of God sufficient to instruct, and make the man of God perfite: so do we affirme and avowe the authoritie of the same, to be of God, and nether to depend on men, nor angels. Wee affirme therefore that sik as allege the Scripture, to have na uther authoritie, bot that quhilk it hes received from the Kirk, to be blasphemous against God, and injurious to the trew Kirk, quhilk alwayes heares and obeyis the voyce of her awin spouse and pastor, bot takes not upon her to be maistress over the samin.

confident the parliament never intended to impose contradictory oaths; therefore I think no man can explain it but for himself. Accordingly I take it, as far as it is consistent with itself, and the protestant religion. And I do declare, that I mean not to bind up myself in my station, and in a lawful way, to wish and endeavour any alteration I think to the advantage of church or

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21. Of General Councels, of their Power, Autoritie, and Cause of their Convention.

As we do not rashlie damne that quhilk godly men assembled together in general council lawfully gathered, have proponed upon us, so without just examination, dare we not receive quhatsoever, is obtruded unto us by men under the name of general Councels; for plaine it is, as they wer men, so have some of them manifestlie erred, and that in matters of great weight and importance. So farre then, as the council provis the determination and commandement that it gives, bee the plaine worde of God; so soon do we reverence and embrace the same. Bot gif men under the name of a councel, pretend to forge unto us, new artickles of our faith, or to make constitutionis repugning to the word of God; then utterlie we must refuse the same, as the doctrine of devils, quhilk drawis out Saules from the voyce of our onlie God, to follow the doctrines and constitutiones of men. The cause then quhy that general councellis convened, was nether to make ony perpetual law, quhilk God before had not maid, nether zit to forge new artickles of our beliefe, nor to give the word of God authoritie, meikle les to make that to be his word, or zit the trew interpretation of the same, quhilk was not before, by his haly will, expressed in his word: bot the cause of councellis (we meane of sik as merite the name of councellis) was partlie for confutation of heresies, and for giving publick confession of their faith to the posteritie following, quhilk baith they did by the authoritie of God's written word and not by ony opinion or prerogative, that they culd not erre, be reason of their general assemblie: And this we judge to have beene the chief cause of general councellis: The uther was for gude policie and ordour, to be constitute and observed in the Kirk, quhilk (as in the House of God) it becummis all things to be done decently, and in ordour. Not that we think, that an policie and an ordour in ceremonies, can be appoynted for all ages, times and places, for as ceremonies sik as men have devised, ar bot temporal: so may and aucht they to be changed, when they rather foster superstition, then that they edifie the Kirk, using the same.

22. Of the Sacramentes.

As the fatheris under the law, besides the veritie of the sacrifices, had twa chiefe sacramentes, to wit, circumcision and the passe-over, the despisers and contemners whereof, were not reputed of God's people: sa do we acknawledge and confesse, that we now in the time of the Evangel, have twa chiefe sacraments onelie, instituted be the Lord Jesus, and commanded to be used of all they, that will be reputed members of his body: to wit, baptisme, and the supper or table of the Lord Jesus, called the communion of his body and blude, and thir sacramentes alsweil of Auld, as of New Testament now instituted of God, not onelie to make ane visible difference, betwixt his people, and they that wes without his league: bot also to exerce the faith of his children, and be participation of the same sacramentes, to seill in their herts the assurance of his promise, and of that most blessed conjunction, union and societie, quhilk the elect have with their head Christ Jesus. And this wee utterlie damne the vanitie of they, that affirme sacramentes to be nathing else bot naked and baire signes. No, we assuredlie beleeve, that be baptisme, we are ingrafted in Christ Jesus, to be made partakers of his justice, be quhilk our sinnes ar covered and remitted. And alswa, that in the supper richtlie used Christ Jesus is so joyned with us, that hee becummis very nurishment, and fude of our saules. Not that wee imagine anie transubstantiation of bread into Christes body, and of wine into his natural blude, as the papistes have perniciouslie taucht, and damnablie beleeved: bot this unioun and conjunction, quhilk we have with the body and blude of Christ Jesus in the richt use of the sacraments, wrocht be operatioun of the Haly Ghaist, who by trew faith carryis us above all things that are visible, carnal and earthly, and makes us to feede upon the body and blude of Christ Jesus, quhilk wes anes broken and shed for us, quhilk now is in heaven, and appearis in the presence of his Father for us: and zit notwithstanding the far distance of place quhilk is betwixt his body, now glorified in heaven, and us now mortal in this earth: zit we man assuredlie beleeve, that the bread quhilk wee break, is the communion of Christes bodie, and the cupe quhilk we blesse, is the communion of his blude. So that we confesse and undoubtedlie beleeve, that the faithful in the richt use of the Lord's table, do so eat the bodie and drink the blude of the Lord Jesus, that he remaines in them, and they in him. Zea, they are so maid flesh of his flesh and bone of his bones, that as the eternal Godhead hes given to the flesh of Christ Jesus (quhilk of the awin conditioun and nature wes mortal and corruptible) life and immortalitie; so dois Christ Jesus his flesh and blude eattin and drunken be us, give unto us, the same prerogatives quhilk albeit we confesse, are neither given unto us at that time onelie, nether zit be the proper power and vertue of the sacrament onelie: zit we affirme that the faithful in the richt use of the Lord's table, hes conjunctioun with Christ Jesus; as the natural man cannot apprehend: zea, and farther wee affirme, that albeit the faithful oppressed be negligence, and namelie infirmitie, dois not profite sameikle, as they wald, in the verie instant action of the supper: zit sall it after bring frute furth, as livelie seid sawin in gude ground. For the Haly-

state, nor repugnant to the protestant religion and my loyalty. And this I understand as a part of my oath."

But the earl finding, as hath been narrated, this his explication, though accepted and approven by his highness and council the day before, to be this day carped and offended at, and advantages thereupon sought and designed

Spirit, quhilk can never be divided fra the richt institutioun of Lord Jesus, will not frustrat the faithful of the fruit of that mystical action, bot all thir we say cummis of trew faith, quhilk apprehendis Christ Jesus, who only makes this sacrament effectual unto us. And therefore whosoever sclanders us, as that we affirme or belevis sacraments to be naked and baire signes do injurie unto us, and speaks against the manifest truth. Bot this liberallie and franklie wee confesse that we make ane distinctioun betwixt Christ Jesus in his eternal substance, and betwixt the elements of the sacramental signes. So that we will nether worship the signes, in place of that quhilk is signified be them, nether zit doe we despise and interpret them, as improfitable and vaine, bot do use them with all reverence, examining ourselves diligentlie, before that so we do. Because we are assured be the mouth of the apostle, that sik as eat of that bread and drink of that cupe unworthelie, are guiltie of the bodie and blude of Christ Jesus.

23. Of the richt Administration of the Sacraments.

That Sacraments be richtlie ministrat, we judge twa things requisite: The ane, that they be ministrat, be lauchful ministers, whom we affirme, to be only they, that ar appoynted to the preaching of the word, into quhais mouthes God hes put sum Sermon of Exhortation, they being men lauchfullie chosen thereto, be sum Kirk. The uther, that they be ministrat in sik elements, and in sik sort, as God hes appoynted, else we affirme that they cease to be the richt sacraments of Christ Jesus. And therefore it is, that we fly the doctrine of the papistical Kirk, in participation of their sacraments: first, because their ministers are na ministers of Christ Jesus, zea (quhilk is maire horrible) they suffer wemen, whome the Haly Ghaist will not suffer to teache in the congregatioun, to baptize: and secundly, because they have so adulterated both the one sacrament and the uther, with their awin inventions, that no part of Christ's abydes in the original puritie. For oyle, salt spittil, and sik lyke in baptisme, ar bot mennis inventiouns. Adoration, veneration bearing throw streitis and townes, and keiping of bread in boxes or buistes, ar prophanatioun of Christ's sacraments, and na use of the same For Christ Jesus saide, Take, eat, &c. do ze this in rememberance of me. Be quhilk word and charge, he sanctified bread and wine, to the sacrament of his halie bodie and blude, to the end that the ane suld be eaten, and that all suld drinke of the uther, and not that they suld be keiped to be worshipped and honoured as God, as the papistes have done heirtofore: wha also committed sacrilege, steilling from the people the ane parte of the sacrament, to wit, the blessed cupe. Moreover that the sacraments be richtly used, it is required, that the end and cause why the sacramentis were institute, be understand and observed, as weil of the minister as of the receiveris. For gif the opinion be changed in the receiver, the richt use ceassis, quhilk is maist evident, be the rejection of the sacrifice, as also gif the teacher planely teache fals doctrine, quhilk were odious and abbominable before God (albeit they were his awin ordinance) because that wicked men use them to an uther end then God hes ordained. The same affirme we of the sacraments in the papistical Kirk; in quhilk we affirme the haill action of the Lord Jesus to be adulterated, alsweil in the external forme as in the end and opinion. Quhat Christ Jesus did, and commanded to be done, is evident, be the Evangelistes, and be Saint Paul, quhat the priest dois, at his altar, we neid not to rehearse. The end and cause of Christ's institution, and why the self same suld be used, is expressed in thir words. Doe ze this in rememberance of me, als oft as ze sall eat of this bread, and drinke of this cupe, ze shall shaw furth, that is, extol, preach, magnifie, and praise the Lord's death, til he cum. Bot to quhat end, and in what opinioun the priestes say their messe, let the worde of the same, their awin doctouris, and wrytings witness, to wit, that they as mediatores betwixt Christ, and his Kirk, do offer unto God the Father, a sacrifice propitiatorie, for the sinnes of the quick and the dead. Quhilk doctrine, as blasphemous to Christ Jesus, and making derogation to the sufficiencie of his only sacrifice, once offered for purgation of all they that sall be sanctified, we utterly abhorre detest and renounce.

24. To whome Sacraments appertaine.

We confesse and acknawledge that baptisme apperteinis asweil to the infants of the faithful, as unto them that be of age and discretion, and so we damne the error of the Anabaptists who denies baptisme to apperteine to children: before that they have faith and understanding; bot the supper of the Lord we confesse to apperteine to sik onely, as be of the houshald of faith, and can trie and examine themselves, alsweil in their faith, as in their dewtie towards their neichtbouris. Sik as eate and drink at that haly table without faith, or being at dissension and division with their brethren, do eat unworthelie: And therefore it is that in our Kirk, our ministers take publick and particular examination, of the knawledge and conversation of sik, as are to be admitted to the table of the Lord Jesus.

25. Of the Civil Magistrate.

We confesse and acknawledge empyres, kingdomes, dominiouns, and citties, to be

against him, did immediately draw up the following explanation of his explication: and for his own vindication, did first communicate it to some privately, and thereafter intended to have offered it at his trial for clearing of his defences.

The Explanation of his Explication.

"I have delayed hitherto to take the oath appointed by the parliament to be taken, betwixt and the 1st of January next; but now being required, near two months sooner, to take it this day peremptorily, or to refuse, I have considered the Test, and have seen several objections moved against it, especially by many of the orthodox clergy, notwithstanding whereof, I have endeavoured to satisfy myself with a just explanation, which I here offer, that I may both satisfy my conscience and obey your highness, and your lordships commands in taking the test, though the act of parliament do not simply com-

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distincted and ordained be God; the powers and authoritie in the same, be it of emperours in their empyres, of kings in their realmes, dukes and princes in their dominiouns, and of uthers magistrates in their citties, to be God's haly ordinance, ordained for manifestatioun of his awin glory, and for the singular profite and commoditie of mankind: So that whosoever goeth about to take away, or to confound the haill state of civile policies, now long established: we affirme the same men, not onely to be enimies to mankinde, but also wickedly to fecht against God, his expressed will. Wee farther confesse and acknawledge, that sik persouns, as are placed in authoritie, ar to be loved, honoured, feared, and halden in maist reverent estimatioun: because that they are the lieutennents of God, in whose sessiouns, God himself dois sit, and judge: zea, even the judges and princes themselves, to whom be God is given the sword, to the praise and defense of gude men, and to revenge and punish all open malefactors. Mairover to kings, princes, rulers and magistrates, we affirme that chieflie and most principallie the conservation and purgation of the religioun appertaines, so that not onlie they are appointed for civile policie, but also for maintenance of the trew religioun, and for suppressing of idolatrie and superstitioun whatsoever.* As in David, Josaphat, Ezechias, Josias, and uthers highlie commended for their zeale in their caice, may be espyed. And therefore wee confesse and avow, that sik as resist the supreme power, doing that thing quhilk appertains to his charge, do resist God his ordinance: And therefore cannot be guiltless. And farther we affirme, that whosoever denies unto them ayde, their counsel and comfort, quhiles the princes and rulers vigilantly travel in execution of their office, that the same men deny their help, support and counsel to God, quha be the presence of his lieutennent dois crave it of them.

26. The Guiftes freelie given to the Kirk.

Albeit that the word of God trewlie preached, and the sacraments richtlie ministred, and discipline executed, according to the word of God, be the certaine and infallible signes of the trew Kirk, we meane not that everie particular persoun joyned with sik company, be ane elect member of Christ Jesus: For we acknawledge and confesse that dornel, cockel, and caffel, may be sawen, grow, and in great aboundance lie in the midst of the wheit, that is, the reprobate may be joined in the societie of the elect, and may externally use with them the benefites of the word and sacraments. Bot sik being bot temporal professoures in mouth, bot not in heart, do fall backe and continew not to the end. And therefore have they na fruite of Christ's death, resurrection nor ascension: bot sik as with heart unfeigned beleeve, and with mouth bauldely confesse the Lord Jesus, as before we have said, sall most assuredly receive their guiftes. First, in this life remission of sinnes, and that be only faith in Christ's blude.—In sameikle, that albeit sinne remaine and continuallie abyde, in thir our mortal bodies, zit it is not imputed unto us, bot is remitted, and covered with Christ's justice. Secondly, in the general judgement, there sall be given to every man and woman, resurrection of the flesh. For the sea sall give her dead; the earth they that therein be inclosed, zea, the eternal our God sall stretche out his hand on the dust, and the dead sall arise uncorruptible, and that in the substance of the selfe same flesh that every man now bearis, to receive according to their warkes, glory or punishment. For sik as now delyte in vanity, cruelty, filthynes, superstition or idolatry, sall be adjudged to the fire unquenchable. In quhilk they sall be tormented for ever, alsweil in their awin bodyes, as in their saules, quhilk now they give to serve the devil in all abomination. Bot sik as continew in well doing to the end, bauldely professing the Lord Jesus; we constantly believe, that they sall receive glorie, honour, and immortality, to reigne for ever in life everlasting with Christ Jesus, to whose glorified body all his elect, sall be made lyke, when he sall appeir againe in judgement, and sall rander up the kingdome to God his Father, who then sall bee, and ever sall remaine all in all things God blessed for ever. To whom with the Sonne, and with the Haly Ghaist, be all honour and glorie, now and ever. So be it.

Arise, O Lorde, and let thy enimies be confounded, let them flee from thy presence that hate thy godlie name. Give thy servands strength to speake thy word in bauldnesse, and let all natiouns cleave to thy trew knawledge. Amen.

Thir acts and artikles are red in the face of parliament, and ratifyed by the three estaitis, at Edinburgh the 17th day of August, the zeir of God 1560 zeiris.

mand the thing, but only under a certification, which I could easily submit if it were with your highness favour, and might be without offence, but I love not to be singular; and I am very desirous to give obedience in this and every thing as far as I can; and that which clears me is, that I am confident whatever any man may think or say, to the prejudice of this oath; the parliament never intended to impose contradictory oaths; and because their sense, they being the framers and imposers, is the true sense, and that this Test injoined is of no private interpretation, nor are the king's statutes to be interpreted but as they bear, and to the intent they are made, therefore I think no man, that is, no private person, can explain it for another, to amuse or trouble him with (it may be) mistaken glosses. But every man, as he is to take it, so is to explain it for himself, and to endeavour to understand it (notwithstanding all these exceptions) in the parliaments, which is its true and genuine sense. I take it therefore, notwithstanding any scruple made by any, as far as is consistent with itself and the protestant religion, which is wholly in the parliament's sense, and their true meaning; which [being present] I am sure was owned by all to be the security of the protestant religion, founded on the word of God, and contained in the Confession of Faith recorded J. 6. p. 1. c. 4. and, not out of scruple, as if any thing in the Test did import the contrary, but to clear myself from all cavils; as if thereby I were bound up further than the true meaning of the oath. I do declare, that by that part of the test, that there lies no obligation on me, &c. I mean not to bind up myself, in my station, and in a lawful way, still disclaiming all unlawful endeavours, to wish, and endeavour any alteration, I think, according to my conscience, to the advantage of church or state, not repugnant to the protestant religion, and my loyalty, and by my loyalty, I understand no other thing than the words plainly bear, to wit the duty and allegiance of all loyal subjects; and this explanation I understand as a part not of the Test, or act of parliament, but as a qualifying part of my oath that I am to swear; and with it I am willing to take the test, if your royal highness and your lordships allow me, or otherwise, in submission to your highness, and the council's pleasure, I am content to be held as a refuser at present.*"

The Council's LETTER to his Majesty, concerning their having committed the Earl of Argyle.

May it please your sacred Majesty;

The last parliament having made so many and so advantageous acts, for securing the protestant religion, the imperial crown of this

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* The Bishop of Aberdeen, and the Synods Explanation of the Test.

"We do not hereby swear to all the particular assertions and expressions of the Confession of Faith, mentioned in the Test, but only to the uniform doctrine of the reformed churches contained therein: 2. We do not hereby prejudge the churches right to, and power of making any alteration in the said Confession, as to the ambiguity and obscure expressions thereof, or of making a more unexceptionable frame. 3. When we swear, That the king is supreme governor, over all persons, and in all causes, as well ecclesiastic as civil; and when we swear to assert and defend all his majesty's rights and prerogatives, this is reserving always the intrinsic unalterable power of the church, immediately derived from Jesus Christ, to wit, the power of the keys consisting in the preaching of the word, administration of the Sacraments, ordaining of pastors, exercise of discipline, and the holding of such assemblies as are necessary for preservation of peace and unity, truth and purity in the church; and withal, we do hereby think, that the king has a power to alter the government of the church at his pleasure. 4. When we swear, That it is unlawful for subjects to meet or convene, to treat or consult, &c. about matters of state, civil, and ecclesiastic, this is excepting meetings for ordination, public worship and discipline, and such meetings as are necessary for the conservation of the church, and true Protestant religion. 5. When we swear, There lies no obligation on us, &c. to endeavour any change or alteration in government, either in church or state, we mean by arms, or any seditious way. 6. When we swear, That we take the Test in the plain and genuine sense of the words, &c. we understand it only in so far as it does not contradict these exceptions."

The Explanation of the Test, by the Synod and Clergy of Perth.

'Because our consciences requires the publishing and declaring of that express meaning we have in, taking the Test, that we be not misinterpreted to swear it in these glosses which men uncharitable to it, and enemies to us, are apt to put upon it; and because some men, ill affected to the government, who are daily broachers of odious and calumnious slanders against our persons and ministry, are apt to deduce inferences and conclusions from the alledged ambiguity of some propositions of the Test, that we charitably and firmly do believe were never intended by the imposers, nor received by the takers. Therefore to satisfy our consciences, and to save our credit from these unjust imputations, we expressly declare, That we swear the Test in this following meaning. 1. By taking the Test, we do not swear to every proposition and clause contained in the Confession of Faith, but only to the true Protestant religion, founded upon the word of God, contained in that Confession, as it is opposed to popery and fanaticism. 2. By swearing the ecclesiastic supremacy, we swear it as we have done formerly, without any reference to the assertory act. We also reserve intire unto the church, its own intrinsic and unalterable

kingdom, and your majesty's sacred person. (whom God Almighty long preserve) and having, for the last, and as the best way for securing all these, appointed a Test to be taken by all who should be intrusted with the government; which bears expressly that the same should be taken in the plain and genuine sense and meaning of the words; We were very

power of the keys, as it was exercised by the Apostles, and the pure primitive church, for the first three centuries. 3. By swearing, that it is unlawful to convocate, convene or assemble in any council, conventions or assemblies, to treat, consult, &c. in any matter of state, civil or ecclesiastic, as we do not evacuate our natural liberty, whereby we are in freedom, innocently without reflection upon, or derogating to authority, or persons intrusted with it, to discourse in any occasional meeting of these things; so we exclude not those other meetings which are necessary for the well-being and discipline of the church. 4. By our swearing it unlawful to endeavour any change or alteration in the government, either of church or state, we mean, that it is unlawful for us to endeavour the alteration of the specific government of monarchy, in the true and lineal descent, and episcopacy. 5. When we swear in the genuine and literal sense, &c. we understand it so far as it is not opposite, or contradictory to the foresaid exceptions."

They were allowed to insert after the Oath, before their subscriptions, these words, or to this purpose:

"We under-written do take this oath, according to the explanation made by the council, approved by his majesty's letter; and we declare, we are no further bound by this oath."

It appears by the *Sederunt* of September 22, 1681, that on that day the Test was subscribed by many Privy Counsellors, and by the earl of Queensberry, who coming in after the Test had taken it, declared that he took it with the Explication following:

"His lordship declared, that by that part of the Test, That there lies no obligation to endeavour any change, or alteration in the government, &c. He did not understand himself to be obliged against alterations, in case it should please his majesty to make alterations of the government of Church or State."

And by the *Sederunt* of October 21st, 1681, it seems, that on that day the bishop of Edinburgh "having drawn up a long explication of the Test, to satisfy the many objections and scruples moved against it, especially by the conformed clergy, presented it to the council for their lordships approbation, which was ordered to be read; but the paper proving prolix, and tedious, his highness, after reading of a few leaves, interrupted, saying very wittily, and pertinently, That the first chapter of John with a stone will chase away a dog, and so break it off. Yet the bishop was afterward allowed to print it if he pleased."

The transactions are much discussed in a tract intitled "The Scotch Mist cleared up," which is inserted in the volume of State Tracts published in 1692, and of which the 7th chapter is as follows:

"Of the Reasons alledged by some eminent Ministers of the Kirk of Scotland, why they refuse to take the Test-Oath.

"The earl of Argyle is not alone in his questioning the lawfulness of taking the oath without limitations, and due clauses, for I find many eminent persons amongst the confirming clergy, who have met with the same, or greater difficulties, which that I may evidence I shall faithfully give the reader a copy of a certain Manuscript drawn up by them in the following words:

"Grounds whereupon some of the Conformed Ministers scruple to take the Test.

"First, passing by the danger of Oaths, when pressed so generally, men of the least tenderness ordinarily swallow them easily, and make small conscience of observing them, whilst they that fear oaths, are hardly induced to take them, and by their strict observance make themselves a prey, we think it strange that this oath should be injoined to us, who cannot be suspected rationally to incline either to phanaticism or popery, since by our subscriptions to the oath of supremacy and canonical obedience, we have sufficiently purged ourselves of the first, and by our refuting popish errors daily in our pulpits do shew an utter abhorrence of the other, and further, since merely our owning of episcopal government, has begot and still increases in the minds of our people; such an aversion from and dislike of us, we would have expected that our spiritual fathers would not have exposed us to greater loathing and contempt by such engagements; which although it should be granted to be causeless and unjust, yet we think ourselves bound to shun it, that our ministry may be the more taking with them, since the thing pressed upon us, is neither absolutely necessary, nor yet so evident in what is asserted for truth, as may incourage us for to under lay their prejudice conceived thereupon, and finally, since it is known that objuring the covenant did hinder many ministers to conform, and people to join in ordinances dispensed by conformists, and our parliaments had hitherto shewed such civil moderation as to free us from the declaration, we cannot look at it, but as bad and fatal that our church should be dashed on this rock, which may occasion its splitting, and instead of quenching this former evil create new flames.

"Secondly, as we wish, for the suppressing of the growth of popery, a more particular way had been made use of, even for the discovering of such, as are of no public trust, so we cannot but regret that this test has been so framed, as to divide the sound sober Presbyterians amongst themselves, whereby our common enemies are gratified, and the true faith endangered, we being persuaded that there are many Presby-

careful not to suffer any to take the said Oath or Test with their own glosses or explications: But the earl of Argyle having, after some delays, come to council, to take the said oath, as a privy counsellor, spoke some things which were not then heard, nor adverted to, and when his lordship at his next offering to take it in council, as one of commissioners of your ma-

terians in the kingdom, gentlemen, ministers and others; who cannot in conscience take this Test, who yet do daily come and are ready to join with us in ordinances. We think it had been fitter to have condescended something for gaining of such, than to have put such a brand upon them, which may more alienate them and weaken us.

"Thirdly, that Confession of Faith recorded in the first parliament of king James the 6th, has some things in it, which may scare the swearing to it without limitation, as 1st. Section the 15th, it asserts those to be evil works, which are done not only *contra*, but *preter verbum Dei*. 2dly, Section the 25th. It asserts such as resist the supreme power, doing that which pertains to his charge, and whilst he willingly travels in his office, does resist the ordinances of God, which clauses may bear an inclusive sense, especially when in the 15th Section, it is reckoned among good works to suppress tyranny. 3dly. Section the 15th, Jesus Christ is asserted to be the only head and lawgiver of his Kirk, and it is counted blasphemy for angels or men to intrude themselves into the said honour and office. 4th. Section the 23rd, on the Sacrament, popish baptism is denied as to its validity, and popish priests denied to be true ministers, which expressions, if narrowly scanned, will be found of dangerous consequence, and contradictory to other positions in the Test itself.

"Fourthly, we fear that our people may look on us rather as countenancers and encouragers, than suppressers of popery, seeing by the act we are obliged to dilate yearly in October such as withdraw from our ministry, that they may be punished by the civil magistrates, and yet by the same act, the king's lawful brother and sons *in perpetuum* are exempt from taking the Test, and consequently left at liberty to be Papists or Protestants, and what bad influence the example may have on inferior people may easily be apprehended, and our taking the Test will be reputed an approving of that exemption, which will be more stumbling. That all former acts against papists were made without any exemption, and them all declared to be disloyal, who embraced not the reformed religion, particularly in the 47th act of the third parliament of James the 6th and the 8th act of the first parliament of Charles 2.

"Fifthly, we are to swear that there lies no obligation on us by virtue of the late covenants, or any other manner of way to endeavour the change of the government, either in church or state, as it is established by law, where we suppose we are sworn not only to maintain monarchy, but also as our law ties us in the present line, and in the nearest akin to our present king, although they should be papists, although we judge the Coronation Oath in the 8th act of the 1st parliament of James the 6th to be contradictory, which yet is a standing unrepealed law, since this current parliament hath ratified and confirmed all acts made in favour of the Protestant religion, whereof this is one, so that we swear contradictions.

"Sixthly, as for the church government, as it is now established by law, there hath not been, nor are yet wanting sound Protestants, who assert the Jus divinum of episcopacy, such could not in conscience take this oath, seeing the king by virtue of his prerogative and supremacy is impowered by law to dispose of the external government, and policy of the church, as he pleases, as for such as look upon episcopal government, as indifferent in itself. Notwithstanding the submission that we give to it, or have engaged for, they can as little swear on these terms, for why should they swear never to endeavour to alter that which in itself they look upon as alterable, there being no indifferent thing which in tract of time through the corruption of men, do not prove hurtful, and why might not men in their station endeavour the refreshing by fair means, any such evil, and advise his majesty if he be willing to exert the power settled on him by the law, for freeing the church from any inconveniency, and although we have engaged to obey bishops, yet we ever did wish that they may be settled amongst us in a way more suitable to the primitive times, viz. That their number might be more encreased, that they might be called by the church alenarly to that office, and that they might be made liable to the censure of the church for their doctrine life and diligence, that they might not be such pragmatical medlers in civil affairs, and that synods and presbyteries might have more power than is assigned them by the act of restitution, from the seeing a remedy in any of which things, this oath doth tie us up.

"Seventhly, the power given to the king by the present laws, if he should be popish should be very prejudicial to the Protestant interest, for by the first act of the 2nd parliament of Charles the 2nd he may not only dispose of the external policy of the church, but may emit such acts concerning the persons employed therein, in all ecclesiastical meetings and matters to be treated upon therein, which he shall think fit, and this act only published are to oblige all his subject, and by the act for a national synod, no doctrinal matter may be proposed, debated or concluded in that his express allowance, in the aforesaid cause it is easily to divine, what advantage the enemies of our religion will have for the overturning of all."

'Hoc Ithacus velit et magno marientur Atridæ.'

jesty's Treasury, was commanded to take it simply, he refused to do so, but gave in a paper, shewing the only sense in which he would take it; which paper we all considered, as that which had in it gross and scandalous reflections upon that excellent act of parliament; making it to contain things contradictory and inconsistent, and thereby depraving your majesty's laws, misrepresenting your parliament, and teaching your subjects to evacuate and disappoint all laws and securities that can be enacted for the preservation of the government: suitable to which, his lordship declares in that paper, That he means not to bind up himself from making any alteration he shall think fit for the advantage of church or state; and which paper he desires may be looked upon as a part of his oath, as if he were the legislator, and able to add a part to the act of parliament. Upon serious perusal of which paper, we found ourselves obliged to send the said earl to the castle of Edinburgh, and to transmit the paper to your majesty, being expressly obliged to both these by your majesty's express laws. And we have commanded your majesty's advocate to raise a pursuit against the said earl, for being author, and having given in the said paper: And for the further prosecution of all relating to this affair, we expect your majesty's commands, which shall be most humbly and faithfully obeyed, by your majesty's most humble, most faithful, and most obedient subjects and servants.

Sic Subscribitur, Glencairne, Winton, Linlithgow, Perth, Roxburgh, Ancarm, Airlie, Levingstoun, Jo. Edinburgen, Ross, Geo. Gardoun, Ch. Maitland, G. Mekenzie, Ja. Foulis, J. Drummond.

Edinburgh, Nov. 8, 1681.

November 15, 1681.

The King's ANSWER to the Council's LETTER.

C. R. Most dear, &c. Having in one of your letters directed unto us, of the 8th inst. received a particular account of the earl of Argyle's refusing to take the Test simply, and of your proceedings against him, upon the occasion of his giving in a paper, shewing the only sense in which he will take it, which had in it gross and scandalous reflections upon that excellent late act of our parliament there, by which the said Test was enjoined to be taken: We have now thought fit to let you know, that as we do hereby approve these your proceedings, particularly your sending the said earl to our castle of Edinburgh; and your commanding our advocate to raise a pursuit against him, for being author of, and having given in the said Paper; so we do also authorize you to do all things that may concern the further prosecution of all relating to this affair. Nevertheless, it is our express will and pleasure, that before any sentence shall be pronounced against him, at the conclusion of the process, you send us a particular account of what he shall be found guilty of, to the end that, after our being fully informed thereof, we may signify our further pleasure in this matter. For doing whereof, &c.

But as notwithstanding the council's demanding, by their letter, his majesty's allowance for prosecuting the earl, they, before any return, caused his majesty's advocate exhibit an indictment against him, upon the points of slandering and depraving, as hath been already remarked, so after having received his majesty's answer, the design grows, and they thought fit to order a new indictment containing, beside the former points, the crimes of treason and perjury, which accordingly was exhibit, and is here subjoined, the difference betwixt the two indictments being only in the particulars above-noted.

A Copy of the INDICTMENT against the earl of Argyle.

"Archibald earl of Argyle;

"You are indicted and accused, that albeit by the common-law of all well-governed nations, and by the municipal-law and acts of parliament of this kingdom; and particularly, by the 21st, and by the 43d act, par. 2. James 1. and by the 83d act, par 6. James 5. and the 134th act, par. 8. James 6. and the 205th act, par. 14. James 6. All leasing-makers and tellers of them are punishable with tinsel of life and goods; like as by the 107th act, par. 7. James 1. it is statuted, that no man interpret the king's statutes otherwise than the statute bears, and to the intent and effect that they were made for, and as the makers of them understood; and whoso does in the contrary to be punished at the king's will: and by the 10th Act, Par. 10. James 6. it is statuted, that none of his majesty's subjects, presume or take upon him publicly to declare, or privately to speak or write any purpose of reproach or slander of his majesty's person, estate, or government, or to deprave his laws, or acts of parliament, or misconstrue his proceedings whereby any mistaking may be moved betwixt his highness, his nobility, and loving subjects, in time coming, under pain of death; certifying them that does in the contrary, they shall be reputed as seditious and wicked instruments, enemies to his highness, and to the commonwealth of this realm, and the said pain of death shall be executed against them with all rigour, to the example of others: and by the second act, ses. 2. par. 1. Char. 2. it is statuted, that whosoever shall by writing, libelling, remonstrating, express, publish, or declare any words or sentences, to stir up the people to the dislike of his majesty's prerogative and supremacy, in causes ecclesiastic, or of the government of the church by archbishops, and bishops, as it is now settled by law, is under the pain of being declared incapable to exercise any office civil, ecclesiastic or military, within this kingdom, in any time

coming. Like as by the fundamental laws of this nation, by the 130th act, par. 8. James 6. it is declared, that none of his majesty's subjects presume to impugn the dignity or authority of the three estates, or to procure innovation or diminution of their power and authority, under the pain of treason. And that it is much more treason in any of his majesty's subjects, to presume to alter laws already made or to make new laws, or to add any part to any law, by their own authority, that being to assume the legislative power to themselves, with his majesty's highest, and most incommunicable prerogative. Yet true it is, that albeit his sacred majesty did not only bestow on you the said Archibald earl of Argyle those vast lands, jurisdictions and superiorities justly forfaulted to his majesty by the crimes of your deceased father; preferring your family to those who had served his majesty against it, in the late rebellion, but also pardoned and remitted to you the crimes of leasing making and misconstruing his majesty's and his parliament's proceedings against the very laws above written, whereof you were found guilty, and condemned to die therefore, by the high court of parliament, the 25th of August, 1662, and raised you to the title and dignity of an earl, and being a member of all his majesty's judicatures. Notwithstanding of all these, and many other favours, you the said Archibald earl of Argyle, being put by the lords of his majesty's privy council to take the test appointed by the act of the last parliament to be taken by all persons in public trust, you, instead of taking the said test, and swearing the same in the plain genuine sense and meaning of the words, without any equivocation, mental reservation, or evasion whatsoever, you did declare against, and defame the said act; and having to the end you might corrupt others by your pernicious sense, drawn the same in a libel, of which libel you dispersed and gave abroad copies, whereby ill impressions were given of the king and parliament's proceedings at a time especially when his majesty's subjects were expecting what submission should be given to the said Test: and being desired the next day to take the same, as one of the commissioners of his majesty's treasury, you did give in to the lords of his majesty's privy-council, and owned twice in plain judgment before them, the said defamatory libel against the said Test and act of parliament; declaring that you had considered the said Test, and was desirous to give obedience as far as you could: whereby you clearly insinuated, that you was not able to give full obedience: in the second article of which libel you declare, that you were confident the parliament never intended to impose contradictory oaths; thereby to abuse the people with a belief, that the parliament had been so impious as really and actually to have imposed contradictory oaths; and so ridiculous as to have made an act of parliament (which should be most deliberate of all human actions) quite contrary to their own intentions: after which you subsumed, contrary to the nature of all oaths, and to the acts of parliament above cited, that every man must explain it for himself, and take it in his own sense; by which not only that excellent law, and the oath therein specified, which is intended to be a fence to the government both of church and state, but all other oaths and laws shall be rendered altogether useless to the government. If every man take the oaths imposed by law in his own sense, then the oath imposed is to no purpose; for the legislator cannot be sure that the oath imposed by him will bind the takers according to the design and intent for which he appointed it; and the legislative power is taken from the imposers, and settled in the taker of the oath; and so he is allowed to be the legislator, which is not only an open and violent depraving of his majesty's laws and acts of parliament, but is likewise a settling of the legislative power on private subjects, who are to take such oaths. In the third article of that paper you declare, that you take the Test in so far only as it is consistent with itself, and the Protestant Religion; by which you maliciously intimate to the people, that the said oath is inconsistent with itself and with the Protestant Religion, which is not only a downright depraving of the said act of parliament, but is likewise misconstruing of his majesty's and the parliament's proceedings, and misrepresenting them to the people in the highest degree, and in the tenderest points they can be concerned; and implying, that the king and the parliament have done things inconsistent with the Protestant Religion, for securing of which, that test was particularly intended. In the fourth article you do expressly declare, that you mean not by taking the said Test, to bind up yourself from wishing and endeavouring any alteration in a lawful way that you shall think fit, for advancing of church and state; whereby also it was designed by the said act of parliament and oath, that no man should make any alteration in the government of church and state, as it is now established; and that it is the duty of all good subjects, in humble and quiet manner, to obey the present government: yet you not only declare yourself, but by your example you invite others to think themselves loosed from that obligation; and that it is free for them to make any alteration in either, as they shall think fit, concluding your whole paper with these words (and this I understand as a part of my oath;) which is a treasonable invasion upon the royal legislative power, as if it were lawful for you to make to yourself an act of parliament; since he who can make any part of an act may make the whole, the power and authority in both being the same. Of the which crimes above-mentioned, you the said Archibald earl of Argyle, are actor, art and part; which being found by the assize, you ought to be punished with the pains of death, forfaulture and escheat of lands and goods, to the terror of others to commit the like hereafter."

An ABSTRACT of the several Acts of Parliament upon which the Indictment against the Earl of Argyle was grounded.

Concerning Raisers of Rumours betwixt the King and his People. C. 20. 1. Stat. of K. Rob.

It is defended and forbidden, that no man be a conspirator or inventor of narrations or rumors, by the which occasion of discord may rise betwixt the king and his people. And if any such man shall be found and attainted thereof, incontinent he shall be taken and put in prison and there shall be surely keeped up, ay and while the king declare his will anent him.

Act 43. Par. 2. King James 1. March 11, 1424. Leasing-makers forfault Life and Goods.

Item, it is ordained by the king and whole parliament, that all leasing-makers, and tellers of them, which may engender discord betwixt the king and his people, whereever they may be gotten, shall be challenged by them that power has and tyne life and goods to the king,

Act 83. Par. 6. James 5. Dec. 10, 1530. Of Leasing-makers.

Item, touching the Article of Leasing-makers to the king's grace of his barons, great men and leiges, and for punishment to be put to them therefore, the king's grace, with advice of his three estates, ratifies and approves the acts and statutes made thereupon before, and ordains the same to be put in execution in all points; and also statutes and ordains, that if any manner of person makes any evil information of his highness to his barons and leiges, that they shall be punished in such manner, and by the same punishment as they that make leasings to his grace of his lords, barons, and leiges.

Act 134. Par. 8. James 6. May 22. 1584. Anent Slanderers of the King, his Progenitors, Estate and Realm.

Forasmuch as it is understood to our sovereign lord, and his three estates assembled in this present parliament, what great harm and inconveniency has fallen in this realm, chiefly since the beginning of the civil troubles occurred in the time of his highness minority, through the wicked and licentious, public and private speeches, and untrue calumnies of divers of his subjects, to the disdain, contempt, and reproach of his majesty, his council and proceedings, and to the dishonour and prejudice of his highness, his parents, progenitors and estate, stirring up his highness's subjects thereby to misliking, sedition, unquietness, and to cast off their due obedience to his majesty; to their evident peril, tinsel and destruction: His highness continuing always in love and clemency toward all his good subjects, and most willing to seek the safety and preservation of them all, which wilfully, needlessly, and upon plain malice, after his highness's mercy and pardon oft-times afore granted, has procured themselves, by their treasonable deeds, to be cut off, as corrupt members of this commonwealth: Therefore it is statute, and ordained by our sovereign lord, and his three estates in this present parliament, That none of his subjects, of whatsoever function, degree, or quality, in time coming, shall presume, or take upon hand, privately or publicly, in sermons, declamations and familiar conferences, to utter any false, slanderous, or untrue speeches, to the disdain, reproach and contempt of his majesty, his council and proceedings, or to the dishonour, hurt, or prejudice of his highness, his parents and progenitors, or to meddle in the affairs of his highness, and his estate present, by gone, and in time coming, under the pains contained in the acts of parliament anent makers and tellers of leasings, certifying them that shall be tried, contraveners thereof, or that hear such slanderous speeches, and reports not the same with diligence, the said pain shall be executed against them with all rigour in example of others.

Act 205. Par. 14. King James 6. June 8, 1594. anent Leasing-makers, and Authors of Slanders.

Our sovereign lord, with advice of his estates, in this present parliament, ratifies, approves, and for his highness and successors, perpetually confirms the act made by his noble progenitors, king James the First, of worthy memory, against leasing-makers, the act made by king James the Second, entituled, Against leasing makers and tellers of them; the act made by king James the Fifth, entituled, Of leasing-makers; and the act made by his highness's self, with advice of his estates in parliament, upon the 22d day of May, 1584. entituled, For the punishment of the authors of slanders and untrue calumnies against the king's majesty, his council and proceedings, to the dishonour and prejudice of his highness, his parents, progenitors, crown and estate; as also the act made in his highness's parliament holden at Linlithgow upon the 10th of December 1585, entituled, Against the authors of slanderous speeches or writs; and statutes and ordains all the said acts to be published of new, and to be put in execution in time coming, with this addition, That whoever hears the said leasings, calumnies, or slanderous, speeches or writs to be made, and apprehends not the authors thereof, if it lies in his power, and reveals not the same to his highness, or one of his privy-council, or to the sheriff, steward or bailiff of the shire, stewards in regality or royalty, or to the provost, or any of the bailiffs within burgh, by whom the same may come to the knowledge of his highness, or his said privy-council, where through the said leasing-makers and authors of slanderous speeches may be called, tried, and punished according to the said acts: The hearer, and not apprehender, [if it lie in his power] and concealer, and not revealer of the

said leasing-makers, and authors of the said slanderous speeches or writs, shall incur the like pain and punishment as the principal offender.

Act 107. Par. 7. King James 1. March 1. 1427. That none interpret the King's Statutes wrongously.

Item, the king, by deliverance of council, by manner of statute, forbids, that no man interpret his statutes otherwise than the statutes bear, and to the intent and effect that they were made for, and as the maker of them understood; and whoso does in the contrary, shall be punished at the king's will.

Act 10. Par. 10. King James 6. Dec. 10, 1585. Authors of slanderous Speeches or Writs should be punished to the death.

It is statuted and ordained by our sovereign lord and three estates, that all his highness's subjects content themselves in quietness and dutiful obedience to his highness and his authority; and that none of them presume, or take upon hand publicly to declaim, or privately to speak or write any purpose of reproach or slander of his majesty's person, estate or government; or misconstrue his proceedings, whereby any misliking may be proved betwixt his highness and his nobility, and loving subjects in time coming, under the pain of death; certifying them that do in the contrary, they shall be reputed as seditious and wicked instruments, enemies to his highness and the commonwealth of this realm: and the said pain of death shall be executed upon them with all rigour in example of others.

Act for Preservation of his Majesty's Person, Authority and Government, May 1662.

———And further, it is by his majesty and estates of parliament declared, statuted and enacted, that if any person or persons shall, by writing, printing, praying, preaching, libelling, remonstrating, or by any malicious or advised speaking, express, publish, or declare any words or sentences, to stir up the people to the hatred or dislike of his majesty's royal prerogative and supremacy, in causes ecclesiastical or of the government of the church by archbishops and bishops, as it is now settled by law———That every such person or persons so offending, and being legally convicted thereof, are hereby declared incapable to enjoy or exercise any place or employment, civil, ecclesiastic, or military, within this church and kingdom, and shall be liable to such further pains as are due by the law in such cases.

Act 130. Par. 8. James 6. May 22, 1584. Afent the Authority of the three Estates of Parliament.

The king's majesty considering the honour and the authority of his supreme court of parliament, continued past all memory of man, unto their days, as constitute upon the free votes of the three estates of this ancient kingdom, by whom the same, under God, has ever been upholden, rebellious and traiterous subjects punished, the good and faithful preserved and maintained, and the laws and acts of parliament (by which all men are governed) made and established. And finding the power, dignity, and authority of the said court of parliament, of late years called in some doubt, at least, some curiously travelling to have introduced some innovation thereanent; his majesty's firm will and mind always being, as it is yet, that the honour, authority, and dignity of his said three estates shall stand and continue in their own integrity, according to the ancient and laudable custom by-gone, without any alteration or diminution; therefore it is statuted and ordained by your said sovereign lord, and his said three estates in this present parliament, that none of his leiges or subjects presume, or take upon hand to impung the dignity and authority of the said three estates, or to seek or procure the innovation or diminution of the power and authority of the same three estates, or any of them, in time coming, under the pain of treason.

The Earl of Argyle's First Petition for Advocates, or Counsel to be allowed him.

To his Royal Highness, his Majesty's High Commissioner, and to the right honourable the Lords of his Majesty's Privy-Council: The humble Petition of Archibald Earl of Argyle.

Sheweth; That your Petitioner being criminally indicted before the lords commissioners of justiciary, at the instance of his majesty's advocate, for crimes of an high nature. And whereas in this case no advocate will readily plead for the petitioner, unless they have your royal highness, and lordships special license and warrant to that effect, which is usual in the like cases.—It is therefore humbly desired, that your royal highness and lordships would give special order and warrant to sir George Lockhart, his ordinary advocate, to consult and plead for him in the aforesaid criminal process, without incurring any hazard upon that account: And your Petitioner shall ever pray.

Edinburgh, *November* 22, 1681.

The Council's Answer to the Earl of Argyle's first Petition, and his having Advocates allowed him.

His Royal Highness, his majesty's high Commissioner, and lords of privy-council do refuse the desire of the above-written bill, but allow any lawyers the petitioner shall employ to consult and plead for him in the process of treason, and other crimes, to be pursued against him at the instance of his majesty's advocate.

Extra. By me, Will. Paterson.

The Earl of Argyle's Second Petition for Counsel to be allowed him.

To his Royal Highness, his Majesty's high Commissioner, and to the right honour-

able the Lords of his Majesty's Privy-Counsel: The humble Petition of Archibald Earl of Argyle.

Sheweth; That your petitioner having given in a former petition, humbly representing, That he being criminally indicted before the lords commissioners of justiciary, at the instance of his majesty's advocate, for any crimes of an high nature: And therefore desired that your royal highness, and lordships, would give special warrants to sir George Lockhart, to consult and plead for him: Whereupon your royal highness and lordships did allow the petitioner to make use of such advocates as he should think fit to call. Accordingly your petitioner have desired sir George Lockhart to consult and plead for him, he hath as yet refused your petitioner. And by the 11th parliament of king James the 6th, cap 38. as it is the undeniable priviledge of all subjects, accused for any crimes, to have liberty to provide themselves of advocates, to defend their lives, honour, and lands, against whatsoever accusation; so the same priviledge is not only by parliament 11 king James the 6th, cap. 90, farther asserted and confirmed, but also it is declared, that in case the advocates refuse, the judges are to compel them, lest the party accused should be prejudiced: And this being an affair of great importance to your petitioner, and sir George Lockhart having been not only still his ordinary advocate, but also by his constant converse with him is best known to your petitioner's principles; and of whose eminent abilities and fidelity, your petitioner (as many others have) have had special proof all along in his concerns, and hath such singular confidence in him, that he is most necessary to your petitioner at this occasion.

May it therefore please your royal highness and lordships to interpose your authority, by giving a special order and warrant to the said sir George Lockhart, to consult and plead for him in the said criminal process, conform to the tenor of the said acts of parliament, and constant known practice in the like cases, which was never refused to any subject of the meanest quality, even to the greatest criminals. And your royal highness's and lordships answer is humbly craved.*

EDINBURGH, *November* 24, 1681.

The Council's ANSWER to the Earl of Argyle's second Petition.

His royal highness, his majesty's high-commissioner, and lords of privy-council, having considered the foresaid petition, do adhere to their former order, allowing advocates to appear for the petitioner in the process aforesaid. Extr. By me WALL. PATERSON.

The Earl of Argyle's LETTER OF ATTORNEY, constituting Alexander Dunbar his Procurator, for requiring sir George Lockhart to plead for him

We Archibald earl of Argyle do hereby substitute, constitute and ordain Alexander Dunbar, our servitor, to be our procurator, to pass and require sir George Lockhart, advocate, to consult and plead for us, in the criminal process intended against us, at the instance of his majesty's advocate; and to compear with us, before the lords commissioners of justiciary, upon the 12th of December next, conform to an act of council, dated the 22d of November instant, allowing any lawyers that we should employ, to consult and plead for us in the said process, and to another act of council of the 24th of November instant, relative to the former, and conform to the acts of parliament. In witness whereof we have subscribed these presents, at Edinburgh-Castle, Nov. 26, 1681, before these witnesses, Duncan Campbell, servitor to James Glen, stationer in Edinburgh, and John Thom, merchant in the said Burg.

ARGYLE.

Duncan Campbell, John Thom, witnesses.

An Instrument whereby the Earl of Argyle required sir George Lockhart to appear and plead for him.

Apud Edenburgum vigesimo sexto die mensis Novembris, Anno Domini millesimo sexcentesimo octuagesimo primo, et Anno Regni Car. 2, Regis trigesimo tertio.

The which day, in presence of me notary-public, and witnesses under-subscribed, compeared personally Alexander Dunbar, servitor to a noble earl, Archibald earl of Argyle, as procurator, and in name of the said earl, conform to a procuration subscribed by the said earl at the castle of Edinburgh, upon the 21st day of November, 1681, making and constituting the said Alexander Dunbar his procurator, to the effect under-written; and passed to the personal presence of sir George Lockhart, advocate, in his own lodging in Edinburgh, having and holding in his hands an act of his majesty's privy council, of the date of the 22d

* "The earl thus mewed up, that he might not give any offence, twice petitions the duke and council, that sir George Lockhart might be his advocate to plead his defence, yet both times refused. The reason of these petitions were; that without leave none would dare to plead the earl's cause, for fear of the king's displeasure: However, by the act, 11 Jac. 6, cap. 90. 'It 'is the undeniable privilege of all subjects accused for any crimes, to provide themselves 'advocates, to defend their lives, honours, and 'lands, against whatsoever accusation:' so by the 11 Jac. 6, c. 90, it is declared, 'That in 'case advocates refuse, the judges may compel 'them.' Hereupon the earl drew up a letter of attorney, constituting Alexander Dunbar to require sir George Lockhart to plead for him; which the duke no sooner heard, but said, 'If 'sir George Lockhart plead for the earl, he 'shall never plead for my brother nor me.'" 2 Coke's Detection, p. 289.

of November, 1681, instant, proceeding upon a petition given in by the said earl of Argyle to the said lords, shewing, that he being criminally indicted before the lords commissioners of justiciary, at the instance of his majesty's advocate, for crimes of an high nature; and whereas in that case no advocates would readily plead for the said earl, unless they had his royal highness's and their lordships special license and warrant to that effect, which is usual in the like cases: And by the said petition humbly supplicated, that his highness and the council would give special order and command to the said sir George Lockhart, the said earl's ordinary advocate, to consult and plead for him in the foresaid criminal process, without incurring any hazard upon that account. His royal highness, and lords of the said privy-council, did refuse the desire of the said petition, but allowed any lawyers the petitioner should employ, to consult and plead for him in the process of treason, and other crimes to be pursued against him, at the instance of his majesty's advocate. And also the said Alexander Dunbar having and holding in his hands another act of the said lords of privy-council, of the 24th of the said month, relative to, and narrating the foresaid first act, and proceeding upon another supplication given in by the said earl to the said lords, craving, that his royal highness and the said lords would interpose their authority, by giving a positive and special order and warrant to the said sir George Lockhart, to consult and plead with him in the aforesaid criminal process, conform to the tenor of the acts of parliament mentioned and particularized in the said petition, and frequent and known practice in the like cases, which was never refused to any subjects of the meanest quality. His royal highness, and the lords of privy-counsel, having considered the aforesaid petition, did, by the said act, adhere to their former order, allowing advocates to appear for the said earl in the process foresaid, as the said acts bear; and produced the said acts procuratory foresaid to the said sir George Lockhart, who took the same in his hands, and read them over successive; and after reading thereof, the said Alexander Dunbar, procurator, and in name and behalf foresaid, solemnly required the said sir George Lockhart as the said noble earl's ordinary advocate, and as a lawyer and advocate, upon the said earl's reasonable expence, to consult and advise the said earl's said process at any time and place the said sir George should appoint to meet thereupon, conform to the foresaid two acts of council, and acts of parliament therein mentioned, appointing advocates to consult in such matters: which the said sir Geo. Lockhart altogether refused: Whereupon the said Alexander Dunbar, as procurator, and in name foresaid, asked and took the instruments, one or more, in the hands of me notary-public under-subscribed. And these things were done within the said sir George Lockhart's lodging, on the south side of the street of Edinburgh, in the lane Mercat within the dining-room of the said lodging, betwixt four and five hours in the afternoon, day, month, year, place, and of his majesty's reign, respective foresaid, before Rob. Dixone, and John Lesly, servitors to John Campbell, writer to his majesty's signet, and Dowgall Mac Alester, messenger in Edinburgh, with divers others, called and required to the premises.

Ita esse Ego Johannes Broun, Notarius Publicus, in Premissis requisitus, Attestor Testantibus his meis signo et subscriptione manualibus solitis et consuetis. BROUN.

Robert Dixone, Dowgall Mac Alester, John Lesly, witnesses.

December 5, 1682.

The Opinion of divers Lawyers concerning the Case of the Earl of Argyle.

We have considered the criminal letters, raised at the instance of his majesty's advocate against the earl of Argyle, with the acts of parliament contained and narrated in the same criminal letters, and have compared the same with a paper, or explication, which is libelled to have been given in by the earl to the lords of his majesty's privy-council, and owned by him, as the sense and explication in which he did take the oath imposed by the late act of parliament. Which paper is of this tenor: 'I 'have considered the Test, and am very desirous 'to give obedience as far as I can, &c.' And having likewise considered that the earl, after he had taken the oath, with the explication and sense then put upon it, it was acquiesced to by the lords of the privy council, and he allowed to take his place, and to sit and vote. And that, before the earl's taking of the oath, there were several papers spread abroad, containing objections, and alledging inconsistencies and contradictions in the oath, and some thereof were presented by synods and presbyteries of the orthodox clergy, to some of the bishops of the church. It is our humble opinion, that seeing the earl's design and meaning in offering the said explication was allenarly for the clearing of his own conscience, and upon no factious or seditious design; and that the matter and import of the said paper is no contradiction of the laws and acts of parliament, it doth not at all import any of the crimes libelled against him, viz. treason, leasing-making, depraving of his majesty's laws, or the crime of perjury, but that the glosses and inferences put by the libel upon the said paper are altogether strained and unwarrantable, and inconsistent with the earl's true design, and the sincerity of his meaning and intention, in making of the said explication.

Wednesday, the 12th of December, the day of compearance assigned to the earl being now come, he was brought by a guard of soldiers from the castle to the place appointed for the trial, and the justice court being met and fenced, the earl, now marquis of Queensbury, then justice-general, the lords Nairn, Collingtown,

Forret, Newtoun, and Kirkhouse, the lords of justiciary sitting in judgment, and the other formalities also performed, the Indictment above set down was read, and the earl spoke as follows:

The Earl of Argyle's SPEECH* to the Lord Justice General, and the Lords of the Justiciary, after he had been arraigned, and his Indictment read.

My Lord Justice General, &c.

I look upon it as an undeniable privilege of the meanest subject to explain his own words in the most benign sense: And even when persons are under an ill character, the misconstruction of words in themselves not ill, can only reach a presumption or aggravation but not any more. [*Can only reach a presumption or aggravation of an offence, but never reach to a crime.*]

But it is strange to alledge, as well as, I hope, impossible, to make any that know me believe, that I could intend any thing but what was honest and honourable, suitable to the principles of my religion and loyalty, though I did not explain myself at all.

My lord, I pray you be not offended that I take up a little of your time, to tell you, I have from my youth made it my business to serve his majesty faithfully, and have constantly, to my power, appeared in his service; especially in all times of difficulty, and have never joined, nor complied with any interest or party, contrary to his majesty's authority, and have all along served him in his own way, without a frown from his majesty these thirty years.

As soon as I passed the schools and colleges, I went to travel to France and Italy, and was abroad 1647, 1648, and till the end of 1649.

My first appearance in the world was to serve his majesty as colonel of his foot-guards. And though at that time all the commissioners were given by the then parliament, yet I would not serve without a commission from his majesty, which I have still the honour to have by me.

After the misfortune of Worcester, I continued [*four years*] in arms for his majesty's service; when Scotland was over-run with usurpers; and was alone with some of my friends in arms in the year 1652, [*whilst none other were in arms for his majesty's service in all Scotland*], and did then keep up some appearance of opposition to them: and general major Dean coming to Argyleshire, and planting several garrisons, he no sooner went away but we fell upon the garrisons he had left, and in one day took two of them, and cut off a considerable part of a third, and carried away in all about 300 prisoners: [*besides provisions and convoys we seized which they sent to plant other garrisons*] and in the end of that year, I sent captain Shaw to his majesty, with my humble opinion, how the war might be carried on; who returned to me with instructions and orders which I have yet lying by me.

After which, I joined with those his majesty did commissionate, and stood out till the last, that the earl of Middleton, his majesty's lieutenant-general, gave me orders to capitulate, which I did without any other engagements to the rebels but allowing persons to give bail for my living peaceable: and did at my capitulating relieve several prisoners by exchange, whereof my lord Granard, out of the castle of Edinburgh, was one.

It is notarly known, that I was forefaulted by the usurpers, who were so jealous of me, that, contrary to their faith, within eight months after my capitulation, upon pretence I keeped horses above the value they seized on me, and keeped me in one prison after another, till his majesty's happy restoration, and this only because I would not engage not to serve his majesty, though there was no oath required.

I do with all gratitude acknowledge his majesty's goodness, bounty and royal favours to me, when I was pursued before the parliament in the year 1662. His majesty was graciously pleased not to send me here [*from London hither*] in any opprobrious way, [*and with a guard as some urged*] but upon a bare verbal paroll. Upon which I came down post, and presented myself a fortnight before the day, [*appointed me by his majesty.*] Notwithstanding whereof I was immediately clapt up in the Castle, but having satisfied his majesty at that time [*of the true meaning of that letter, I was questioned for; and his majesty being convinced of it himself and*] of my entire loyalty, I did not offer to plead by advocates. And his majesty was not only pleased to pardon my life, and to restore me to a title and fortune, but to put me in trust in his service, in the most eminent judicatories of this kingdom, and to heap favours upon me, far beyond whatever I did [*pretend to*] or can deserve: though I hope his majesty hath always found me faithful and thankful, and ready to bestow all I have, or can have, for his service: and I hope never hath had nor ever shall have ground to repent any favour he hath done me. And if I were now really guilty of the crimes libelled, I should think myself a great villain.

The next occasion I had to shew my particular zeal to his majesty's service was in Anno 1666, when the insurrection was made that was represt at Pentland-Hills. At the very first, the intercourse betwixt this place and me was stopt, so that I had neither intelligence nor orders from the council, nor from the general; but upon a letter from the now archbishop of

* In a copy of the Case of the earl of Argyle, printed in the year 1683, which is now the property of a gentleman in Edinburgh, there is a note which says, that it was the Earl's own copy, and that some corrections which appear in the margin are in his hand writing. I have been favoured with a transcript of these corrections, and they are accordingly inserted in Italic characters.

St. Andrews, telling me there was a rebellion like to be in the three kingdoms, and bidding me beware of Ireland and Kintyre, I brought together about 2,000 men: I seized all the gentlemen in Kintyre that had not taken the declaration, though I found them peaceable. And I sent a gentleman to general Dalziel, to receive his orders, who came to him just as they were going to the action at Pentland, and was with him in it; and I kept my men together till his return. And when I met with considerable trouble from my neighbours, rebelliously in arms, and had commissions both on public and private accounts, have I not carried dutifully to his majesty, and done what was commanded with a just moderation, which I can prove under the hands of my enemies, and by many infallible demonstrations?

Pardon me a few words: did I not in this present parliament shew my readiness to serve his majesty and royal family, in asserting vigorously the lineal legal succession of the crown, and had a care to have it expressed in the commissions of the shires and burghs I had interest in? Was I not for offering proper supplies to his majesty and his successor? And did I not concur to bind the landlords for their tenants, although I was mainly concerned? And have I not always kept my tenants in obedience to his majesty?

I say all this, not to arrogate any thing for doing what was my honour and duty to his majesty; but if after all this, upon no other ground but words that were spoken in absolute innocence, and without the least design, except for clearing my own conscience, and that are not capable of the ill sense wrested from them by the libel, I should be further troubled, what assurance can any of the greatest quality, trust, or innocency have, that they are secure? especially considering, that so many scruples have been started, as all know, not only by many of the orthodox clergy, but by whole presbyteries, synods, and some bishops, which were thought so considerable, that an eminent bishop took the pains to write a treatise that was read over in council, and allowed to be printed, and a copy given to me, which contains all the expressions I am charged for, and many more that may be stretched to a worse sense.

Have I not shewed my zeal to all the ends of the Test? How then can it be imagined that I have any sinister design in any thing that I have said? If I had done any thing contrary to it all the course of my life, which I hope shall not be found, yet one act might pretend to be excused by a habit. But nothing being questioned but the sense of words misconstrued to the greatest height, and stretched to imaginary inferences, quite contrary to my scope and design, and so far contrary, not only to my sense, but my principles, interest, and duty, that I hope my lord advocate will think he hath gone too far on in this process, and say plainly what he knows to be truth by his acquaintance with me, both in public and private, viz. That I am neither papist nor fanatic, but truly loyal in my principles and practices.

The hearing of this libel would trouble me beyond most of the sufferings of my life if my innocence did not support me, and the hopes of being vindicated of this and other calumnies before this public and noble auditory.

I leave my defences to these gentlemen that plead for me, they know my innocence, and how groundless that libel is.

I shall only say, as my life hath most of it been spent in serving and suffering for his majesty; so, whatever be the event of this process, I resolve, while I breathe, to be loyal and faithful to his majesty. And whether I live publicly or in obscurity, my head, my heart, nor my hand, shall never be wanting where I can be useful to his majesty's service. And while I live, and when I die, I shall pray, that God Almighty would bless his majesty with a long, happy, and prosperous reign; and that the lineal legal successors of the crown may continue monarchs of all his majesty's dominions, and be defenders of the true Primitive, Christian, Apostolic, Catholic, Protestant Religion, while Sun and Moon endure.

God save the King.

The King's own LETTER to this Nobleman, when he was lord Lorn.

"My lord Lorn; *Cologne, Dec.* 1654.

"I am very glad to hear from Middleton, what affection and zeal you show to my service, how constantly you adhere to him in all his distresses, and what good service you have performed upon the rebels. I assure you, you shall find me very just, and kind to you in rewarding what you have done and suffered for me; and I hope you will have more credit and power with those of your kindred, and dependants upon your family, to engage them with you for me, than any body else can have to seduce them against me; and I shall look upon all those who shall refuse to follow you as unworthy of any protection hereafter from me, which you will let them know. This honest bearer, M——, will inform you of my condition and purposes, to whom you will give credit; and he will tell you, that I am very much Your affectionate friend, C. R."

General MIDDLETON'S ORDER to the Earl of ARGYLE, who was then lord Lorn, for capitulating with the English, wherein he largely expresseth his worth and loyalty.

John Middleton, Lieutenant-General, next and immediately under his majesty, and Commander in chief of all the Forces raised, and to be raised, within the kingdom of Scotland. —Seeing the lord Lorn hath given so singular proofs of clear and perfect loyalty to the King's majesty, and of pure and constant affection to the good of his majesty's affairs, as never hitherto to have any ways complied with the enemy, and to have been principally instrumental in the enlivening of this late war, and

one of the chief and first movers in it, and hath readily, cheerfully, and gallantly engaged, and resolutely and constantly continued active in it, notwithstanding the many powerful dissuasions, discouragements, and oppositions he hath met withal from divers hands, and hath, in the carrying on of the service, shewn such signal fidelity, integrity, generosity, prudence, courage and conduct, and such high virtue, industry, and ability, as are suitable to the dignity of his noble family, and the trust his majesty reposed in him; and hath not only stood out against all temptations and enticements, but hath most nobly crossed and repressed designs and attempts of deserting the service, and persisted loyally and firmly in it to the very last, through excessive toil and many difficulties, misregarding all personal inconveniences, and chusing the loss of friends, fortune, and all private concernments, and to endure the utmost extremities rather than to swerve in the least from his duty, or taint his reputation with the meanest shadow of disloyalty and dishonour. I do, therefore, hereby testify and declare, that I am perfectly satisfied with his whole deportments, in relation to the enemy, and this late war; and do highly approve them, as being not only above all I can express of their worth, but almost beyond all parallel. And I do withal hereby both allow, and most earnestly desire, and wish him, to lose no time in taking such course for his safety and preservation by treaty and agreement, or capitulation, as he shall judge most fit and expedient for the good of his person, family, and estate, since inevitable and invincible necessity hath forced us to lay aside this war. And I can now no other way express my respects to him, nor contribute my endeavour to do him honour and service. In testimony whereof I have signed and sealed these presents at Dunveagave, the last day of March, 1655. JOHN MIDDLETON.

Another LETTER from the Earl of MIDDLETON, to the same purpose.

My noble Lord; PARIS, *April* [illegible], 1655.

I am hopeful, that the bearer of this letter will be found one who has been a most faithful servant to your lordship, and my kind friend, and a sharer in my troubles. Indeed I have been strengthened by him to support and overcome many difficulties. He will acquaint you with what hath past, which truly was strange to both of us, but your own re-encounters will lessen them. My lord, I shall be faithful in giving you that character which your worth and merit may justly challenge. I profess it is, next to the ruin of the service, one of my chiefest regrets that I could not possibly wait upon you before my going from Scotland, that I might have settled a way of correspondence with you, and that your lordship might have understood me better than yet you do; I should have been plain in every thing, and indeed have made your lordship my confessor: and I am hopeful the bearer will say somewhat for me, and I doubt not but your lordship will trust him. If it shall please God to bring me safe from beyond sea, your lordship shall hear from me by a sure hand. Sir Ro. M. will tell you a way of corresponding. So that I shall say no more at present, but that I am, without possibility of change, My noble lord, your lordship's, &c. JOHN MIDDLETON.

A LETTER from the Earl of GLENCAIRN, testifying his esteem for this noble person, and the sense he had of his loyalty to the King, when few had the courage to own him.

My Lord; Lest it may be my misfortune, in all these great revolutions, to be misrepresented to your lordship, as a person unworthy of your favourable opinion (an artifice very frequent in these times) I did take occasion to call for a friend and servant of yours, the laird of Spanie, on whose discretion I did adventure to lay forth my heart's desire, to obviate in the bud any of these misunderstandings. Your lordship's true worth and zeal to your country's happiness being so well known to me, and confirmed by our late suffering acquaintance: and now finding how much it may conduce to these great ends, we all wish that a perfect unity may be amongst all good and honest-hearted Scotchmen, though there be few more insignificant than myself: yet my zeal for those ends obliges me to say, that if your lordship's health and affairs could have permitted you to have been at Edinburgh in these late times, you would have seen a great inclination and desire, amongst all here, of a perfect unity, and of a mutual respect to your person, as of chief eminence and worth. And I here shall set it under my hand, to witness against all my informers, that none did with more passion, nor shall with more continued zeal, witness themselves to be true honourers of you, than he who desires infinitely to be esteemed, my lord, your most humble servant,

GLENCAIRN.

What I cannot well write, I hope this discreet gentleman will tell you, in my name; and I shall only beg leave to say, that I am your most noble lady's humble servant.

After the reading of which Order and Letters, which yet the Court refused to record, the earl's advocate, or counsel, sir George Lockhart said in his defence as follows:

Sir George Lockhart's ARGUMENT and PLEA for the Earl of Argyle.

Sir George Lockhart for the earl of Argyle, alledgeth, That the libel is not relevant, and whereupon he ought to be put to the knowledge of an inquest. For,

It is alleged in the general, That all criminal libels, whereupon any person's life, estate and reputation, can be drawn in question, should be founded upon clear, positive and express acts of parliament, and the matter of fact which is libelled, to be the contravention of those

laws, should be plain, clear, and direct contraventions of the same, and not argued by way of implications and inferences. Whereas in this case, neither the acts of parliament founded upon, and libelled, can be in the least the foundation of this libel: nor is the explication which is pretended to be made by the pannel, at the time of the taking of his oath (if considered) any contravention of those laws; which being premised, and the pannel denying the libel, as to the whole articles and points therein contained, it is alleged in special:

That the libel, in so far as it is founded upon the 21st chap. stat. 1. Robert 1. and upon 83d act, par. 6. James 5. the 43d act, par. 2, James 1. and upon the 83d Act, par. 10. James 5. and upon 84th act, par. 8. James 6. and upon the 10th act, par. 10. James 6. and upon the 2d act, par. 1. Ses. 2. of his sacred majesty; and inferring thereupon, that the pannel, by the pretended explication given in by him to the Lords of his majesty's privy-council, as the sense of the oath he had taken, doth commit the crime of leasing-making, and depraving his majesty's laws: The inference and subsumption is most unwarrantable, and the pannel, though any such thing were acknowledged and proved, can never be found guilty of contravening these acts of parliament. In respect it is evident, upon perusal and consideration of these acts of parliament, that they only concern the case of leasing-making tending to sedition, and to beget discord betwixt his majesty and his subjects, and the dislike of his majesty's government, and the reproach of the same. And the said laws and acts of parliament were never understood or libelled upon, in any other sense. And all the former acts of parliament, which relate to the crime of leasing-making in general terms and under the qualification foresaid as tending to beget discord betwixt his majesty and his subjects, are explained and fully declared, as to what is the true meaning and import thereof, by the 134th act, par. 8. James 6. which relates to the same crime of leasing-making, and which is expressly described in these terms, to be wicked and licentious, public and private speeches, and untrue calumnies to the disdain and contempt of his majesty's council and proceedings, and to the dishonour and prejudice of his highness and his estate, stirring up his highness's subjects to misliking and sedition, and unquietness, which being the true sense and import of the acts of parliament made against leasing-makers, there is nothing can be inferred from the pannel's alledged explication, which can be wrested or construed to be a contravention of these laws: In respect,

1. It is known by the whole tenor of his life, and graciously acknowledged by his sacred majesty, by a letter under his royal hand, that the pannel did ever most zealously, vigorously, and constantly promote and carry on his majesty's service and interest, even in the worst and most difficult times; which is also acknowledged by a pass under the earl of Middleton's hand, who had then a special commission from his majesty, for carrying on his majesty's service in this kingdom, as lieutenant-general under his majesty; and by a letter under the earl's hand, of the date, both which do contain high expressions of the pannel's loyalty, and of the great services he had performed for his majesty's interest. And his majesty as being conscious thereof, and perfectly knowing the pannel's loyalty, and his zeal and faithfulness for his service, did think fit to entrust the pannel in offices and capacities of the greatest trust of the kingdom. And it is a just and rational presumption, which all law makes and infers, that the words and expressions of persons; who by the tenor and course of their lives have expressed their duty and loyalty to his majesty's interest, are ever to be interpreted, and understood 'in meliorem partem.' And by way of implication and inference, to conclude and infer crimes from the same, which the user of such words and expressions never meaned nor designed, is both unreasonable and unjust.

II. As the foresaid acts of parliament made against leasing-makers, and depravers of his majesty's laws, only proceed in the terms foresaid, where the words and speeches are plain, tending to beget discord between the king and his subjects, and to the reproach and dislike of his government, and when the same are spoke and vented in a subdolous, pernicious, and fraudulent manner: So they never were, nor can be understood to proceed in the case of a person offering in the presence of a public judicature (whereof he had the honour to be a member) his sincere and plain meaning and apprehension of what he conceived to be the true sense of the act of parliament imposing and enjoining the test: There being nothing more opposite to the act of parliament made against leasing-making, and venting and spreading abroad the same upon seditious designs, than the foresaid plain and open declaration of his sense and apprehension, what was the meaning of the said act of parliament. And it is of no import to infer any crime, and much less of any of the crimes libelled, albeit the pannel had erred and mistaken in his apprehension of the act of parliament. And it were a strange extension of the act of parliament made against leasing-makers, requiring the qualifications foresaid and the acts against depraving his majesty's laws, to make the pannel, or any other person guilty upon the mistakes and misapprehensions of the sense of the laws, wherein men may mistake and differ very much, and even eminent lawyers and judges. So that the acts of parliament against leasing-making, and depraving his majesty's laws, can only be understood in the express terms and qualifications foresaid. Like as it neither is libelled, nor can be proven, that the pannel, before he was called and required by the Lords of his majesty's privy-council to take the oath, did ever, by word or practice, use any reproachful speeches of the said act of parliament, or of his majesty's

government; but being required to take the oath, he did humbly, with all submission, declare what he apprehended to be the sense of the act of parliament, enjoining the Test, and in what sense he had freedom to take the same.

III. The act of parliament enjoining the test does not enjoin the same to be taken by all persons whatsoever, but only prescribes it as a qualification, without which persons could not assume or continue to act in public trust: which being an oath to be taken by so solemn an invocation of the name of Almighty God, it is not only allowable by the laws and customs of all nations, and the opinion of all divines, and casuists, popish or protestant, but also commended, that when a party has any scrupulosity, or unclearness in his conscience, as to the matter of the oath, that he should exhibit and declare the sense and meaning in which he is willing and able to take the oath. And it is not at all material, whether the scruples of a man's conscience, in the matter of an oath, be in themselves just or groundless, it being a certain maxim, both in law and divinity, that 'conscientia etiam erronea ligat:' and therefore though the pannel had thought fit, for the clearing and exoneration of his own conscience, in a matter of the highest concern as to his peace and repose, to have expressed and declared the express sense in which he could take the oath whether the sense was consistent with the act of parliament, or not, yet it does not in the least import any matter of reproach or reflection upon the justice or prudence of the parliament in imposing the said oath: but allenarly does evince the weakness and scrupulosity of a man's conscience, who neither did, nor ought to have taken the oath but with an explanation that would have saved his conscience to his apprehension. Otherwise he had grossly sinned before God, even though it was 'conscientia errans.' And this is allowed and prescribed by all protestant divines, as indispensibly necessary, and was never thought to import any crime, and is also commended even by popish casuists themselves, who though they allow, in some cases, of mental reservations and equivocations, yet the express declaration of the sense of the party is allowed and commended, as much more ingenuous: and 'tutius remedium conscientiæ ne illaqueetur,' as appears by Bellarmine 'de Juramento,' and upon the same title 'de Interpretatione Juramenti;' and Lessius, that famous casuist, 'de Justitia et Jure, Dubitatione 8, 9. utrum si quis salvo animo aliquid juramento promittat obligetur, et quale peccatum hoc sit.' And which is the general opinion of all casuists, and all divines, as may appear by Amesius, in his treatise 'de conscientia,' Sanderson 'de juramento, prelectione secunda.' And such an express declaration of the sense and meaning of any party when required to take an oath, for no other end but for the clearing and exoneration of his own conscience, was never in the opinion of any lawyer, or any divine, construed to be the crime of leasing-making, or of defamatory libels or depraving of public laws, or reproaching or misconstruing of the government; but on the contrary, by the universal suffrage of all protestant divines there is expressly required, in cases of a scrupulous conscience, an abhorrence and detestation of all reserved senses, and of all amphibologies and equivocations, which are in themselves unlawful and reprobate, upon that unanswerable reason, that Juramentum being the highest act of devotion and religion, 'in eo requiritur maxima simplicitas;' and that a party is obliged, who has any scruples of conscience, publicly and openly to clear and declare the same.

IV. Albeit it is not controverted, but that a legislator, imposing an oath, or any public authority, before whom the oath is taken, may, after hearing of the sense and explication which a person is willing to put upon it, either reject or accept of the same if it be conceived not to be consistent with the genuine sense of the oath: yet though it were rejected, it was never heard of, or pretended, that the offering of a sense does import a crime, but that notwithstanding thereof, 'Habetur pro recusante,' and as if he had not taken the oath, and to be liable to the certification of law, as if he had been a refuser.

V. The pannel having publicly and openly declared the sense in which he was free to take the oath, it is offered to be proved, that he was allowed, and did accordingly proceed to the taking the oath, and did thereafter take his place, and sit and vote, during that sederunt of privy-council. So as the pretended sense and explication, which he did then emit and give, can import no crime against him.

VI. It is also offered to be proved, that before the pannel was require to take the oath, or did appear before his royal highness, and lords of the privy-council, to take the same, there were a great many papers spread abroad from persons, and ministers of the orthodox clergy; and, as the pannel is informed, some thereof presented to the bishops of the church, in the name of synods and presbyteries, which did, in downright terms, charge the Test and oath with alledged contradictions and inconsistencies. And for satisfaction whereof, some of the learned and reverend bishops of the church did write a learned and satisfying answer, called, 'A Vindication of the Test, for clearing the scruples, difficulties and mistakes, that were objected against it.' And which vindication and answer was exhibited, and read before the lords of his majesty's privy-council, and allowed to be printed: and from which, the pannel argues,

VII. That it neither is, nor can be pretended in this libel, that the alledged explication, wherein he did take the oath, does propose the scruples of his conscience in these terms, which were proposed by the authors of these objections, which do flatly and positively assert, that the oath and test do contain matters of inconsistency and contradiction; whereas all that is

pretended in this libel, with the most absolute violence that can be put upon the words, is arguing implications and inferences; which neither the words are capable to bear, nor the sincerity of the earl's intention and design, nor the course of his by-past life can possibly admit of. And none of the persons who were the authors of such papers, were ever yet judged or reputed criminal or guilty, and to be prosecuted for the odious and infamous crimes libelled, of treason, leasing-making, perjury, and the like.

2. The pannel does also argue from the said matter of fact, that the alledged explication libelled can neither in his intention and design, nor in the words, infer or import any crime against him, because, before his being required, or appearing to take the oath there were spread abroad such scruples and objections, by some of the orthodox clergy and others; so that the earl can never in any sense be construed in his explication wherein he took the oath; to have done it *animo infamandi*, and to declaim against the government; for the scruples and objections, that were spread abroad by others, were a fair and rational occasion why the earl in any sense or explication which he offered might have said that he was confident the parliament never intended to impose contradictory oaths; and this is so far from importing the insinuations and inference made by the libel, that thereby the parliament were so impious as to impose contradictory oaths, as on the contrary, considering the circumstances fore-mentioned, that there were papers spread abroad insinuating, that there were inconsistencies and contradictions contained therein; the said expression was an high vindication of the honour and justice of the parliament, against the calumnies and misrepresentations which were cast upon it, and was also a just rise for the pannel, for the clearing and exoneration of his own conscience, in the various senses and apprehensions which he found were going abroad as to the said Test, humbly to offer his sense, in which he was clear and satisfied to take the oath.

VII. To the libel, in so far as it is founded upon the act of parliament, viz. Act. 130. Par. 8. James VI. declaring, that none should presume to impugn the dignity or authority of the three estates of parliament, or procure any invasion or diminution thereof, under the pain of treason; as also, in so far as it is pretended in the libel, that the pannel, by offering the sense and explication libelled, has assumed the legislative power, which is incommunicable, and has made a law, or part of a law.

It is answered, the libel is most groundless and irrelevant, and against which the act of parliament is opponed, which is so plain and evident upon the reading thereof, that it neither is nor can be subject to the least cavillation: and the plain meaning whereof is nothing else but to impugn the authority of parliaments, as if the king and parliament had not a legislative power, or were not the highest representative of the kingdom: or that any of the three estates were not essentially requisite to constitute the parliament. And besides there is nothing more certain, than that the occasion of the said act, its being made was in the relation to the bishops and clergy; and there is nothing in the pretended explanation, that can be wrested to import the least contravention of the said act, or to be an impugning of the three estates of parliament, or a seeking any innovation therein. And it is admired, with what shadow of reason it can be pretended, that the pannel has assumed a legislative power, or made a part of a law, seeing all that is contained in the alledged explication libelled, is only a declaration of the earl's sense in which he was satisfied to take the oath, and so respected none but himself, and for the clearing of his own conscience, which justly indeed the word of God calls a law to himself, without any incroaching upon the legislative power. And where was it ever debated, but that a man in the taking of an oath, if as to his apprehensions he thought any thing in it deserved to be cleared, might declare the same, or that his exhibiting, at the time of the taking of the oath, his sense and explication wherein he did take it, was ever reputed or pretended to be the assuming of a legislative power, it being the universal practice of all nations to allow this liberty; and which sense may be either rejected or accepted, as the legislator shall think fit, importing no more but a party's private sense, for the exoneration of his own conscience? and as to that member of the libel founded upon Act 19. Par. 3. Queen Mary, it contains nothing but a declaration of the pain of perjury, and there is nothing in the explication libelled, which can in the least be inferred as a contravention of the said act, in respect if it should be proved, that the pannel, at the time of the taking of the oath, did take it in the words of the said explication, as his sense of the oath, it is clear that the sense being declared at the time of taking the oath, and allowed [illegible] the sense wherein it was taken, the pannel [illegible]n only be understood to have taken it in that [illegible]nse. And although public authority [illegible]ler whether the sense given by the [illegible] satisfy the law or not, yet that can import no more, though it was found not to satisfy, but to hold the pannel as a refuser of the oath: but it is absolutely impossible to infer the crimes of perjury upon it, being, as is pretended by the libel, the pannel did only take it with the declaration of the sense and explication libelled.

VIII. As the explication libelled does not at all import all, or any of the crimes contained in the said libel, so by the common principles of all law, where a person does emit words for the clearing and exoneration of his own conscience, although there were any ambiguity, or unclearness, or involvedness in the tenor or import of the expressions or words, yet they are ever to be interpreted, 'interpretatione benigna et favorabili,' according to the general principles of law and reason. And it never was, nor can be refused to any person to interpret and put a

congruous sense upon his own words, especially the pannel being a person of eminent quality, and who hath given great demonstration, and undeniable evidences of his fixt and unalterable loyalty to his majesty's interest and service, and at the time of emitting the said explication was invested and entrusted in public capacities. And it is a just and rational interpretation and caution which Sanderson, that judicious and eminent casuist, gives, Prælect, 2. That 'dicta et facta principum, parentum, rectorum,' are ever to be looked upon as 'benignæ interpretationis,' and that, 'dubia sunt interpretenda in meliorem partem.' And there is nothing in the explication libelled, which without detorsion and violence, and in the true sense and design of the pannel, is not capable of this benign interpretation and construction, especially respect being had to the circumstances wherein it was emitted and given, after a great many objections, scruples, and alledged inconsistencies, were owned, vented, and spread abroad, which was a rise to the earl for using the expressions contained in the pretended declaration libelled.

IX. These words whereby it is pretended the pannel declares, he was ready to give obedience as far as he could, first, do not in the least import, that the parliament had imposed any oath which was in itself unlawful: but only the pannel's scrupulosity and unclearness in matter of conscience. And it is hoped it cannot be a crime, because all men cannot go the same length. And if any such thing were argued, it might be argued ten times more strongly from a simple refusing of the oath, as if any thing were enjoined which were so hard that it is not possible to comply with it: and yet such implications are most irrational and inconsequential, and neither in the case of a simple and absolute refusing of the oath, nor in the case of an explication of the party's sense wherein he is willing to take the oath, is there any impeachment of the justice and prudence of the legislator, who imposeth this oath, but singly a declaration of the scrupulosity and weakness of the party, why he cannot take the oath in other terms: and such explications have been allowed by the laws and customs of all nations, and are advised by all divines, of whatsoever principles, for the solace and security of a man's conscience.

X. As to that point of the explication libelled, That I am confident the parliament never intended to impose contradictory oaths; it respects the former answer, which, considering the plain and downright objections which were spread abroad, and made against the oath, as containing inconsistencies and contradictions, was an high vindication of the justice and prudence of the parliament.

XI. As to those words, 'And therefore I think nobody can explain it but himself.' The plain and clear meaning is nothing else but that the oath being imposed by act of parliament it was of no private interpretation: and that therefore every man who was to take it, behoved to take it in that sense which he apprehended to be the genuine sense of the parliament. And it is impossible, without impugning common sense, that any man could take it in any other sense, it being as impossible to see with another man's eyes as to see with his private reason. And a man's own private sense and apprehension of the genuine sense, was the only proper way wherein any man could rationally take the oath.

XII. And as to these words, 'That he takes it as far as it is consistent with himself and the protestant religion.' The pannel neither intended nor expressed more, but that he did take it as a true protestant, and he hopes all men have taken it as such.

XIII. And as to that clause, wherein the pannel is made to declare, 'That he does not bind up himself in his station, in a lawful way, to wish and endeavour any alteration he think to the advantage of church or state, not repugnant to the protestant religion and his loyalty.'

It is answered, there is nothing in this expression that can import the least crime, or give the least umbrage for any mistake. For,

1. It is most certain, it is impossible to elicite any such thing from the oath, but that it was the intention of the parliament, that persons, notwithstanding of the oath, might concur in their stations, and in a lawful way, in any law to the advantage of church and state. And no rational man ever did, or can take the oath in other terms, that being contrary to his allegiance and duty to his sacred majesty and prince.

2. There is nothing in the said expression which does in the least point at any alteration in the fundamentals of government, either in church or state; but, on the contrary, by the plain and clear words and meaning, rather for its perpetuity, stability, and security. The expression being cautioned to the utmost scrupulosity as that it was to be done in a lawful manner; that it was to be to the advantage of church, or state; that it was to be consistent with the protestant religion, and with his loyalty, which was no other but the duty and loyalty of all faithful subjects; and which he has signally and eminently expressed upon all occasions. So that how such an expression can be drawn to import all or any of the crimes libelled, passeth all natural understanding.

XIV. And as to the last words, 'And this I understand as a part of my oath,' which is libelled to be a treasonable invasion, and assuming of the legislative power, It is answered, it is most unwarrantable; and a party's declaring the sense and meaning in which he was free to take an oath, does not at all respect or invade the legislative power, of which the pannel never entertained a thought, but has an absolute abhorrence and detestation of such practices. But the plain and clear meaning is, that the sense and explication was a part of his oath, and not of the law imposing the oath, these being as distant as the two poles: And which sense was taken off the earl's hands, and he accordingly was allowed to take his place at

the council-board, and therefore repeats the former general defences.

XV. And to convince the lords of justiciary, that there is nothing in the pretended explication libelled which can be drawn to import any crime, even of the lowest size and degree, and that there is no expression therein contained that can be detorted and wrested to import the same, is evident from that learned Vindication, published and spread abroad by an eminent bishop,* and which was read in the face of the privy council, and does contain expressions of the same nature, and to the same import contained in the pretended explication libelled, as the ground of this indictment libelled against the pannel. And it is positively offered to be proven that these terms were given in, and read, and allowed to be printed, and, without taking notice of the whole tenor of the said Vindication, which the lords of justiciary are humbly desired to peruse, and consider, and compare the same with the explication libelled, the same acknowledgeth, that scruples had been raised and spread abroad against the oath; and also acknowledgeth, that there were expressions therein that were dark and obscure; and likewise takes notice, that the Confession ratified, Par. 1. James 6. to which the oath relates, was hastily made, and takes notice of that authority that made it, and acknowledges in plain terms, that the oath does not hinder any regular endeavour to regulate or better the established government; but only prohibits irregular endeavours and attempts to invert the substance or body of the government; and does likewise explain the act of parliament anent his majesty's supremacy, that it does not reach the alteration of the external government of the church. And the pannel and his proctors are far from insinuating in the least, that there is any thing in the said Vindication but what is consistent with the exemplary loyalty, piety, and learning of the writer of the same. And though others perhaps may differ in their private opinion, as to this interpretation of the act of parliament anent the king's supremacy, yet it were most absurd and irrational to pretend, that whether the mistake were upon the interpretation of the writer, or the sense of others, as to that point, that such mistakes or misapprehensions, upon either hand, should import or infer against them the crimes of leasing-making, or depraving his majesty's laws: For if such foundations were laid, judges and lawyers had a dangerous employment, there being nothing more ordinary than to fall into differences and mistakes, of the sense and meaning of the laws and acts of parliament. But such crimes cannot be inferred, but with and under the qualifications above-mentioned, of malicious and perverse designs, joined with licentious, wicked and reproachful speeches spread abroad, to move sedition and dislike of the government. And the said laws were never otherwise interpreted, nor extended in any case. And therefore the explication libelled, neither as taken complexly, nor in the several expressions thereof, nor in the design of the ingiver of the same, can in law import against him all or any of the crimes libelled.

In like manner the pannel conjoins with the grounds abovementioned, the proclamation issued forth by his majesty's Privy-Council, which acknowledges and proceeds upon a narrative, that scruples and jealousies were raised and spread abroad against the act of parliament enjoining the test. For clearing and satisfaction whereof, the said proclamation was issued forth, and is since approved by his sacred majesty.

The King's Advocate's Argument and Plea against the Earl of Argyle.

His majesty's advocate, for the foundation of his debate, does represent, that his majesty, to secure the government from the rebellious principles of the last age, and the unjust pretexts made use of in this, from popery, and other jealousies; as also to secure the Protestant religion, and the crown, called a parliament; and that the great security resolved on by the parliament was this excellent Test, in which, that the old juggling principles of the covenant might not be renewed, wherein they still swore to serve the king in their own way, the parliament did positively ordain, that this oath should be taken in the plain genuine meaning of the words, without any evasion whatsoever. Notwithstanding whereof, the earl of Argyle, by this paper, does invent a new way, whereby no man is at all bound to it. For how can any person be bound, if every man will only obey it as far as he can, and as far as he conceives it consistent with the Protestant religion, and with itself, and reserve to himself notwithstanding thereof, to make any alteration that he thinks consistent with his loyalty? And therefore his majesty's advocate desires to know, to what the earl of Argyle, or any man else, can be bound by this Test? What the magistrate can expect, or what way he can punish his perjury? For if he be bound no farther than he himself can obey, or so far as this oath is consistent with the Protestant religion or itself, *quomodo constat*, to whom or what is he bound? And who can determine that? Or against what alteration is the government secured, since he is judge of his own alteration? So that that oath, that was to be taken without any evasion, is evaded in every single word or letter; and the government as insecure as before the act was made, because the taker is no farther bound than he pleases. From which it cannot be denied, but his interpretation destroys not only this act, but all government, since it takes away the security of all the government, and makes every man's conscience, under which name there goes ordinarily in this age humour and interest, to be the rule of the taker's obedience. Nor can it be conceived to

* Qu. that of the bishop of Edinburgh

what purpose laws, but especially oaths, needed to be made, if this were allowed; or how this cannot fall under the 107th act. par. 7, James 6, whereby it is statuted, 'That no man interpret the statutes otherwise than the maker understood.' For what can be more contrary to the taking of them in the maker's sense, than that every man should obey as far as he can, and be allowed to take them in a general sense, so far as they are consistent with themselves, and the Protestant religion, without condescending wherein they do not agree with the Protestant religion? And that they are not bound not to make any alteration which they think good for the states? For all these make the rule of obedience in the taker, whereas the positive law makes it to be in the maker. Or how could they be punished for perjury after this oath? For when he were quarrelled for making alterations against this oath, and so to be perjured; he might easily answer, that he took this oath only so far as it was consistent with the Protestant religion, and with a salvo, that he might make any alteration that he thought consistent with his loyalty. And as to these points, upon which he were to be quarrelled he might say, he did not think them to be inconsistent with his loyalty, think we what we pleased, and so needed not be perjured, except he pleased to decide against himself. For in these generals he reserves to himself to be still judge. And this were indeed a fine security for any government. And by the same rule that it loses this oath, it shews a way of losing all oath and obedience. And consequently strikes at the root of all laws, as well as this. Whereas to shun all this, not only this excellent statute 107, has secured all the rest, but this is common reason: And in the opinion of all divines, as well as lawyers in all nations, 'Verba juramenti intelliguntur secundum mentem et intentionem ejus, cui fit juramentum.' Which is set down, as the grand position, by Saunderson, (whom they cite) page 137, and is founded upon that mother-law, 'leg. 10, cui interrogatus f. f. de interrogationibus in jure faciendis;' and without which no man can have sense of government in his head, or practise it in any nation. Whereas on the other hand there is no danger to any tender conscience, since there was no force upon the earl to take the oath, but he took it for his own advantage, and might have abstained.

1. It is inferred from the above-written matter of fact, that the earl is clearly guilty of contravention of the 10th Act, par. 10. James 6, whereby the lieges are commanded not to write any purpose of reproach of his majesty's government, or misconstrue his proceedings, whereby any misliking may be raised betwixt his highness, his nobility, or his people. And who can read this paper, without seeing the king and the parliament reproached openly in it? For who can hear, that the oath is only taken as far as it is consistent with itself and the protestant religion, but must necessarily conclude, that in several things it is inconsistent with itself, and the protestant religion? For if it were not inconsistent with itself, and the protestant religion, why this clause at all, but it might have been simply taken? For the only reason of hindering it to be taken simply, was because of the inconsistency. Ergo there behoved necessarily to be an inconsistency. And if there be any inconsistency with the protestant religion, or any contradiction in the oath itself, can there be any thing a greater reproach on the parliament, or a greater ground of mislike to the people? And whereas it is pretended, that all laws and subsumptions should be clear, and these are only inferences; It is answered, that there are some things which the law can only forbid in general: And there are many inferences which are as strong and natural, and reproach as soon, or sooner, than the plainest defamations in the world do: For what is openly said of reproach to the king, does not wound him so much as many seditious insinuations have done in this age and the last: so that whatever was the earl's design (albeit it is always conceived to be unkind to the act, against which himself debated in parliament) yet certainly the law in such cases is only to consider what effect this may have amongst the people: And therefore the acts of parliament that were to guard against the misconstruing of his majesty's government, do not only speak of what was designed, but where a disliking may be caused; and so judgeth *ab effectu:* And consequentially to the same emergent reason, it makes all things tending to the raising of dislike to be punishable by the Act 60. Parl. 6, Queen Mary; and the 9th Act Parl 20, James 6. So that the law designed to deter all men by these indefinite and comprehensive expressions: And both in this and all the laws of leasing making, the judges are to consider what falls under these general and comprehensive words; nor could the law be more special here, since the makers of reproach and slander are so various that they could not be bound up or exprest in any law: But as it evidently appears, that no man can hear the words expressed, if he believe this paper, but he must think, the parliament has made a very ridiculous oath, inconsistent with itself and the protestant religion, the words allowing no other sense, and having that natural tendency; even as if a man would say, I love such a man only in so far as he is an honest man, he behoved certainly to conclude that the man was not every way honest; so if your lordships will take measures by other parliaments, or your predecessors, ye will clearly see, that they thought less than this a defaming of the government, and misconstruing his majesty's proceedings. For in Balmarino's Case the justices find an humble supplication made to the king himself to fall under these acts now cited. Albeit, as that was a supplication, so it contained the greatest expressions of loyalty, and offers of life and fortune that could be exprest; yet because it

insinuates darkly, that the king in the preceding parliament had not favoured the protestant religion, and they were sorry he should have taken notes with his own hands of what they said, which seems to be most innocent, yet he was found guilty upon those very same acts. And the parliament 1661 found his lordship himself guilty of leasing-making, though he had only written a letter to a private friend, which requires no great care or observation (but this paper, which was to be a part of his own oath, does) because after he had spoken of the parliament in the first part of this letter, he thereafter added, that the king would know their tricks: Which words might be much more applicable to the private persons therein designed, than that the words now insisted on can be capable of any such interpretation. And if either interpretations, upon pretext of exonering of conscience, or otherwise be allowed, a man may easily defame as much as he pleases: And have we not seen the king most defamed by covenants entered into upon pretence to make him great and glorious by remonstrances made to take away his brother and best friend, upon pretence of preserving the protestant religion, and his sacred person? And did not all who rebelled against him in the last age declare, that they thought themselves bound in duty to obey him, but still as far as that could consist with their respect to the protestant religion, and the laws and liberties, which made all the rest ineffectual? And whereas it is pretended, that by these words, 'I take the same in as far 'as it is consistent with itself and the protestant 'religion,' nothing more is meant, but that he takes it as a true protestant: His majesty's advocate appeals to your lordships, and all the hearers, if upon hearing this expression they should take it in this sense, and not rather think that there is an inconsistency. For if that were possible to be the sense, what need he say at all, 'as far as it is consistent with itself?' Nor had the other part, 'as far as it is consistent 'with the protestant religion,' been necessary. For it is either consistent with the protestant religion, or otherwise they were enemies to the protestant religion, that made it. Nor are any lawyers or others in danger, by pleading or writing: For these are very different from, and may be very easily pleaded without defaming a law, and an oath, when they go to take it. But if any lawyer should say, in pleading or writing, that the Test was inconsistent, or, which is all one, that it were not to be taken by any man, but so far as it was consistent with itself and the protestant religion, no doubt this would be a crime even in pleading, though pleading has a greater allowance than deliberate swearing [illegible]. And as there is nothing wherein there is not [illegible] inconveniency, so the inconveniency of defaming the government is much greater than that of any private man's hazard, who needs not err, except [illegible].

Whereas it is pretended, that before the earl gave in this explication, there were other explications spread abroad, and answers read to them in council; and that the council itself gave an explication. It was answered, that if this paper be leasing-making, or misconstruing his majesty's proceedings, and treasonable, as is contended, then a thousand of the like offences cannot excuse it. And when the king accused noblemen, ministers, and others, in the year 1661, for going on in the rebellions of that age, first with the covenanters, and then with the usurpers, it was found no defence, that the nation was overgrown with those crimes, and that they were thought to be duties in those days, yea, this were to invite men to offend in multitudes. And albeit sometimes these who follow the examples of multitudes may thereby pretend this as an excuse to many, yet this was never a formal defence against guilt, nor was ever the chief of the offenders favourable on that head. And it is to be presumed, that the earl of Argyle would rather be followed by others, than that he would follow an example. But his majesty's advocate does absolutely decline to debate a point that may defame a constant and standing act of parliament, by leaving upon record a memory of its being opposed. Nor were this relevant, except it could be said, the counsel had allowed such explications which reflected upon the king and the government: For the writing an answer is no allowance, but a condemning: Nor can the council allow any more than they can remit: and though it may justly be denied that the council heard even the earl's own explanation, yet the hearing or allowing him to sit is no relevant plea, because they might very justly have taken a time to consider how far it was fit to accuse upon that head. And it is both just and fit for the council to take time; and by express acts of parliament the negligence of the king's officers does not bind them. For if this were allowed, leading men in the council might commit what crimes they pleased in the council, which certainly the king may quarrel many years after. And though all the council had allowed him that day, any one officer of state might have quarrelled it the next day. As to the opinion of Bellarmine, Sanderson, and others, it is ever contended, that the principles of the covenant agree very well with these of the Jesuits, and both do still allow equivocations and evasions: But no solid orthodox divine ever allowed, that a man who was to swear without any evasion, should swear so as he is bound to nothing, as it is contended the earl is not, for the reasons represented. And as they still recommend, that when men are not clear they might abstain, as the earl might have done in this case, so they still conclude, that men should tell in clear terms, what the sense is by which they are bound to the state: Whereas the earl here tells only in the general, and in most ambiguous terms, that he takes it as far as he can obey, and as far as it is consistent with the Protestant religion, and that he takes it in his own sense, and that he is not bound by it from making alterations, but as

far as he thinks it for the advantage of church or state: Which sense is a thousand [illegible] more doubtful than the Test, and as in nothing but what the taker pleases himsel[illegible]

As to the treason founded on, his advocate founds it first upon the [illegible] and common laws of this and all n[illegible] whereby it is treason for any man to make an alteration he shall think for the advantage of church or state: Which he hopes is a principle cannot be denied in the general. And whereas it is pretended, that this cannot be understood of mean alterations, and of alterations to be made in a lawful way: It is answered, that as the thing itself is treason, so this treason is not taken off by any of these qualifications; because he declares, he will wish and endeavour any alteration he thinks fit: And any alteration comprehends all alterations that he thinks fit: 'nam propositio indefinita æquipollet universali.' And the word 'any' is general in its own nature, and is in plain terms a reserving to himself to make alterations, both great and small. And the restriction is not, all alterations that the king shall think fit, or are consistent with the laws and acts of parliament but he is still to be judge of this, and his loyalty is to be the standard Nor did the covenanters in the last age, nor do these who are daily executed, decline that they are bound to obey the king simply, but only that they are bound to obey him no otherwise than as far as his commands are consistent with the law of God, of nature, and of this kingdom, and with the covenant And their treason lies in this And when it is asked them, who shall be judge in this, they still make themselves judges And the reason of all treason being, that the government is not secure, it is desired to be known, what way the government can be secured after this paper, since the earl is still judge how far he is obliged, and what is his loyalty. And if this had been sufficient, the covenant had been a very excellent paper For they are there bound to endeavour, in their several stations, to defend the king's person: But when the king challenged them, how they came to make war against him? their great refuge was, that they were themselves still judges as to that. And for illustrating this power, the Lords of justiciary are desired to consider, *quid Juris*, if the earl, or any man else should have reserved to himself in this oath a liberty to rise in arms, or to oppose the lineal succession, though he had added in a lawful manner: For the thing being in itself unlawful, this is but sham, and 'Protestatio contraria facto' And if these be unlawful, notwithstanding of such additions, so much more must this general reservation, of making any alterations, likewise be unlawful, notwithstanding of these additions: For he that reserves the general power of making any alteration, does, *a fortiori*, reserve power to make any alteration, though never so fundamental. For all particulars are included in the general: and whatever may be said against the particulars, may much more strongly be said against the general.

The 130th act, par. 8. James 6 is expressly founded on, because nothing can be a greater diminution of the power of the parliament, than to introduce a way or mean whereby all their acts and oaths shall be made insignificant and ineffectual, as this paper does make them, for the reasons represented Nor are any of the estates of parliament secure at this rate, but that they who reserved a general power to make all alterations, may, under that general, come to alter any of them.

What can be a greater impugning of the dignity and authority of parliaments, than to say, that the parliament has made acts for the security of the kingdom, which are in themselves ridiculous, inconsistent with themselves and the protestant religion?

And as to what is answered against invading the king's prerogative, and the legislative power in parliaments, in adding part to an oath or act, is not relevantly inferred, since the sense of these words, 'and this I understand as a 'part of my oath,' is not to be understood as if any thing were to be added to the law, but only to the oath, and to be an interpretation of the oath. It is replied, that after this no man needs to add a caution to the oath in parliament. But when he comes to take the oath, do the parliament what they please, he will add his own part. Nor can this part be looked upon as a sense: for if this were the sense before this paper, he needed not understand it as a part of it, for it wanted not that part And in general, as every man may add his own part, so the king can be secure of no part. But your lordships of justiciary are desired to consider, how dangerous it would be in this kingdom, and how ill it would sound in any other kingdom, that men should be allowed to reserve to themselves liberty to make any alteration they thought fit in church or state, as to the legality of which they were themselves to be judges: and how far, from degree to degree, this at last may come to absolute anarchy, and how scandalous a thing as well as unsecure, this new way may look in an age wherein we are too much tracing the steps of our rebellious progenitors in the last, whose great defection and error was, that they thought themselves, and not the king, the authors of reformation in church and state. And no man ever was barred by that, that the way he was upon was not a lawful way: for if it be allowed to every man to take his own way, every man will think his own way to be the lawful way.

As to the perjury, it is founded on this, first, That perjury may be committed, not only [illegible] king an oath, but even in [illegible] [illegible]h evasions as make the oath ineffectual: for which Sanderson is cited, pag. 138. 'Aliquod perjurii genus est 'novo aliquo excogitato commento juramenti 'vim declinare aut eludere, et jurans tenetur 'sub pœna perjurii implere secundum intentionem deferentis;' both which are here

For the earl being bound by the very oath, to swear in the genuine meaning, without any evasion, he has sworn so as he has evaded every word, there being not one word to which it can be said particularly he is bound, as is said. And it is undeniable, that he has not sworn in the sense of the makers of the law, but in his own sense, which is perjury, as is said. And consequentially, whatever sense may be allowed in ambiguous cases, yet there can be none where the paper clearly bears generals: and where he declares, that he takes it in his own sense, his majesty's advocate declares, he will not burden himself, that copies were disperst, though it is certain, since the very paper itself by the giving in is chargeable with all that is above charged upon it.

Sir John Dalrymple's DEFENCE and PLEA for the Earl of Argyle, by way of Reply upon the King's Advocate.

Sir John Dalrymple replies for the pannel, That since the solid grounds of law adduced in the defences have received no particular answers, in relation to the common consent of all casuists, viz. That a party who takes an oath is bound in conscience to clear and propose the terms and sense in which he does understand the oath: nor in relation to the several grounds adduced concerning the legal and rational interpretation of dubious clauses. And since these have received no answers, the grounds are not to be repeated: but the proctors for the pannel do farther insist on these defences.

It is not alledged, that any explanation was given in by the pannel to any person, or any copy spread, before the pannel did take the Test in council: so that it cannot be pretended, that the many scruples that have been moved concerning the test, did arise from the pannel's explication: but on the contrary, all the objections that are answered, and obviated in the pannel's explication, were not only privately muttered, or were the thoughts of single or illiterate persons but they were the difficulties proposed by synods and presbyteries, long before the pannel came from home, or was required to take the test. so that the general terms of the acts of parliament founded upon in the libel are not applicable to this case: for as these laws, in relation to leasing-makers, are only relative to atrocious wilful insinuations, or misconstructions, of his majesty's person or government, or the open depraving of his laws, so the restrictive clause, whereby sedition or misconstructions may be moved, raised, or engendered betwixt his majesty and his leiges, cannot be applied to this case, where all these apprehensions and scruples were [illegible] and agitated long before the pannel's explanation.

As it cannot be pretended, that any new dust was raised by the pannel's explanation, so it is positively offered to be proved, that there is not one word contained in this explanation, but that either these individual words, or much worse, had been publicly proposed and verbatim read in council, without the least discouragement, or the least objection made by any member of the council. And where a writing, *ex proposito* read in so high a court, was universally agreed upon, without the alteration of a syllable, how can it be pretended, that any person thereafter using the said individual terms in any explanation, and far easier terms, that they shall incur the high and infamous crimes libelled? and the question is not here, whether the council was a proper judicature to have proposed, or imposed a sense, or allowed any explanation of the Test to be published; but that is impossible that a sense they allowed, or being publicly read before them, and which the king's advocate did not controul, that this should import treason, or any crime: and though the pannel's advocate will not pursue or follow the reply that has been made to this point, yet certainly no man of sober sense will think that it is fit to insinuate, that so high a judicature might have authorised or acquiesced in such explanations as the leiges thereafter should be entrapped to have used.

If the pannel had officiously or ultroneously offered a sense or explanation of his majesty's laws, which the laws themselves could not have borne, it might justly have been alledged, that he was extra ordinem, and meddling in a matter he was not concerned in, but where the act of council did enjoin, and he was required and cited to that effect, it could neither be constructed as ostentation, or to move or encourage scruples, or resistance, but it was absolutely necessary, either for to have refused the test, or else to have declared what he thought to be the true and genuine meaning of it. And there being so many objections publicly moved and known, his explanation was nothing else but to clear, that he did not look upon these scruples and objections, moved by others, as well founded and rational in themselves; and therefore he was able to take the Test in that sense the council had heard or allowed. And it is not controverted, that the sense of the legislator is the genuine sense both of laws and oaths: and if a person were only interpreting the meaning of either a law or an oath imposed, he should deprave or misconstruct the law and oath, if he rendered it wittingly and willingly in terms inconsistent with the meaning of the imposer: but there is a great difference betwixt taking of oaths, and interpreting oaths; for when a man comes to take an oath, except his particular sense did agree with the genuine meaning of the imposer, he cannot take that oath, though he may very well interpret and declare what is the sense of the legislator, which he may know, and yet perhaps not be able to take the oath.

And therefore when there is any doubtfulness in an oath, and a party is bound to take it, if then he gives in an explication of the sense which he in his private judgment doth apprehend to be the genuine meaning, if that private sense be disconform to the legislator's sense in the oath, then the imposer of

the oath, or he that has power to offer it to the party, if he consider the party's sense disconform, he ought to reject the oath, as not fulfilling the intent of the law imposing it.

But it is impossible to state that as a crime, that a party should neither believe what is proposed in the oath, nor be able to take it; and he can run no farther hazard, but the penalty imposed upon the refuser. And therefore in all oaths there must be a concourse both of the sense imposed by authority, and of the private sense, judgment, or conscience of the party. And therefore if a party should take an oath in the sense proposed by authority contrary to his own sense, he were perjured: hereby it is evident that the sense of authority is not sufficient, without the acquiescence and consent of the private person. And therefore it is very strange why that part of the pannel's explanation should be challenged, that he takes it in his own sense, the posterior words making it as plain as the light, that that sense of his own is not what he pleases to make of the oath, for it bears expressly, that no body can explain it but for himself, and reconcile it as it is genuine, and agrees in it's own sense: so that there must be a reconciliation betwixt his own sense and the genuine sense, which upon all hands is acknowledged to be the sense of authority. And if the pannel had been of these lax and debauched principles, that he might have evaded the meaning and energy of the oath, by imposing upon it what sense he pleased, certainly he would have contented himself in the general refuse of equivocation, or mental reservation, and he would never have exposed his sense to the world, in which he took this oath, whereby he became absolutely fixed and determined to the oath, in that particular sense, and so had no latitude of shuffling off the energy or obligation of the oath: and it is likewise acknowledged, that the cases alledgd in the reply are true, viz. that the person is guilty of perjury, 'si aliquo novo commento' he would elude his oath, or who doth not fulfil the oath in the sense of the imposer. But that does not concern this case: for in the foresaid citation, a person, after he has taken an oath, finding out some new conceit to elude it, he is perjured: but in this case, the pannel did at and before his taking the Test, declare the terms, in which he understood it; so that this was not 'novo aliquo commento' to elude it. And the other case, where a party takes it in the sense of authority, but has some subterfuge, or concealed explanation, it is acknowledged to be perjury. But in this case there was no concealed explanation; but it was publicly expressed, and an explanation given, which the pannel designed, and understood as the meaning of authority, and had ground to believe he was not mistaken since upon that explanation he was received and allowed to sit and vote in council.

And as to that part of the reply, that explains the treason there can be no treason in the pannel's case, because the express act of parliament founded upon, doth relate only to the constitution of the parliament: and I am sure his majesty's advocate cannot subsume in these terms: and therefore in the reply he recurs to the general grounds of the law, that the usurping of his majesty's authority, in making a part of the law, and to make alterations in general, and without the king, are high and treasonable words or designs, and such as the party pleases, and such designs as have been practised in the late times. And that even the adjection of fair and safe words, as in the covenant, does not secure from treasonable designs; and that it was so found in Balmerino's case, though it bear a fair narrative, of an humble supplication.

It is replied, that the usurpation of making of laws is undoubtedly treasonable, but no such thing can be pretended or subsumed in this case: for albeit the pannel declares his explanation to be a part of his oath, yet he never meaned to impose it as a part of the law, or that this explanation should be a thing distinct, or a separate part even of his oath, for his explanation being exegetic of the several parts of the oath, it is no distinct thing from the oath, but declared to be a part of the oath *de natura rei*. And it was never pretended, that he that alledged any thing to be *de natura rei*, did say, that that was distinct and separate, which were a contradiction. And therefore the argument is retorted, the pannel having declared, this explanation was, *de natura rei*, implied in the oath, he necessarily made this explanation no addition or extention of the oath. So that for all this explanation, the oath is neither broader nor longer than it was.

And as to these words, 'I do not mean to 'bind up myself in my station, and in a lawful 'way to wish and endeavour any alteration I 'think to the advantage of church or state, 'not repugnant to the Protestant Religion, 'and my loyalty.' It is a strange thing how this clause can be drawn in question, as treasonable, when it may with better reason be alledged, that there is no good subject but is bound to say it. And albeit the words to 'endeavour in my station;' be words contained in the covenant, yet that is no reason why two words in the covenant may not be made use of in another very good and loyal sense. And there is no man that shall have the honour either to be entrusted by his majesty in his council, or any other judicature, or to be a member of parliament, but he is bound by his loyalty to say the same thing. And there was never a clause more cautiously exprest; for the words run, 'to endeavour any alteration I shall think 'to the advantage of church and state.' And though that was sufficient, yet the clause is so cautiously conceived, that it contains another restriction, 'not repugnant to religion and his 'loyalty.' So that except it could be alledged, that a man by lawful means, to the advantage of church and state, consistent with his religion and loyalty, could make treasonable alterations and invasions upon the government and mo-

narchy, which are the highest contradictions imaginable, there can be nothing against the pannel. And albeit the clause, 'any alterations,' might, without the restrictions and qualifications foresaid, be generally extended, yet the preceding words of 'lawful way,' and the rational interpretation of the emission of words, especially before a solemn judicatory, leaves no place or shadow to doubt, that these alterations were no fundamental or treasonable alterations, but such as the frailty of human affairs and constitutions, and vicissitude of things and circumstances, do constantly require in the most exact constitutions under Heaven. And the clause does not so much as import, that there is a present necessity of alteration, but it was a necessary and rational prospect, that albeit at present all things under Heaven had been done to secure the religion and government, yet there might occur cases that would require new helps, alterations, and remedies. And it is not pretended in this case for the pannel, that he desires to alleviate, or take off words truly treasonable, or having an ill design, by the mixing of fair and safe, dutiful and submissive expressions, which indeed are protestations *contraria facto.* For there is nothing in his explanation, that either in his design, or in the words themselves, being rationally and naturally interpreted, can infer the crimes libelled, or any of them. And the pannel's known principles and known practices, do not only clear that loyalty that he has profest before the lords of justiciary, and instructed by unquestionable documents, but they put him far from the suspicion of these damnable principles related in the reply, of which the whole tract of his life hath been an entire evidence of his abhorrency and detestation. And in the last place, it is thought strange, why that should be represented as an affront or disgrace to the government, that the parliament imposed a Test which the pannel is not able to take simply. And it is not pretended, that he hath defamed, written or spoken against the Test itself, or for the inconvenience of it; but only that he hath not been able to see the good ground upon which it may be simply taken. And this were to condemn him for want of sight or sense, when the law hath punished no man for not taking the Test, but only turned him out of the government. And it is as strange an inference, that because the pannel declares, he believes the parliament meaned no contradiction, and would take the Test, in as far as it is consistent, that therefore he said, the parliament imposed contradictions: which is so far from a rational induction, that the contradiction of these subsumptions, in all congruity of language and sense, is necessarily true. And therefore the last part of that clause, 'in so far as it is consistent,' is a consequence inferred upon the former, viz. I believe the parliament designed to impose no contradictions: Ergo, I take the Test as consistent, and in so far as it must be consistent, if the parliament did not impose contradictions, as certainly they have not; and to convince the world, that in this sense this explanation is receivable, it was proposed in council, and allowed, and therefore without the highest reflection it cannot now be quarrelled.

Sir George Lockhart's SECOND PLEA for the Earl of Argyle, by way of Reply upon the King's Advocate.

Sir George Lockhart duplies, that the defender repeats and oppones his former defences, which are no ways eluded, nor satisfied by the reply made by his majesty's advocate. And although it be easy for the king's advocate, out of his zeal, to pretend and argue crimes of the highest nature upon inferences and consequences, neither consistent with the pannel's design, nor with his words and expressions; yet there cannot be a more dangerous foundation laid, for the security and interest of the government, and the security and protection of the subjects, than that crimes should be inferred but from clear, evident, and express laws, and plain, palpable contravention of these laws: it being both against the laws of God and man, that a man should be made an offender for a word, and especially for expressions which, according to sense and reason, and considering the time and place where they were spoken by the pannel, viz. as a member of his majesty's privy-council, and in presence of his royal highness and the members of council, and when required to take the Test, were safe and innocent: and it were against all law and reason, to suppose that the pannel either did, or designed to do any thing which may, or did import the crimes libelled against him. And whereas it is pretended, that the oath required and imposed by act of parliament was for the security of the government; and that the pannel, by his explication, does evade the oath, by taking it only so far as it is consistent with the Protestant Religion, and his own loyalty, whereof he was judge. It is answered, that the pretence is most unwarrantable, and the security of his majesty's government is not at all endangered (as God forbid it should) though the pannel, and a thousand more, had simply refused the Test, or had taken it in a sense which does not satisfy the law; it being competent to public authority to consider, whether the pannel's oath, in the terms of the explication wherein he did take it, does satisfy the act of parliament or not; and if not, there can be no rational consequence inferred thereupon, but that he is holden as a refuser of the oath, and liable to the certification of the act of parliament, of not assuming and continuing in any public trust: and no more was intended or designed by the act of parliament itself, than strictly to make the oath in the true and genuine sense and meaning of the parliament, an indispensable qualification of persons admitted to public trust: so that it is not at all material to dispute, whether the pannel's explication can be looked upon as a full satisfaction of the act, which whether it

should or not, it can import no crime against him, it not being consistent with sense and reason, that a person who absolutely refuseth the Test, upon the scrupulosity of his conscience, albeit he be not capable of public trust, should be, notwithstanding, looked upon as guilty of no crime: and yet another who was willing to go a greater length, albeit he did demur and scruple as to the full length, that he should be reputed criminal and guilty of a crime.

II. The pannel repeats, and conjoins with this the grounds above-mentioned, contained in his defences, viz. That neither the crimes libelled, nor any other crime were ever pretended or made use of against any others, who did spread abroad objections of an high nature, which yet were so favourably looked upon, as to be construed only to proceed from scrupulosity of conscience, as also the satisfaction endeavoured, is in such terms, and by such condescensions, as do take in and justify the whole terms of the explication libelled.

It is of great moment, and whereof the lords of justiciary are desired to take special notice, both for clearing the absolute innocence of the pannel's meaning and intention, and to take off all possible misconstruction that can be wrested or detorted from the tenor and expressions of the libelled explication, that the pannel was put to, and required to take the oath, before the lords of his majesty's privy-council did pass and publish their proclamation explaining the oath, and declaring the genuine sense and meaning thereof, namely, that it did not tie to the whole articles of the Confession of Faith, ratified by act of parliament, James 6, and which, as to several articles thereof, had occasioned the scruples and difficulties, and alledged inconsistency and contradiction betwixt the last part of the oath and the said confession, and betwixt some of these articles, and the current of the Protestant doctrine, received and contained in the syntagmœ of the Protestant confessions. And therefore if the pannel at that time did think fit, for the clearing and exoneration of his own conscience, to use the expressions in the explication libelled, and yet with so much duty and confidence of the parliament's justice, as to their meaning and intention, 'that the parliament never intended to impose contradictory oaths;' and that he 'did take 'it so far as it was consistent with itself, and the 'Protestant religion,' not knowing then, whether the whole confession was to be reputed a part of the oath, and doubting thereanent; and which the lords of his majesty's privy-council and his sacred majesty by his approbation since, have thought a difficulty of so great moment, as it was fit to clear the same by a public proclamation; how now is it possible, that any judicatory under Heaven, which proceeds upon the solid grounds of law and reason, and who (it cannot be doubted) will have a just regard to the intrinsic principles of justice, and to all men's security, that they can now believe all, or any of the crimes libelled, should be in the least inferred from all, or any of the expressions contained in the said explication? But that on the contrary it was a warrantable allowance, and Christian practice, condemned by the law and custom of no nation, that having scruples in the matter of an oath which should be taken in truth, judgment, and righteousness, and upon full deliberation, and with a full assurance and sincerity of mind, that he did plainly, openly, and clearly declare the sense in which he was willing to take it; and if authority did allow it as the genuine sense of the oath, the pannel to be holden as a taker of the oath: And if upon farther consideration, authority think not, that habetur pro recusante, and a refuser of the oath, but no ways to be looked upon as a criminal or guilty person.

And the pannel repeats and conjoins with this point of reply, that point in his defence whereby he positively offers to prove, 1. That his explication, and the sense wherein he took the oath, was heard, and publicly given and received in council, and the pannel thereafter allowed to take his place, and sit and vote in that Sederunt.

The pannel also offers positively to prove, That the tenor and terms of his sense and explication wherein he did take the oath, is contained in that solid, learned, and pious Vindication, written by the bishop of Edinburgh, in answer to the objections and alledged inconsistencies and contradictions in the oath, and which Vindication was publicly read in council, and so far approved, that it was allowed to be printed and published, and was accordingly dispersed and spread abroad. And it is not of the least import, that the proclamation of the lords of privy-council, although he does only allow the same to be taken by the clergy, yet at the same time they expressly declare the genuine sense and meaning of the parliament not to comprehend the whole articles of the Confession, which was not cleared before the pannel's taking his oath.

And whereas it is pretended, That the acts of parliament libelled upon, against leasing-makers, depravers of his majesty's laws, do obtain and take place, where-ever there are any words or expressions that have a tendency in themselves, or by a natural consequence, and rational inferences, to reflect upon the government, or misconstrue his majesty's proceedings; and that the explication libelled is such, and that it was found so in the case of Balmerino, albeit it was drawn up by way of humble petition and address to his majesty, and with great protestations and expressions of loyalty. It is answered, the acts of parliament libelled upon are opponed, and the 130 act, par. 8 James 6, and the other acts making the depraving of his majesty's laws, to be crimes, do expressly require, that speeches so judged be perverse and licentious speeches, *ex natura sua probrosa* and reproachful, and spoke *animo defamandi*, and which could not receive any other rational construction, which cannot

in the least be applied to, or subsumed upon the words, or explication given in by the pannel. And law and reason never infers nor presumes a crime, where the thing is capable of a fair and rational construction, and where it was done palam and publicly, and in presence of his majesty's high commissioner, and lords of his majesty's privy-counsel, whereof the pannel had the honour to be a member, persons committing and designing to commit crimes making use of times and places, and companies of another nature, on whom their suggestions and insinuations may prevail. But it is a violence to the common reason of mankind, to pretend, that a person of the pannel's quality, having the honour to serve his majesty in the most eminent capacities, and devoted to his majesty's interest and service, beyond the strictest ties of duty and allegiance, by the transcendant favours he had received, that the pannel in those circumstances, and in presence of his royal highness and lords of privy-council, should design to declaim, and *de facto*, declaim against and defame his majesty's government: To suppose this is absolutely contradictory to the common principles and practices of law, and common topics of reason.

And as to Balmerino's case, it is answered, that the lords of justiciary are humbly desired to call for and peruse the said petition and books of adjournal, which was certainly a defamatory libel of his majesty's father of blessed memory, and of the states of parliament in the highest degree, bearing expressly, that there was nothing designed but an innovation of the Protestant religion, and the subversion and overturning the liberties and privileges of the parliament, and the constitutions of the articles, and other things of that kind, which made certainly of itself a most villainous and execrable libel, containing the highest crimes of Treason and Perduellion, and was not capable of any good sense or interpretation, but was absolutely pernicious and destructive: So that it is in vain to pretend, that the said libel did contain prefaces and protestations of loyalty, which no law regards, even *in simplici injuria et maledicto*, though committed by a private person, *cum præfatione salvo honore*, or the like, and which were certainly ridiculous to sustain in a libel concerning crimes of treason.

And whereas it is pretended, that though others were guilty of these crimes, it does not concern the earl: and that the lords of privy council cannot remit crimes; and the negligence of the king's officers cannot prejudge his interest. It is answered, The pannel is very confident, that neither the lords of his majesty's privy council, consisting of persons of eminent [illegible] and judgment, nor his majesty's officers, [illegible] capable of any such escape as is [illegible] and if the tenor of the pannel's explication [illegible] in the least import the high and [illegible] crimes libelled, as beyond all peradventure it does not, it were strange, how the same being contained in the foresaid Vindication, and the whole clauses thereof justified, that this should have been looked on as no crime, and allowed to be published. And the pannel neither does, nor needs to make farther use thereof, but to convince all disinterested persons, that his explication can import no crime.

And whereas it is pretended, that the crime of treason is inferred from the fundamental laws of the kingdom, and from that clause of the pannel's explication, whereby he declares, he is not bound up by any thing in this oath not to endeavour any alteration in a lawful way: which being an indefinite proposition, is equipollent to an universal, and is upon the matter coincident with a clause which was rebellious in its consequences, contained in the Solemn League and Covenant. It is answered, that it is strange, how such a plain and innocent clause, whereby, beyond all question, he does express no more than was naturally imported in the oath itself, whether exprest or not, should be made a foundation to import the crime of treason, which no lawyer ever allowed, except where it was founded upon express law *et luce meridiana clarior*; and indeed if such stretches and inferences can make men guilty of treason, no man can be secure. And the words in the pannel's declaration are plain and clear (yet *non sunt cavillanda*) and import no more, but that, in his station, and in a lawful way, and consistent with the Protestant religion and his loyalty, he might endeavour any alteration to the advantage of church and state. And was there ever any loyal or rational subject, that does, or can doubt, that this is the natural import of the oath? And indeed it were a strange oath, if it were capable of another sense, and being designed for the security of the government, should bind up men's hands to concur for its advantage. And how was it possible, that the pannel, or any other in the capacity of a privy counsellor, or a member of the parliament, would have satisfied his duty and allegiance in other terms? And whereas it is pretended, that there was the like case in the pretended League and Covenant, it is answered, the assertion is evidently a mistake; and though it were, the argument is altogether inconsequential: for that League and Covenant was treasonable in itself, as being a combination entered into without his majesty's authority, and was treasonable in the glosses that were put upon it, and was imposed by absolute violence on the subjects of this kingdom, and how can the pannel be in the least supposed to have had any respect to the said League and Covenant, when he had so often taken the declaration, disowning and renouncing it, as an unlawful and sinful oath, and concurred in the many excellent laws and acts of parliament made by his majesty, condemning the same as seditious and treasonable? And whereas it is pretended, that the pannel is guilty of perjury, having taken the oath in another sense than was consistent with the genuine sense of the parliament, and that by the authority cited, he doth *commento eludere juramentum*, which ought

always to be taken in the sense of him that imposeth the oath: It is answered, the pretence is most groundless, and perjury never was nor can be inferred, but by the commission, or omission of something directly contrary to the oath. And although it is true, that when an oath is taken, without any declaration of the express sense of the persons who take it, it obliges *sub pœna perjurii*, in the sense, not of the taker, but of the imposer of the oath, because expressing no sense, law and reason presumes there is a full acquiescence in the sense and meaning of the imposer of the oath: and then if an oath be not so taken, he that takes it is guilty of perjury. Yet there was never lawyer nor divine, Popish or Protestant, but agree in this, that whatever be the tenor of the oath, if before the taking thereof, the party in express terms does publicly and openly declare the sense in which he takes it, it is impossible it can infer the crime of perjury against him in any other sense, this not being *commentum excogitatum*, after the taking of the oath. And if this were not so, how is it possible, in sense and reason, that ever any explication or sense could solve the scruples of a man's conscience? For it might be always pretended, that notwithstanding of the express sense wherein he took it, he should be guilty of perjury from another sense. And that this is the irrefragable opinion of all divines, of whatever persuasion, is not only clear from the authority above-mentioned, even those who allow of reserved senses, but more especially by the universal suffrage of all Protestant divines, who though they do abominate all thoughts of subterfuges or evasions, after taking of the oath, yet they do always allow and advise, for the safety and security of a doubting and scrupulous conscience, that they should express and declare, before the taking of the oath, the true sense and meaning wherein they have freedom to take it; and for which Sanderson de Juramento is cited. Prælect. 6, sect. 10, page 75, where his words are, 'sane ut inte jurandum omnia 'recte fiant, expedit ut de verborum sensu inter 'omnes partes quarum interest liquido constet, 'quod veteribus dictum, liquido jurare.' And an oath being one of the highest acts of devotion, containing *cultum latriæ*, there is nothing more consonant to the nature of all oaths, and to that candour, ingenuity, and christian simplicity, which all law and religion requires in such cases.

The King's Advocate's THIRD PLEA against the Earl of Argyle.

His majesty's advocate conceives he has nothing to answer, as to depraving, leasing making, and misinterpreting, &c. save that this oath was only designed to exclude recusants: and consequently the pannel may thereby be debarred from his offices, but not made guilty of a crime. To which he triplies; If ever the earl had simply refused, that had been true; but that did not all excuse from defaming the law, for a defamer is not punished for refusing, but for defaming.

If he had simply refused, the government had been in no more hazard; but if men will both retain their places, and yet take the same in such words as secure not the government, it were strange to think, that the design of the law being to secure against men's possessing who will not obey, that yet it should allow them possession who do not obey. Nor is the refuser here in a better case than the earl, and others, who offered to obey, because it is the defaming the law, as ridiculous and inconsistent with that Protestant religion, and leasing-making betwixt the king, the nobility, and the people, the misconstruing, and misrepresenting, as hath been formerly urged, that puts the earl in a worse condition. And all those arguments might as well be urged for any who had uncontrovertedly contravened these acts, as for the pannel.

Whereas it is pretended, that the king emitted a proclamation to satisfy dissenters; it is answered, that the proclamation was designed for none who had been members of parliament, and so should have known the sense; but it was designed for mere ignorants, not for such as had defamed the law, which is still here charged upon the pannel.

As to the article of treason, it is conceived, that it is unanswerably founded upon the common-law, discharging all men to make alteration of the government. As to which there needs no express statute, that being the very essence of government, and needing no laws. Like as it falls positively under all the laws that discharge the assuming the royal or legislative power: for to alter the government is inseparably united to the crown. Like as the subsumption is as clear, the express words not bearing, that the earl reserves to himself a power to propose to his majesty any alterations, or to concur to serve his majesty in making alterations, but owning in most general and arbitrary terms, to wish and endeavour any alteration he should think fit for the advantage of church or state, and not determining any thing that could bind him otherwise than according to his own pleasure: For the word [lawful] is still subjected to himself, and as subjoined to it, 'as he should think fit,' which governs the whose proposition; and in that sense, and as the words are here set down, the greatest rebel in Scotland will subscribe that explanation: For there is no man but will restrict himself to a lawful obedience, providing he be judge of the lawfulness. And seeing all oaths proposed for the security of government requires a certain depending upon the legislature, and not upon the taker, it is impossible that that end could be attained by any qualification, how special soever, which is made to depend absolutely upon the taker, and not upon the legislator. And we have often seen how little security there is in those specious words, the very covenant itself having not only the very words above-repeated, but attesting all the world to be witnesses to their loyalty and sincerity. And as to the former

instances, viz. rising in arms, or opposing the lawful successor, there is no covenanter in Scotland, but will say, he will do neither, but in a lawful way, and in his station, and in a way consistent with his loyalty, for a man were mad to say otherwise: But yet when they come to explain this, they will only do it as they think fit, and will be judges themselves; and then will tell us, that defensive arms are lawful, and that no popish successor should succeed, nor no successor, unless he subscribe the covenant. And whereas it is pretended, that no clause in the test does exclude a man from making alterations; it is answered, that the alterations which the Test allows are none at all but in subordination to authority. And as to the two points above-mentioned, it excludes all alterations as to these points. And as to the making fundamental alterations, this reservation allows to make any alteration, and consequently fundamental alterations; to preclude which libertinism, this excellent law was invented.

Whereas it is pretended, that the pannel designs not to add any thing as a part of the law, but as a part of his oath, it is duplied, since the oath is a part of the law, whoever adds to the oath, adds to the law.

Whereas it is pretended, that the crime of perjury cannot be inferred here, because all divines allow, that the taker of an oath is still allowed to declare in what sense he takes the oath; and that this is clear from Sanderson, page 175. It is triplied, that where there are two dubious senses, lawyers and divines allow, that the taker should clear himself, which of the two he take; which is very just, because to which soever of the two he determines himself, the legislator in that case is sure of him: But here it is not pretended, that there are two senses; nor does the pannel declare in which of the two he takes it, or in what clear sense at all he takes it, which is indeed *liquido Jurare.* But here the pannel neither condescends, what particular clause of the Test is unclear; nor after he has condescended upon the articles, does he condescend upon the sense, but in general mysterious words, where he can neither be followed nor found out, he only takes it in so far as it is consistent with itself and the protestant religion, reserving the squaring all by his own loyalty, as he did in the beginning declare, that he took in his own sense; by which general sense, neither is the government secure of any thing it does enjoin, nor could he be punished if he transgressed. Nor can it be doubted, but perjury may be inferred by any equivocal or evading sense, 'inter jurandum,' as well as by breaking an oath afterwards: Which is very clear from Sanderson, page 138. The words whereof are, 'alterum perjurii genus est inter jurandum detorquere verba;' and which is farther clear by the 28th page; but above all, from the principles of reason, and the necessity of commerce and government: For, if men may adhibit such glosses, even whilst they swear, as may make the oath useless, what way will either government or commerce be maintained? And he deceives as much that deceives in swearing *salvis verbis*, as he who after he has sworn does break the oath, nay and more too, because the breaking may come from forgetfulness, or other accidents: But the evading by general clauses, which bind no man, does from the first instance originally make all oaths useless and dangerous, and that this interpretation eludes the oath absolutely is very clear from what hath been formerly debated. For it may be argued, that the earl broke the oath in so far as the first day he swears the oath, which bears to be without any evasion (and must be so, notwithstanding of whatever he could say:) and the next day he gives in this evasion, which is a downright violation of that oath and inconsistent with it. Nor was this oath forced, but voluntarily emitted to keep his own places. And it was the greater crime that it was done in the council, because that was to make it the more public, and consequently the more to misrepresent the government.

After this debate, which, according to the custom of the court, was verbatim dictate by the advocates of either side, and written by the clerk, and so took up much time, and the court having sat at least twelve hours without intermission, it adjourned till the next day, being Tuesday the 13th of December at two of the clock in the afternoon: And then the Earl being again brought to the bar, the following Interloquutour (that is the judgment and sentence) of the lords of justiciary, on the foregoing debate, was read, and pronounced in open court.

EDINBURGH, *December* 12, 1681.

The Interloquutour of the Lords of Justiciary.

The lords, justice-general, and commissioners of the justiciary, having considered the libel and debate, they sustain the defence proponed for the earl of Argyle, the pannel, in relation to the perjury libelled, viz. 'That he 'emitted this explanation at, or before his 'taking the Test, first before his royal highness, 'his majesty's high commissioner, and the lords 'of his majesty's privy-council,' relevant, to elude that article of the libel.

The lords sustain the libel, as being founded upon the common-law, and explication libelled, and upon Act 130 Parl 8. James 6, to infer the pain of Treason,

They likewise sustain the libel, as founded upon the 10th Act, Parl. 10 James 6, to infer the pain of death, and likewise sustain that part of the libel anent Leasing-making, and Leasing-telling, to infer the particular pains mentioned in the several acts libelled.

And repel the whole other defences, duplies, and quadruplies, and remit the libel, with the defences anent the perjury, to the knowledge of an assize.

Thereafter the assize, that is the jury, being constitute and sworn, viz.

List of the Assizers.—Marquis Montrose

E. of Middletoun, E. of Airlie, E. of Perth, P. C. E. of Dulhousie, E. Roxburgh, P. C., E. Dumfries, E. Linlithgow, P. C. lord of Lindoors, lord Sinclare, lord Bruntisland, laird of Gosford, laird of Claverhouse, laird of Balnamoon, laird of Park Gordon.

His majesty's advocate adduced four witnesses to prove the points of the Indictment, remitted to the knowledge of the assize, viz. John Drummond of Lundie, then governor of the castle of Edinburgh, now treasurer-depute, sir William Patterson, and Mr. Patrick Menzies, clerks of the privy council, and H. Stevenson, their under clerk: who deponed, That on the 4th of November, the Earl did give in an unsubscribed explanation of the Test, which he refused to sign; one of the witnesses adding, that he heard him make the same explanation the day before in council, and that it was there accepted.

Then his majesty's advocate asked, if the earl would make use of his exculpation for eliding the perjury libelled, to wit, that he had emitted the same explanation before taking the Test, in presence of his royal highness and the council. To which the earl answered, that, seeing they had sustained the libel, as to the alledged Treason, he would not trouble them about the perjury: Especially the matter of fact, referred by the Interloquutour to his probation, being of itself so clear and notour.

But the truth is, the Interloquutour pronounced was so amazing, that both the earl and his advocates, were struck with deep silence, for they plainly perceived that, after such a judgment in the case, all further endeavours would be in vain, it being now manifest, that seeing the earl's innocence had so little availed, as that his plain and honest words, purely uttered for the necessary satisfaction of his own conscience, and clearing of his loyalty, had been construed, and detorted, to infer Leasing-making, depraving, and treason: The tongues of men and angels, as some of his advocates also said, could not do any good, and therefore neither did the earl, nor they object any thing, either against the assizers or witnesses, though liable to obvious, and unanswerable exceptions: Nor did the earl's advocates say any thing to the assize, as the custom is, and as in this case they might well have done to take off the force of the evidence, and to demonstrate that the depositions, instead of proving the indictment, did rather prove the earl's defences. But, as I have said, they now plainly saw that all this had been unnecessary work, and, in effect, were of opinion, that after so black, and dreadful a sense, put upon what the earl had spoke and done, in such fair, and favourable circumstances, there could be nothing said, before such a court, which might not expose themselves to the like hazard, and more easily be made liable to the same misconstruction.

Upon this silence, the advocate, taking instruments, protests, for an Assize of Error, in case the assizers should assoil or acquit. Whereupon the assize removing was inclosed: And, after some time, returned their verdict, which was read in open court, of this tenour.

The Verdict of the Assize.

The assize having elected and chosen the marquis of Montrose to be their chancellor, they all in one voice find the earl of Argyle Guilty, and culpable of the crimes of Treason, Leasing making and Leasing-telling, and find, by plurality of votes, the said earl innocent and Not Guilty of perjury.

And then the court again adjourned: And the privy-council wrote the following Letter:

The Council's LETTER to the King, desiring Leave to pronounce Sentence against the Earl of Argyle.

HALYRUDHOUSE, *December* 14, 1681.

"May it please your sacred majesty; In obedience to your majesty's letter, dated the 15th of November last, we ordered your majesty's advocate to insist in that process, raised at your instance, against the earl of Argyle: And having allowed him a long time for his appearance, and any advocates he pleased to employ, and letters of exculpation, for his defence: He, after full debate, and clear probation, was found Guilty of Treason, Leasing-making betwixt your majesty, your parliament, and your people, and the reproaching of your laws and acts of parliament. But because of your majesty's letter, ordaining us to send your majesty a particular account of what he should be found guilty of, before the pronouncing of any sentence against him, we thought it our duty to send your majesty this account of our and your justices proceedings therein; and to signify to your majesty, with all submission, that it is usual and most fit for your majesty's service and the advantage of the crown, that a sentence be pronounced, upon the verdict of the assize, without which the process will be still imperfect. After which, your majesty may, as you in your royal prudence and clemency shall think fit, ordain all further execution to be sisted, during your majesty's pleasure: which shall be dutifully obeyed by your majesty's most humble, most faithful, and most obedient, subjects and servants,

"Sic Subscribitur, Alex. St. And. Athol, Douglas, Montrose, Glencairn, Wintoun, Linlithgow, Perth, Roxburgh, Dumfries, Strathmore, Airlie, Ancram, Livingstoun, Jo. Edinburgens., Elphingstoun, Dalziell, Geo. Gordon, Ch. Maitland, G. Mekenzie, Geo. Mckenzie, Ramsay, J. Drummond."

The Earl, as well as the lords of privy-council, waited some days for the Answer of this Letter: But the earl making his escape a day or two before it came, I shall take occasion to entertain you, in the mean time, with an account of some thoughts that the earl had set down in writing, in order to some discourse he intended to have made to the lords of justiciary, before their pronouncing sentence. And then I shall subjoin the Motives and Argu-

ments, which, as he hath since informed some of his friends, did induce him to make his escape: Which, with what I have said before, will give you a full account of all matters, till his majesty's return came, and the sentence past.

And first, he takes notice, That on Monday the 12th of December, the day of his arraignment, the court adjourned, before he was aware: And it being then late, about 9 of the clock, and after a sederunt of 12 hours, he did not imagine, they would have proceeded further that night; but only heard afterwards that they sat it out till 2 or 3 after midnight: And was surprised the next morning, to understand, that without calling him again, or asking at him, or hearing, or considering his own sense of his own words, they had not only found the libel relevant, but repelled his defences, and with one breath rejected all his most material reasons of exculpation, root and branch. This seemed hard, though the words had been worse, and no way capable of a favourable construction, which none, no not the judges themselves, can be so void of sense, as to think really they were not, and this was so far beyond all imagination, that, neither the earl, nor his advocates, did ever dream it could fall out, though all was not said might have been said; nor what was said, so fully enforced as the earl's advocates could easily have done, if the case had not been thought so very clear, and the earl his innocence so obvious and apparent, and they unwilling unnecessarily to irritate many concerned.

This great haste, and strange proceeding, did so surprise and astonish him, as I have said, that it caused him, the next day when the sentence was read, to keep deep silence, and suffer the interloquutor to be pronounced, the assizers chosen, and sworn, and the witnesses received, and examined, without once offering to say, or object any thing, or so much as inquiring, at either assizers, or witnesses, whether they had not been tampered with, and practised by promises, and threatenings, or whether some of them had not previously, and publicly declared themselves in the case, and others of them had not partially advised and solicited against him; which, as they are just, and competent exceptions, so he was able to have proven them, against most of them, instantly, and fully.

And indeed, as to such of the assizers as were counsellors, (whom, for your better information, I have marked in the list of assizers thus, P. Cr.) and had first ordered his imprisonment, next, signed the letter to his majesty, and then ordered the process, and therein manifestly forestalled their own judgment (had they done no more) it was a wonder, beyond parallel, that, neither their own honour, nor the common decency of justice, nor even his majesty's advocate's interest, did prevent their being impannelled on that assize.

But the truth is, the earl did so far neglect and abandon himself, and give way to the court, that he did not so much as open his month to clear himself of the perjury laid to his charge, which yet God Almighty was pleased to do, by the plurality of voices of the same assize, who it appears plainly did bear him little kindness: For whereas assizers do usually return their verdict, proven, or not proven, rather than guilty, or not guilty, and ought alwise to do so, where the relevancy is *in dubio*; and especially in a case of this nature, in which the alledged treason is no overt-act, and indeed no act, nor so much as a real ground of offence; but plainly such a subtil, chimerical, and nonsensical consequence, that the finding it doth quite surpass the comprehension of all unbiassed men; it might have been expected that persons of their quality would have chosen the more moderate form of proven or not proven, and not involved themselves unnecessarily upon oath in adjudging the relevancy of a guilt, which so few are able to imagine, and none will ever make out; yet you see in their verdict, that all in one voice they did find the earl guilty, in the most positive and strong form; adding, for superabundance, culpable, forsooth, the better to demonstrate their good will. Nor is it unworthy of remark, that when such of the assizers as were present at the council declared the earl innocent of the perjury (which his majesty's advocate did only pretend to infer from the earl's alledged silence, or not speaking loud enough, the first day, when he signed the Test) because they heard him, at the same time, pronounce his explanation: Yet some other assizers that were no counsellors, and knew nothing of the matter of fact, but by hearsay, without all regard to the witnessing of these counsellors, their fellow assizers, voted him guilty: And so took it formally on their consciences, that he had said nothing in the council, at his taking the Test; albeit all the council knew the contrary: (by which they are clearly perjured). Nay, such was the earnestness of some (who thought it scarce possible to carry the treason upon words so safe and innocent) to have the earl found guilty of perjury, that it was particularly recommended to his majesty's advocate to get him made guilty of that point, to render him for ever uncapable of public employment. And the clerk of the assize was so concerned in it, that he twice misreckoned the votes, before he would yield that the earl was assoiled, or acquit of the perjury. And this, among other things, may serve to clear, how that whole matter was influenced and managed: For, as the earl cannot be charged with perjury the second day, because he swore none at all; so as little the first day, seeing whether he took the Test with an explanation (as certainly he did) or simply without saying any thing, It is equally apparent, there was no perjury in the case. But it appears, their assizers were of the opinion, that the indictment or libel alone (as it was indeed the only evidence) was a sufficient proof of the earl's being guilty of perjury. And indeed for any other rule or reason that occurs,

they might as well have found him guilty of the perjury as of the treason: But the assizers that were counsellors being under a particular check, apprehending they might be found perjured themselves, if they had not acknowledged the hearing of the words, that all other present could have attested to have been audibly spoken, and some of themselves have confessed to have heard, before they knew the tenor of the libel; and the great crime of treason being sufficient to do the job, it is like they judged it advisable to give this insignificant absolution from perjury, that their verdict of treason might have the greater colour, and shew of candour, and sincerity. However it seems to be without measure hard to be prosecute with such a deadly dilemma of either treason or perjury; for you see, in their account, if the earl swear with an explanation his life is knocked down by treason; and if without an explanation, his honour, which is dearer to him than his life, is run through with perjury But, to complete a fancy beyond Bedlam, the advocate urges, and several assizers agree, at the same time, to condemn the earl as perjured, for not explaining; and for treason, for explaining: *Quis talia fando?*

In the next place, the earl's papers contain some thoughts, and endeavours, to remove certain mistakes, which he had good ground to believe, did so much prompt, and precipitate the judges to pronounce so important a sentence against him, upon so weak and sandy foundations, and which were indeed either mere fancies, or so frivolous, that though they were true, they could never excuse them before men, far less exoner them before God Almighty. Where, laying down a true ground, that 'nunquam concluditur in criminalibus, '&c.' and withal representing, how his advocates were questioned, in so extraordinary a manner, for signing their opinion (which you have above, num. 32. Where you may see how fair, just, and safe it was) that now they dare no more plead for him; He says, he cannot be denied to plead for himself, as he best may.

The first ground of mistake then that he was to represent, was, that he knew it had been told them, it was very much his majesty's interest, and necessary for the support of the government, to divest and render him uncapable of public trust: Which words had been oft said, and said to himself, to persuade him that there was no further rigour intended: But as he is very confident our gracious king will never, upon any such pretence, allow any innocent person to be condemned, far less to be destroyed, in a pique or frolic, where his majesty can reap no advantage; so he is persuaded, his majesty hath no design to render him miserable, far less to cut him off, without a cause. And therefore concludes, it is only his misfortune, in his present circumstances, never having access to, nor being heard by his majesty, nor the case perfectly understood by him, that hath made his majesty give so much as way to a process to be raised or led, far less to a sentence to be pronounced against him. But in effect, as this affair hath been managed all along, and so many engaged, in so extraordinary ways, to act, and write against him, first and last, nothing should appear strange or surprising: However, as their own consciences, and God Almighty, knows how they have been brought to meddle, and act, as they have done; so, one day or other, the world may likewise know it.

A second ground of mistake, which, he says may impose upon them, is a confidence of his majesty's pardon intended for him, a pretence only given out to render the condemnation more easy; yet indeed least wished for by those who were readiest to spread the report, and whereof the earl had indeed more confidence than any that talked of it, if his majesty were left to himself, and had the case fully and truly represented to him: but as his majesty needs not this false occasion to make his clemency appear, which is so well known over all his dominions, by far more true and genuine discoveries; so it were the heighth of injustice in their lordships of the justiciary to proceed to sentence against him, upon such apprehensions in case in their hearts they believe him innocent (as he certainly knows they do) besides, they cannot but see their acting, upon so unjust a ground, will not only stain their names, and memories, but instead of alleviating, rather aggravate their guilt, both in their own consciences when they reflect on it in cold blood, and in the sight of God Almighty: and if his majesty, on importunity and a third application should give way to execution, as he hath already given way first to the process, and then to the sentence; or if (as some may design) execution shall be adventured on, without the formality of a new order (as the process was at first commenced, before his majesty's return, and so is not impossible) would not their lordships be as guilty of his blood, as if they had cut his throat?

And in effect, these are grounds and excuses pretended at this day, in private, by such of his judges, for their procedour, who are not yet come to have the confidence, at all occasions, own directly what they have done.

A third reason why his exculpation was not allowed, he says, might be, because the sustaining of it, might have brought other explanations above-board, and discover both these who had made, and those who had accepted them, and perhaps not have left their own bench untouched. But as this artifice will not keep up the secret; and as this way of shifting is neither just nor equal; so to all interested it is the meanest of security; for his majesty's advocate hath already told us, that his majesty's officers can never wrong him: and although the lords and he should conceal what others had done, it might make themselves more guilty, but not prove any exoneration to those concerned, without a downright remission: whereas it is manifest, that if their lordships had admitted the earl's exculpation, upon the

sure and evident grounds therein contained, it would not only have answered the justice of his case, but vindicated all concerned.

And lastly, he was to tell them, that possibly they might be inclined to go on, because they were already so far engaged, as they knew not how to retreat with their honour: but, as there can be no true honour where there is manifest wrong, and injustice; so, in the frail and fallible condition of human things, there can be no delusion more dangerous and pernicious than this, 'unum scelus est alio scelere tegendum.' And here the earl thought to lay before them, very plainly and pertinently, some remarkable and excellent rules, whereby Lord Chief Justice Hales, a renowned judge of our neighbour nation, tells he did govern himself in all criminal cases; which (adds the earl) if they took a due impression, would certainly give them peace, and joy, when all the vain considerations that now amuse, will avail them nothing.—The rules are these.

I. Not to be rigid in matters purely conscientious, where all the harm is diversity of judgment.

II. That popular, or court-applause, or distaste, have no influence on any thing is to be done, in point of distribution of justice.

III. In a criminal case, if it be measuring cast, then to incline to mercy and acquittal.

IV. In criminal things, that consist only of words, where no harm ensues, moderation is then no injustice.

V. To abhor all private solicitations, of what kind soever, and by whomsoever.

VI. In matters depending, not to be solicitous what men will say or think, so long as the rule of justice is exactly kept.

VII. And lastly, never to engage themselves in the beginning of a cause, but reserve themselves unprejudged, till the whole business be heard.

Then the Earl goes on, and makes notes for Additional Defences, reducible to these heads.

I. The absolute innocence of his explication in its true and genuine meaning, from all crime or offence, far more from the horrible crimes libelled.

II. The impertinency and absurdity of his majesty's advocate's arguings, for inferring the crimes libelled, from the Earl's words.

III. The reasonableness of the exculpation.

IV. The Earl's Answer to the advocate's groundless pretences for aggravating of his case.

As to the first, the Earl waving what hath been said from common reason and humanity itself, and from the whole tenour and circumstances of his life, comes close to the point by offering that just and genuine Explanation of his Explication which you have above, num. 21.

"I have delayed hitherto to take the oath appointed by the parliament to be taken, betwixt and the first of January next: but now being required, near two months sooner, to take it, this day peremptorily, or to refuse: I have considered the Test, and have seen several objections moved against it, especially by many of the orthodox clergy; notwithstanding whereof, I have endeavoured to satisfy myself with a just explication, which I here offer that I may both satisfy my conscience, and obey your highness, and your lordships commands in taking the Test, though the act of parliament do not simply command the thing, but only under a certification, which I could easily submit to, if it were with your highness's favour, and might be without offence: but I love not to be singular; and I am very desirous to give obedience in this, and every thing, as far as I can; and that which clears me, is, that I am confident, whatever any man may think or say to the prejudice of this oath, the parliament never intended to impose contradictory oaths; and because their sense (they being the framers and imposers) is the true sense, and this Test, enjoined is of no private interpretation, nor are the king's statutes to be interpreted, but as they bear, and to the intent they are made; therefore I think no man, that is, no private person, can explain it for another, to amuse or trouble him with (it may be) mistaken glosses: but every man, as he is to take it, so is to explain it for himself, and to endeavour to understand it, notwithstanding all these exceptions in the parliament's, which is its true and genuine sense; I take it therefore, notwithstanding any scruple made by any, as far as it is consistent with itself, and the protestant religion, which is wholly in the parliament's sense, and their true meaning; which (being present) I am sure, was owned by all to be the securing of the protestant religion, founded on the word of God, and contained in the confession of faith recorded, J. 6, p. 1. c. 4. And not out of scruple, as if any thing in the Test did import the contrair. But to clear myself from cavils, as if thereby I were bound up further than the true meaning of the oath; I do declare, that by that part of the Test, that there lies no obligation on me, &c. I mean not to bind up myself in my station, and in a lawful way; still disclaiming all unlawful endeavours, To wish, and endeavour any alteration, I think, according to my conscience, to the advantage of church, or state, not repugnant to the protestant religion, and my loyalty: And by my loyalty I understand no other thing than the words plainly bear, to wit, the duty and allegiance of all loyal subjects; and this explanation I understand as a part, not of the Test, or act of parliament, out as a qualifying part of my oath that I am to swear; and with it I am willing to take the Test, if your royal highness and your lordships allow me. Or otherwise, in submission to your highness and the council's pleasure, I am content to be held as a refuser, at present."

Which Explanation doth manifestly appear to be so just, and true, without violence or straining; so clear and full, without the least impertinency; so notore and obvious to common sense, without any commentary; so loyal and honest, without ambiguity; and lastly, so far from all, or any of the crimes libelled, that

it most evidently evinceth, that the words thereby explained are altogether innocent: and therefore it were lost time to use any arguments to enforce it.

Yet seeing this is no trial of wit, but to find out common sense; let us examine the advocate's fantastical paraphrase, upon which he bottoms all the alledged crimes, and see whether it agrees, in one jot, with the true and right meaning of the earl's words; and (as you may gather from the indictment) it is plainly thus.

"I have considered the Test; which ought not to be done, and am very desirous to give obedience, as far as I can, but am not willing to give full obedience: I am confident the parliament never intended to impose contradictory oaths; that is, I am confident they did intend to impose contradictory oaths; and therefore I think no man can explain it but for himself; that is to say, every man may take it in any sense he pleases to devise, and thereby render this law, and also all other laws, though not at all concerned in this affair, useless; and so make himself a legislator, and usurp the supreme authority: and I take it, in so far as it is consistent with itself, and the protestant religion, whereby I suppose that it is not at all consistent with either; nor was ever intended by the parliament it should be consistent: and I declare, that by taking this Test, I mean not to bind up myself in my station, and in a lawful way, to wish, or endeavour any alteration, I think, to the advantage of church, or state, not repugnant to the protestant religion, and my loyalty: whereby I declare myself, and all others free from all obligation to the government, either of church, or state, as by law established, and from the duty and loyalty of good subjects; resolving of myself to alter all the fundamentals, both of laws and religion, as I shall think fit, and this I understand as a part of my oath, that is as a part of the act of parliament, by which I take upon me, and usurp the royal legislative power."

Which sense and explanation, as it consists of the advocate's own words, and was indeed every word, necessar to infer these horrible crimes contained in the indictment; so, to speak with all the modesty that truth will allow, I am sure, it is so violent, false, and absurd, that the greatest difficulty must be to believe that any such thing was alledged, far more received, and sustained in judgment, by men professing only reason, far less religion.

But thirdly, If neither the Earl's true, genuine, and honest sense, nor this violent, corrupt, and false sense, will satisfy; let us try what transposing the Earl's explanation will do, and see how the just contrary will look. ——And it must be thus.

"I have considered the Test, nor am I at all desirous to give obedience, so far as I can; I am confident the parliament intended to impose contradictory oaths; and therefore I think every man can explain it for others, as well as for himself, and take it, without reconciling it, either to itself, or his own sense of it: and I do take it, though it be inconsistent with itself, and the protestant religion: and I declare, that I mean thereby to bind up myself never (either in my station, or in any lawful way whatsoever,) to wish, or endeavour, in the least, any alteration, though to the advantage of church, or state, and though never so suitable, and no way repugnant to the protestant religion, and my loyalty: and, though this be the express quality of my swearing, yet I understand it to be no part of my oath."

Now whether this contradictory conversion be not treason, or highly criminal, at best, I leave all the world to judge; and to make both sides of a contradiction, that is, both the affirmative and negative of the same proposition, treason, is beyond ordinary logic. Escobar finds two contrary ways may both be probable and safe ways to go to heaven; but neither he, nor the devil himself, have hitherto adventured to declare two contradictory propositions, both damnable, and either of them a just cause to take away men's lives, honours, and fortunes.

But where the disease is in the will, it is lost labour to apply remedies to the understanding; and must not this be indeed, either the oddest treason, or strangest discovery that ever was heard of? The bishop of Edinburgh sees it not, witness his Vindication, saying the same, and more; nor many of the orthodox clergy, witness their explanations; nor his royal highness, in private; nor at first in council, nor all the counsellors, when together at the council-board; nor the president of the council, nor the then president of the session (now chancellor) though he rose from his seat, to be sure to hear; nor any of the most learned lawyers, witness their signed Opinion; nor the most learned of the judges on the bench; nor the generality of the knowing persons, either in Scotland, or England: wonderful treason one day seen by none, another day seen by so many! A stander by hearing the trial, and the sentence, said, he believed the earl's words were by popish magic transubstantiate, for he saw them the same as before: Another answered, that he verily thought it was so; for he was confident, none could see treason in the words, that would not, whenever it was a proper time, readily also profess his belief of transubstantiation; but he believed many that professed both, believed neither.

The second head of the earl's additional defence, contains the impertinencies and absurdities of the advocate's arguings. And here you must not expect any solid debate; for as there is no disputing with those that [illegible] principles, so as little with those who heap up phantastical and inconsequential inferences, without all shadow of reason. If a stone be thrown, though it may do hurt, yet having some weight, it may be thrown back with equal, or more force: but if a man trig up a feather, and fling it, it is in vain to throw it back; and the more strength, the less success: it shall therefore serve, by a cursory discourse,

to expose his arguments, which are in effect easier answered than understood; and, without any serious arguing, which they cannot bear, rather leave him to be wise in his own eyes, than by too much empty talk hazard to be like him.

He alleges first, That the earl, instead of taking the Test in its plain and genuine meaning, as he ought, doth declare against, and defame the act that enjoined it, which is certainly a great crime: but now, inasmuch, says the advocate, as he tells us, that he had considered the Test: which I have indeed heard say was his greatest crime; and that he ought to have taken it with a profound and devout ignorance, as some of our most inventive politicians boasted they had done. But the earl says that he was desirous to give obedience, as far as he could; whereby, says the advocate, he insinuates that he was not able to give full obedience. This is not the meaning; but what if it were, and that indeed he could not? Have not thousands given no obedience, yet even in law are guiltless? And ought not that to please his highness, and the council, that is accepted of God Almighty, and is all any mortal can perform? But the earl, says the advocate, goes on, That he was confident the parliament never intended to impose contradictory oaths; whereby, says the advocate, he abuses the people with a belief that the parliament did intend to impose such. Wonderful reasoning! All men know that parliaments neither are, nor pretend to be infallible: and in our present case, hundreds of loyal subjects complain of contradictions and inconsistencies, some way or other, crept into this oath; and even the council have yielded so far to their exceptions, as to make an alteration upon it, for satisfying those scruples, far beyond any thing the earl said; and such an alteration, as, I believe, few dreamed of; and I am certain, none durst have attempted, without their express command and authority: and yet, in the midst of all this, the earl's charitable and honest opinion, in behalf of the parliament's good intentions, must be perverted to a direct slander. But the earl says, That every man must explain it for himself; and so, no doubt, he must, if the Test be either in itself, or in his apprehension, ambiguous, otherwise how can he swear in judgment? But this the advocate will have to be a man's own sense, and thereupon runs out, That hereby this law and oath, and all laws and oaths are rendered useless, and to no purpose: and further, the legislative power is taken from the imposer, and settled in the taker of the oath, which certainly is a most treasonable presumption. But first, although there be no reason to strain, or mistake the expression, yet the earl did not say, That every man must take the Test in his own sense.

II. The council hath now explained the Test for the clergy: might not then the earl, before their explanation was devised, say, by the council's allowance, which he had, That he might explain it for himself? For if an ambiguous proposition (the Test for example) may be reconciled to itself two different ways; must not the taker reconcile it, as in his own sense he thinks it doth best agree with the genuine meaning of the words themselves, and with the sense he conceives was intended by the parliament that formed it, especially before the parliament emit their own explanation? And is it not juster to do it so, than in any other man's sense, which he thinks agrees less with the words, albeit they may be thought by others to be reconcileable another way?

III. All this looks like designed mistakes and traps; for should any man swear, unless he understand? And where an oath is granted to be ambiguous, can any man understand, unless, in want of the imposer's help, he explain it for himself.

IV. Was ever a man's explaining an oath for himself, before taking it, far less his bare saying that he must explain it, before he take it, alleged to be, The overturning of all laws and oaths, and the usurping of the legislative power, and making of new laws? Certainly to offer to answer such things, were to disparage common reason.

And lastly, this is strange doctrine from the advocate, who himself, in council, did allow, not only the earl his explanation, but that explanation to the clergy, contrary, as appears by their scruples, to what they that took it thought either the parliament's design, or the plain words of the Test could bear, and certainly different from the sense many had already taken it in, and wherein others were commanded to take it. And whatever the advocate may cavil to insnare the earl, sure he will not allow that by his explaining this oath he himself hath taken on him the legislative power of the parliament, far less, though he should acknowledge it, will any believe that he hath, or would thereby make all laws or oaths useless? By this you see what strange stuff he pleads, which deserves no answer.

But, says the advocate, the earl affirms, He takes the the Test, 'only' as far as it consists with itself, and with the Protestant religion; by which he most maliciously insinuates, that it is inconsistent with both. But, first, this 'only' is not the earl's, but the advocate's addition. Secondly, I would soberly ask the advocate, or any man, whether the Test, as it includes the Confession in general, and consequently all contained in it, was not either really, or at least might not have been apprehended to be inconsistent with itself? Else what was the use or sense of the council's explanation, wherein it is declared, That men do not swear to every proposition of the Confession, but only to the Protestant religion therein contained? And if it was either inconsistent, or apprehended to be so, how could the earl, or any honest man swear it in other terms, with a safe conscience? But thirdly, If parliaments be fallible, and this oath, as being ambiguous, needed the council's explanation to clear it from consistencies, must the

earl's words, when he was to swear, That he took it in so far as it was consistent, be in this case understood as spoken maliciously, and with a criminal intent, when all sense, reason, and religion, made this caution his duty? And if it be so criminal for one going to swear, to suppose a possibility of inconsistencies in it, is it not manifestly more criminal in others, plainly to confess and grant that there are inconsistencies in it, after they have swallowed it in gross, without any explanation whatsoever?

But, says the advocate, The earl hath invented a new way, whereby no man is at all bound to the Test; for how can any man be bound, if he will obey only as far as he can? And yet it will be hard, even for the advocate, though he sometimes attempts, indeed, more than he and all the world with him can do, to tell how a man can obey farther: and I am sure, that in a matter of this kind, viz. The free tender of an oath, all discreet men will judge the earl's offer both frank and obliging. Then he asks, To what the earl is bound, if he bound no further than he himself can obey? Manifest confusion! and never either spoke by the earl, nor at all pertinent to his case; besides he freely acknowledges, that all men are bound to more than they can do; or so far as the Test is consistent with itself, and the Protestant religion (a strange doubting or! yet, I dare say, imports as much as his majesty expects of any, and more than the advocate will ever perform). But, says the advocate, who can determine to what the earl is bound? Which says plainly, That either the Test agrees with itself, and the Protestant religion in nothing, or that the Protestant religion is nothing, both which the earl thinks far from truth. But the advocate's reasoning reflects far more on the council's explanation, where it is plainly said, That the Confession is not sworn to in the Test, but only the Protestant religion contained in the Confession; so that the Protestant religion indefinitely is that which is said to be sworn to. Now, pray, is it not much worse for a man to say, That by taking the Test he swears only to the Confession as it contains or agrees with the Protestant religion (which is in effect to set the Protestant religion at variance with its own Confession, and so to reproach and ranverse the standard, and make void the very security that the parliament intended) than to say, That he swears the Test as it agrees with itself and the Protestant religion, which imports no such insinuation? But from these pleasant principles, he jumps into this fantastic conclusion, That therefore it cannot be denied but the earl's interpretation destroys, not only this act, but all government, and makes every man's conscience or humour the rule of his obedience.

But first, as to the whole of his arguing, the earl neither invents, says, nor does any thing, except that he offered his explanation to the council, which they likewise accepted. Secondly, What mad inferences are these! You say, you will explain this oath for yourself, therefore you overturn all government, and what not! Whereas it is manifest, on the other hand, That if the earl apprehending, as he had reason, the oath to be ambiguous, and in some things inconsistent, had taken it without explaining it for himself, or respect to its inconsistency, it might have been most rationally concluded, that in so doing he was both impious and perjured. Thirdly, It is false, that the earl doth make his conscience any other way the rule of his obedience, than as all honest men ought to do: that is, as they say, To be *regula regulata*, in conformity to the undoubted *regula regulans*, the eternal rules of truth and righteousness, as is manifest by his plain words. As for what the advocate insinuates of humour instead of conscience, it is very well known to be the ordinary reproach, whereby men that have no conscience endeavour to defame it in others.

But the advocate is again at it, and having run himself out of all consequences, he insists and inculcates, that the earl had sworn nothing. But it is plain, that to swear nothing, is none of the crimes libelled. Secondly, The earl swears positively to the Test as it is consistent with itself and the Protestant Religion, which certainly is something; unless the advocate prove, as he insinuates, that there is nothing in the Test consistent with either. And 3dly, If the Protestant Religion, and the earl his reference to it, be nothing, then is not only the council sadly reproached, who, in their explanation, declare this to be the only thing sworn to, in the first part of the Test, but our religion quite subverted, as far as this Test can do it.

But next for the treason, the advocate says, That the earl expressly declares, he means not by the Test to bind up himself, from wishing, or endeavouring, in his station, and in a lawful way, any alteration he shall think for the advantage of church or state; whereby, says he, the earl declares himself, and others, loosed from any obligation to the government and from the duty of all good subjects, and that they may make what alterations they please. A direct contrariety, instead of a just consequence; as if to be tied to law, religion, and loyalty, were to be loosed from all three; can there be a flatter and more ridiculous contradiction? Next, the advocate pretends to found upon the fundamental laws of this, and all nations, whereby it is treason for any man to make any alterations he thinks fit for the advantage of church or state. But first, the earl is not, nor cannot be accused of so much as wishing, much less endeavouring or making any alteration, either in church or state, only he reserves to himself the same freedom, for wishing, which he had before his oath, and that all that have taken it do in effect say they still retain. 2dly, For a man to endeavour, in his station, and in a lawful way, such alterations in church or state, as he conceives to their advantage, not repugnant to religion and

loyalty, is so far from being treason, that it is the duty of every subject, and the sworn duty of all his majesty's counsellors, and of all members of parliament: but the advocate by fancying, and misapplying laws of nations, wresting acts of parliaments, adding, taking away, chopping and changing words, thinks to conclude what he pleases. And thus he proceeds, that the treason of making alterations, is not taken off by such qualifications, of making them in a lawful way, in one's station, to the advantage of church or state, and not repugnant to religion or loyalty. But how then? Here is a strange matter! Hundreds of alterations have been made within these few years, in our government, and in very material points, and the king's best subjects, and greatest favourites, have both endeavoured, and effectuate them: and yet, because the things were done according to the earl's qualifications, instead of being accounted treason, they have been highly commended and rewarded. The treasury hath been sometimes in the hands of a treasurer, sometimes put into a commission backward and forward: and the senators of the college of justice (the right of whose places was thought to be founded on an act of parliament, giving his majesty the prerogative only of presenting) are now commissioned by a patent under the great seal, both which are considerable alterations in the government, which some have opposed, others have wished and endeavoured, and yet without all fear of treason on either hand; only because they acted according to these qualifications, in a lawful way, and not repugnant to religion and loyalty. But that which the advocate wilfully mistakes (for it is impossible he could do it ignorantly) is, that he will have the endeavouring of alterations in general, not to be of itself a thing indifferent, and only determinable to be good or evil by its qualifications (as all men see it plainly to be) but to be, forsooth in this very generality intrinsically evil; a notion never to be admitted on earth, in the frail and fallible condition of human affairs. And then he would establish this wise position by an example he adduces, That rising in arms against the king (for so sure he means, it being otherwise certain that rising in arms in general is also a thing indifferent, and plainly determinable to be either good or evil, as done with or against the king's authority) is treason, and says, If the earl had reserved to himself a liberty to rise in arms against the king, though he had added in a lawful manner, yet it would not have availed, because, (and he says well) this being in itself unlawful, the qualification had been but shams and contrary facto. But why then doth not his own reason convince him where the difference lies? viz. That rising in arms against the king, is in itself unlawful; whereas endeavouring alterations is only lawful, or unlawful, as it is qualified; and, if qualified in the earl's terms, can never be unlawful. But, says the advocate, the earl declares himself free to make all alterations, and so he would make men believe that the earl is for making all or any, without any reserve; whereas the earl's words are most express, that he is, Neither for making all or any, but only for wishing and endeavouring for such as are good and lawful, and in a lawful way; which no man can disown, without denying common reason; nor no sworn counsellor disclaim, without manifest perjury. But the advocate's last conceit is, That the earl's restriction is not as the king shall think fit, or as is consistent with the law, but that himself is still to be judge of this, and his loyalty to be the standard. But first, the earl's restriction is expressly according to loyalty, which in good sense is the same with according to law, and the very thing that the king is ever supposed to think. Secondly, as neither the advocate, nor any other hitherto, have had reason to distinguish the exercise and actings of the earl's loyalty, from those of his majesty's best subjects; so it not a marvellous thing, that the advocate should profess to think (for in reality he cannot think it) the earl's words, his loyalty which all men see to be the same with his duty and fidelity, or what else can bind him to his prince capable of any quibble, far more to be a ground of so horrid an accusation? And whereas the advocate says, the earl is still to be judge of this, it is but an insipid calumny, it being as plain as any thing can be, that the earl doth nowhere declare his thinking to be the rule of right and wrong; but only mentions it as the necessary application of these excellent and unerring rules of religion, law and reason; to which he plainly refers, and subjects both his thinking and himself, to be judged accordingly. By which it is evident, that the earl's restriction is rather better, and more dutiful than that which the advocate seems to desiderate: and if the earl's restrictions had not been full enough, it was the advocate's part, before administrating the oath, to have craved what more he thought necessary, which the earl, in the case, would not have refused. But it is believed, the advocate can yet hardly propose restrictions more full and suitable to duty than the fore-mentioned of religion, law and reason, which the earl did of himself profer. As for what his majesty's advocate adds, That under such professions and reserves, the late rebellions and disorders have all been carried on and fomented, it is but a mere vapour; for no rebellion ever was, or can be, without a breach of one or other of the earl's qualifications, which doth sufficiently vindicate that part of the earl's explanation.

The advocate insists much, that 'any' is equivalent to 'all;' and that 'all' comprehends every particular under it; which he would have to be the deadly poison in the earl's words: and yet the earl may defy him and all his detracters, to find out a case of the least undutifulness, much less of rebellion, that a man can be guilty of, while he keeps within the excellent rules and limitations wherewith his

words are cautioned. I could tell you further, that so imaginary, or rather extravagant, and ridiculous is this pretended treason, that there is not a person in Scotland, either of those who have refused, or who by the act, are not called to take the Test, that may not upon the same ground and words be impeached, viz. That they are not bound (and so without doubt both may and do say it) by the Test, in their station, &c. to wish and endeavour any alteration, &c. Nay, I desire the advocate to produce the man among those that have taken the Test, that will affirm, that by taking it he hath bound up himself never to wish or endeavour any alteration, &c. according to the earl's qualifications, and I shall name hundreds (to whom his highness, as you have heard, may be added) that will say they are not bound up.

So that by this conclusion, if it were yielded, all Scotland are equally guilty of treason, the advocate himself, to say nothing of his royal highness, not excepted: or if he still think he is, I wish he would testify under his hand to the world, that, by his oath he is bound up never to wish, nor endeavour any alteration he thinks to the advantage of church or state, in a lawful way, nor in his station, though neither repugnant to the Protestant religion, nor his loyalty. And if this he do, he does as a man, if not of sense, at least of honour; but if not, I leave a blank for his epithets.

But that you may see that this whole affair is a deep mystery, pray, notice what is objected against the last part of the explanation: 'This 'I understand as a part of my oath.' Which, says the advocate, is a treasonable invasion upon the royal legislative power, as if the earl could make to himself an act of parliament, since he who can make any part of an act, may make the whole. And then say I, farewell all takers of the Test with an explanation, whether the Orthodox clergy, or earl Queensbury (though himself justice general) who were allowed by the council so to do; seeing that whether they hold their explanation for a part of their oath or not, yet others may; and in effect all men of sense do understand it so: and thus, in the advocate's opinion, they have treasonably invaded the legislative power, and made an act of parliament to themselves: neither, in that case, can the councils allowance excuse them, seeing not only the earl had it, as well as they; but even the council itself cannot make an act of parliament, either for themselves, or others. But, Sir, I protest, I am both ashamed and wearied of this trifling; and therefore to shut up this head, I shall only give a few remarks: first, you may see, by the acts of parliament upon which the advocate founds his indictment, that as to leasing-making and depraving laws, all of them run in these plain and sensible terms; the inventing of narrations, the making and telling of lies, the uttering of wicked and untrue calumnies, to the slander of king and government, the depraving of his laws and misconstruing his proceedings, to the engendering of discord, moving and raising of hatred and dislike betwixt the king and his people. And, as to treason, in these yet more positive terms; that none impugn the dignity and authority of the three estates, or seek, or procure the innovation, or diminution thereof. Which are things so palpable, and easily discerned, and withal so infinitely remote both from the earl's words and intentions, or any tolerable construction can be put on either, that I confess, I never read this indictment, but I was made to wonder that its forger and maker was not in looking on it, deterred by the just apprehensions he might have, not only to be sometime accused as a manifest depraver of all law, but to be for ever accounted a gross, and most disingenuous perverter of common sense. The earl's words are sober, respectful, and dutifully spoken, for the exoneration of his own conscience, without the least insinuation of either reflection or slander, much less the impugning of the authority of parliament, as the earl may appeal, not only to his majesty's true and royal sense, but to the most scrupulous and nice affecters of the exactest discerning; besides that they were first formally tendered in council, for their approbation, and by them directly allowed: how then can any man think, that they could be charged with the greatest and vilest of crimes, leasing-making, depraving, perjury, and treason? But the advocate tells us, that there are some things which the law commonly forbids in general, and that some inferences are as natural and strong, and reproach as soon or sooner than the plainest defamations. But what of all this? Must therefore such generals be left to the phantastic application of every wild imagination, to the confounding of the use of speech, and subverting of human society, and not rather be still submitted to the judgment of common sense, for their true and right understanding, and the deducing thence these strong and natural inferences talked of? Of which good sense, if the advocate do but allow a grain weight, it is evident that the inferences he here libels against the earl, must infallibly be cast, and by all rational unbiassed men be found strange, unnatural, and monstrous.

For, Sir, secondly, pray observe these rational and sound maxims he sounds his inferences on, and they are manifestly these: first, That he who says he will only obey as far as he can, invents a new way whereby no man is at all bound to obey. 2dly, That he who in the midst of hundreds of exceptions and contradictions, objected against an oath injoined by act of parliament, and still unanswered, says, that he is confident the parliament never intended to impose contradictory oaths, reproaches the parliament. 3dly, That he that says he must explain an ambiguous oath for himself before he take it, renders all laws and oaths useless, and makes himself the legislator. 4thly, That he that says that he takes this oath, as far as it is consistent with

itself and the Protestant religion seems no thing. 5thly, That he that declares himself not tied up by the Test from endeavouring, in a lawful way, such alteration as he thinks to the advantage of church and state, consistent with religion and loyalty, declares himself and all others, loosed from the government, and all duty to it, and free to endeavour any and all alterations that he pleases. And 6thly, That he that takes the Test with an explanation, and holds it to be a part of his oath, invades the legislative power, and makes acts of parliament.

Upon which rare and excellent propositions I dare say the earl is content, according to the best judgment that you and all unbiassed men can make either of their truth, or of my ingenuity in accepting them, to be adjudged Guilty or not Guilty, without the least fear or apprehension of the issue.

And in the third and last place, I shall only intreat you to try how the advocate's reasoning will proceed in other cases, and what brave work may be wrought by so useful a tool. Suppose then a man refuses the test simply, or falls into any other kind of nonconformity, either civil or ecclesiastic, or pays not the king's custom, or other dues; or lastly, understand an act otherwise than the advocate thinks he should: is not his indictment already formed and his process as good as made? viz. That he regards not the laws, that he thinks it is unjustly or foolishly enacted, that he will only obey as far as he can and as he pleases, and thereby renders all laws useless, and so reproaches the king and parliament, and impugns their authority, and assumes to himself the legislative power, and therefore is guilty of leasing-making, depraving his majesty's laws, and of Treason, of which crimes above mentioned or one or other of them, he is actor, art and part: which being found by an assize he ought to be punished with the pains of death, forfaulture and escheat of lands and goods, to the terror of others to do or commit the like hereafter. And, if there be found a convenient judge the poor man is undoubtedly lost.

But Sir, having drawn his parallel, rather to retrieve the earl's case, than to make it a precedent which, I hope, it shall never be; and chusing rather to leave the advocate than follow him in his follies, I forbear to urge it further.

These things considered, must it not appear strange, beyond expression, how the earl's explanation, such as it is, did fall under such enormous and grievous misconstructions? for, setting aside the council's allowance and approbation, (which comes to be considered under the next head) suppose the earl or any other person called before the council and there required to take the Test, had, in all due humility, said, either that he could not at all take it, or, at least not without an explanation, because the Test did contain such things, as, not only he, but many other, and those the best of the loyal and orthodox clergy, did apprehend to be contradictions, and inconsistencies; and thereupon had proponed one or two such as the papers above set down plainly enough hold out; and the bishop in his explanation rather evades than answers; would it not be hard, beyond all the measures of equity and charity, to look upon this as a designed reflection, far more a malicious and wicked slander, and the blackest treason? We see the act of parliament doth not absolutely enjoin the taking of the Test but only proposeth it to such as are intrusted in the government with the ordinary certification either of losing or holding their trust, at their option. We know also that in cases of this nature it is far more suitable both to our christian liberty and the respect we owe to a christian magistrate, to give a reason of our conscientious non-compliance with meekness, and fear, than by a mute compliance to fall under the censure of a stubborn obstinacy. And lastly, It is certain, and may safely be affirmed, without the least reproach, that parliaments are not infallible, as witness the frequent changes, and abrogations of their own acts, and their altering of oaths imposed by themselves, and even of this very oath after it was presented, which the earl was not for altering, though it is it was done, as I told you before. How then can it be, that the earl appearing before the council, and there declaring in terms at the worst a little obscure, because tender and modest, his scruples at an oath presented to him, either to be freely taken, or refused, should fall under any censure? If the earl had on this occasion said he could not take the Test, unless liberty were given him first to explain himself, as to some contradictions and inconsistencies which he conceived to be in it, though he had said far more than is contained in his controverted explanation, yet he had said nothing but what christian liberty hath often freely allowed, and christian charity would readily construe for an honest expression, or a commendable tenderness without any imputation of reproach against either king or parliament. How much more then is his particular and innocent, when, albeit so many thought the contradiction to be undeniable, yet such was his overly tempered respect, both to God, and man, to his own conscience, and his majesty's authority, that before, and not after, the taking of the oath, to clear himself (in the midst of the many exceptions and scruples raised) of all imbittering in swearing, he first applies himself to a satisfying explanation, to the parliament, the prime imposers, their true intentions and genuine meaning, and then gathering it very rationally from the oath's consistency with itself, and with the Protestant Religion, the parliament's aim and scope, and so asserting the king and parliament's truth, and honour, he places the relief and quiet of his own conscience in his taking the Test with this explanation, and in declaring its congruity with his oath, and duty of allegiance.

The third head of the earl's additional defences, is the further clearing and improving

of his grounds of exculpation, above adduced and repelled: which were, first, that before the earl did offer his explanation to the council, a great many papers were spread abroad by some of the orthodox clergy, charging the Test with contradictions and inconsistencies. 2dly, That there was a paper penned by a reverend bishop, and presented and read in council, and by them allowed to be printed, which did contain the same, and far more important things than any can be found in the earl's explanation: and consequently, far more obnoxious to all his majesty's advocate's accusations. 3dly, That the explanation upon which he was indicted was publicly by himself declared in council, and by the council allowed; so that the oath was administrate to him, and he received to sit in council, and vote, by his highness, and the rest of the members, with, and under this express qualification.

But, to all urged for the earl's exculpation, the advocate makes one short answer, viz. That if the earl's paper did infer the crimes charged on it, a thousand the like offences cannot excuse it. And his majesty is free to pursue the offenders, when, and in what order, he thinks fit: which answer doth indeed leave the council, and all concerned, in his majesty's mercy: but that it doth no way satisfy the earl's plea, is manifest: for, the first ground of exculpation, viz. That before the earl did offer his explanation, a great many papers, writ by the orthodox clergy, and others, were abroad, charging the Test with contradictions, &c. not alledged by the earl merely to justify his explanation by the multitude of the like papers, and so to provide for an escape in the crowd: but, the earl having most rationally pleaded, that his explanation was given in by him, after these many scruples and objections raised by others were abroad, it was a good plea, from a most pregnant circumstance, clearing both the design, and sense of his words, from the foul aspersions of reproaching, and depraving, thrown upon them: seeing the words spoken by him under the motive of such a circumstance, by all fair rules of interpretation, instead of being judged misconstruing and depraving, could only be understood as a seasonable asserting of the integrity of the parliament's intentions, and the uprightness of the earl's conscience; which argument being in reason unanswerable, it necessarily follows, that the advocate's return to the first ground was neither sufficient, nor pertinent, and that therefore the exculpation was unjustly repelled. But next, the second ground of exculpation is so far from being answered by the advocate, that it does not appear it was so much as understood; for, the earl's argument being, that words allowed and approven by the council, can never fall under the accusation, either of leasing-making or slandering his majesty's proceedings, or depraving laws, and acts of parliament, as is evident in itself, and granted by the advocate, where he says that an explanation, though reflecting on the king and government (which the earl's was not) yet, if allowed by the council, is to be sustained. But so it is, that the council hath allowed the words contained in this explanation contraverted, both in themselves, and also in their equivalent, and far more important expressions: as for instance, not only by accepting the earl's explanation (as shall be cleared in the next place) but by giving warrand for the publication of the bishop of Edinburgh his Vindication; wherein first, for obviating the contradictions objected from the confession of faith, he positively asserts, that by the Test men do not swear to own every article of that confession; and yet the Test binds expressly to believe that confession to be founded on, and agreeable to the word of God, and never to consent to any alteration contrary thereto, or inconsistent therewith: so that he gives both the Test and the parliament the lie. And then, for removing another scruple, he tells us, That by the Test men are not bound up from regular endeavours to rectify or better the established government, both of church and state, which is clearly the same thing, (but not so well cautioned) with that which in the earl's case is made a ground of treason: from which it unquestionably follows, that the earl's words, having been allowed, and approved by the council, could never, in law, or reason, be thereafter made a ground of accusation, by any, much less by themselves. Now I desire to know where the advocate, in all his plea, doth so much as notice, f[illegible]swer, this defence; or what his telling us, a thousand offences of the like nature doth not excuse one, either doth, or can signify? seeing this argument for the earl, instead of pleading excuses doth justify the matter, and for ever purge all shadow of offence, or ground of quarrel, which will be yet more apparent, when you shall add to this the third ground of the earl's exculpation, viz. That the explanation, whereupon the earl was indicted, was publicly by himself declared in council, allowed and accepted: Insomuch, as, after he had given his explanation as the sense wherein he was free to swear the Test, the oath was thereupon administrate to him, and he received to sit, and vote as a counsellor. Whereby it is evident, that, by this allowance, and acceptance, the earl's explanation became the council's, as much as if, after the earl's pronouncing the words, they had *verbatim* repeated them, and told him, they were satisfied he should swear the Test in these terms: and whether this ought not to be a sufficient exoneration to the earl, let all men judge. The advocate makes a noise, that in the case of an oath required, the taker ought to swear it in the sense of the imposer, (which none doubts) and then runs out, that the earl in place of taking it in the imposer's sense, did unwarrantably intend a sense of his own, to the eluding and frustrating of the obligation of this and all other oaths. But all this is nothing to the purpose; for waving that in the earl's case it is most impertinent to talk of his obtruding of a sense to the eluding, and frustrating of the

obligation of his oath, seeing his oath was not then given, or at all in being, it is expressly alledged by the earl, and notour that the explanation tendered by him, when called to take the Test, was accepted by the council, and the oath thereupon administrated, and so the earl freely joins issue with the advocate, and acknowledging that the taker of the oath ought to swear in the sense of the imposer, subsumes 'in terminis,' that he himself did swear so, and not otherwise, inasmuch as he did swear in a sense accepted by the council, before he gave his oath, as is evident. 1. By their commanding him to sit after he had sworn; and 2. In that neither the advocate, nor any other, had ever the confidence to quarrel his sitting, as a breach of the law, which no doubt they had done, if not convinced that by taking the oath, he had satisfied the act of parliament; which things, in true dealing, and the construction of all honest men, are the same as if the oath had been required of him by the council, in the very sense and words of this explanation. Neither is it material whether the explanation, offered by the earl, doth deserve (as certainly it doth not) these many ill names, which the advocate would fix upon it; because, though it had been much worse than it is, yet being offered to the council, and submitted to their judgment, and they having accepted of it, the thing became *quasi res judicata*, and cannot be retracted, without subverting the surest rules, both of truth, and government. The advocate indeed tells us, 1. That the council heard not the earl's explanation: But I have already told you, they did hear it, and the earl is still ready to prove it: and suppose some say they did not hear it distinctly, (as what thing spoke in council is distinctly heard and considered by all?) Yet it being certain that they did all approve it, it is sufficient to the earl: and it is only their concern, whether in approving what they did not hear, they observed their oath *de fideli*, &c. or not. His highness, who the earl was most concerned should hear, did certainly hear, as himself afterwards acknowledged. 2. The advocate says, that the hearing and allowing the earl to sit, is no relevant plea; yea further, though all the council had allowed him that day, yet any of his majesty's officers might have quarrelled him the next day. But first, I would gladly know, upon what head? for if upon obtruding a sense of his own, it is undeniable that whatever the sense was, the obtruding of it was purged by the council's acceptation, and it became theirs, and was no more his. But if the advocate doth think, that even the matter of the explanation, though allowed and accepted, may still be quarrelled: Then, 1. I hope, he will consider in what terms he doth it; for if he charge it after it becomes the council's (as in truth he hath done already) with the same liberty wherewith he treats it as the earl's, he runs fair to make himself the arrantest defamer and slanderer of the king and council, that ever yet attempted it. But 2dly, It merits a worse name than I am free to give it, to say, that an explanation allowed by the council, in the administrating of an oath proper to be administrat by them, doth not secure the taker as to that sense, both in law and conscience: Seeing in effect this quite takes away the best grounds of assurance among men, and turns their greatest security to their greatest snare. And 3dly, If this be sound doctrine, it is worth the enquiring, what security the clergy, to whom the council, as you have heard, did indulge an explanation, have thereby obtained; For as to such laicks as did only at their own hand take hold of, and snatch at this indulgence, not provided for them by the council's act, it is clear their doom is dight. It is not here debated how far that explication of the council's may satisfy, and quiet conscience, let such concerned see to it Some please themselves with a general notion, That if the sense given by the administrator be sound, then it is also safe, whether it be agreeable to the plain and genuine meaning of the oath or not; nay, whether it be agreeable to the sense of the first imposers, or not: But others, who consider more tenderly what it is to swear in truth, and in judgment, think it rather a prophanation, and a sinful preferring of the credit of men to the glory of the Almighty, to offer to smooth an oath by a disagreeable interpretation, when in effect the oath itself ought to be changed; But the thing in question is about the security of life and fortune; for seeing the council's explanation is, at least, to say no worse, liable enough to the calumnies of an inventive malice, and the advocate telleth us, Though all the council had allowed a man to swear with an explanation, yet any of his majesty's officers may, the next day, quarrel him; it is evident that this allowance can afford him no security. It is true, the advocate may alledge, and possibly find a difference betwixt the council's emitting, and their accepting of an explananation. But as in truth there is none, more than betwixt a mandat and a ratihabition; so I am confident, if ever the thing come to be questioned, this pretence will evanish, and come to nothing.

It is likewise to be remembered, That when the earl, the next day after he took the Test, was questioned for the explanation he had made, and required to exhibit a copy (which was afterwards made the ground of his indictment) so soon as he observed that some began to carp, he refused to sign it, demanded it back, and would have destroyed it, as you have heard, which were all clear acts of disowning and retracting, for eviting offence, and of themselves sufficient to have prevented any further enquiry; there being nothing more just and human, than that words, though at the first hearing, offensive; yet if instantly retracted, when questioned, should be past: But this, as well as other things, must in the earl's case be singular; and whether he plead the council's allowing, or his own disowning (as in effect he doth both) it is equally to no purpose,

the thing determined must be accomplished. You heard before, how that a reverend bishop, and many of the orthodox clergy, did take a far greater liberty of explanation than the earl pretended to: you see also that first the council allows his words, whereupon he rests: And when he finds that they begin to challenge, he is willing to disown: And withal, it is undeniable, and acknowledged by the council themselves, that the Test, as it stands in the act of parliament, is ambiguous, and needs to be explained: And the earl may confidently aver, that of all the explanations that have been offered (even at the council's not excepted) his is the most safe, sound, and least disagreeable to the parliament's true sense and meaning. And yet when all others escape, he alone must be seized; and for a thing so openly innocent, clearly justifiable, and undeniably allowed, found guilty of the worst of crimes, even leasing-making, leasing-telling, depraving of laws, and treason; but all these things God Almighty sees, and to him the judgment yet belongs.

And thus I leave this discourse, shutting it up with the case of archbishop Cranmer, plainly parallel to the earl's, to show how much he was more favourably dealt with by the king, and government, in those days, than the earl now is, though he live under a much more merciful, and just prince, than that worthy prelate did; for Cranmer being called and promoted by Henry 8, of England to be archbishop of Canterbury, and finding an oath was to be offered to him, which, in his apprehension, would bind him up from what he accounted his duty, he altogether declined the dignity and preferment, unless he were allowed to take the oath with such an explanation as he himself proposed, for salving of his conscience; and though this oath was no other than the statute, and solemn oath, that all his predecessors in that see, and all the mitred clergy in England, had sworn, yet he was admitted to take it, as you see in Fuller's Church Hist. of Britain, lib. 5. p. 185, and 186, with this formal protestation.

'In nomine Domini, Amen. Coram vobis, '&c. Non est, aut erit meæ voluntatis, aut intentionis, per hujusmodi juramentum vel juramenta, qualitercunque verba in ipsis posita sonare videbuntur me obligare ad aliquid, ratione eorundum, posthac dicendum, faciendum, aut attentandum, quod erit, autesse videbitur, contra Legem Dei, vel contra illustrissimum Regem nostrum Angliæ, Legesve, aut prærogativas Ejusdem: Et quod non intendo, per hujusmodi juramentum, vel juramenta, quovis modo me obligare, qui minus libre loqui, consulere, aut consentire valeam, in omnibus, et singulis reformationem Religionis Christianæ, Gubernationem Ecclesiæ Anglicanæ, et Prærogativam Coronæ ejusdem Reipublicæ, vel commoditatem earundem, quoquo modo concernentibus; et ea ubique exequi, et reformare, quæ mihi in Ecclesia Anglicana reformanda videbuntur: Et secundum hanc interpretationem, et intellectum hunc, et non aliter, neque alia modo, dictum juramentum me præstiturum protestor, et profiteor.'

That is to say. 'In the name of God, 'Amen. Before you, &c. It neither is, nor 'shall be, my will or meaning, by this kind of 'oath, or oaths, and however the words of 'themselves shall seem to sound or signify, to 'bind up myself, by virtue hereof, to say, do, 'or endeavour any thing, which shall really be, 'or appear to be, against the law of God, or 'against our illustrious king of England, or 'against his laws and prerogatives: And that 'I mean not, by this my oath, or oaths, any 'ways to bind up myself from speaking, con'sulting, and consenting freely, in all, and 'every thing in any sort concerning the refor'mation of the Christian religion, the govern'ment of the Church of England, and the 'prerogative of the crown of the Common'wealth thereof, or their advantage; and from 'executing, and reforming such things as I 'shall think need to be reformed in the Church 'of England: And according to this explana'tion, and sense, and not otherwise, nor in any 'other manner, do I protest, and profess, that I 'am to take, and perform this oath.'

Nor did that excellent person, says Mr. Fuller, smother this privately in a corner, but publicly interposed it three several times; once in the Charter-house, before authentic witnesses; again upon his bended knees, before the high altar, in view and hearing of many people, and bishops beholding him, when he was consecrated; and the third time, when he received the pall, in the same place.

Now would it not be very strange if the like liberty should not be allowed to the earl, under his majesty, in reference to the Test, which Henry the 8th, a prince that stood as much on his prerogative as ever any, did vouchsafe to this Thomas Cranmer, who, as another historian observes, acted fairly, and above-board: But there wanted then the high and excellent designs of the great ministers, the rare fidelity of counsellors, sound religion and tender piety of bishops, solid law and learning of advocates, incorruptible integrity of judges, and upright honesty of assizers, that now we have, to get archbishop Cranmer accused, and condemned, for leasing-making, depraving laws, perjury, and treason, to which accusation his explanation was certainly no less obnoxious than the earl's.

But I hasten to the fourth, and last head of the earl's additional defences, viz. The removing certain groundless pretences, alledged by the advocate, for aggravating the earl's offence: As 1. That the earl, being a peer, and member of parliament, should have known the sense of the parliament, and that neither the scruples of the clergy, nor the council's proclamation, designed for mere ignorants, could any way excuse the earl for offering such an explanation. But, first, the advocate might have remembered, that in another passage he taxes the earl as having debated in parliament

against the Test, whereof it is easy to [illegible] that the earl having been in the matter of the Test a dissenter, this quality did [illegible] than aggravate the earl's crime. [illegible] 5thly, If the proclamation was designed for the more ignorants of the clergy, [illegible] advocate calls them, who knew not [illegible] what had passed in parliament in exoneration [illegible] far more necessary for the earl, who knows so little of what the [illegible] all [illegible] Test have past in parliament, viz. That the Confession of Faith was not to be sworn [illegible] as a part of the Test, that of necessity (as I think) he must know the contrary [illegible] much as first, as this is obvious from the express tenor of the Test, which binds to own [illegible] the true Protestant religion contained in the Confession of Faith, and to believe the same to be [illegible] the word of God, and to adhere thereto, and never to consent to any change contrary to or inconsistent with the said [illegible] religion, and Confession of Faith. Which to common sense appears as plain, and evident as can be contrived or desired. But 2dly, It is very well known that it was expressly craved and carried in parliament, that the Confession of Faith should be a part of the Test and Oath. For the Confession of Faith being designed to be sworn to, by an act for securing the Protestant religion (which you have heard was prepared in the articles but afterwards thrown out) when this act for the Test was brought into the parliament some days after by the bishop of Edinburgh, and others, the Confession was designedly left out of it. But it being again debated that the bare naming of the Protestant religion without condescending on a standard for it, was not sufficient, the Confession of Faith was of new added. And after the affirmative clause for owning it, and adhering to it was insert, upon a new motion, the negative, never to consent to any alteration, contrary to, or inconsistent with the said protestant religion and Confession of Faith, was also subjoined; but not without a new debate and opposition made against the words, 'And Confession of Faith,' by the bishop of Edinburgh, until at length he also yielded; all which it is hoped, was done for some purpose. And if, at that time, any had doubted of the thing, he had certainly been judged most ridiculous. For it was by that addition concluded by all, That the Confession was to be sworn to: for he takes pains to justify it, though calumniously enough, alledging, That it was hastily compiled in the short space of four days, by some barons and ministers in the infancy of the Reformation. Where, by the by, you see he makes no reckoning of what the act of parliament, to which the Test refers, expressly bears, viz. That that second ratification 1567, which we only have recorded, was no less than seven years after this Confession was first exhibited, and approven A. D. 1560. But moreover, he tells us, That the doctors of Aberdeen, who refused the Covenant, were yet willing not only to subscribe but to swear this Confession of Faith. Which again, to answer the bishop's critic of four days, was more than 70 years after it was universally received. It is true that when the bishop finds himself straitened how to answer objections, he is forced to make use of the new gloss, I shall not call it of Orleans, whereby the Protestant religion is made to be sworn to only as every man pleases to interpret, and as far as may be consistent with any new principles of state. But the parliament certainly (I do not speak ironically) did intend by this Test, to swear and assert the true Protestant religion, and the said Confession of Faith, whatever may be now pretended. The earl could not also but very well remember what his highness had said to himself about the inserting of the Confession, and [illegible] the advocate [illegible] notorious knows all this. For the thing was at that time matter of common talk; and indeed, till papers objecting contradiction and inconsistencies betwixt the Confession and the rest of the Test began to be so numerous, which was about the [illegible] October, that [illegible] were so [illegible] to swear them, but by alleging, That in the Test men do not swear to every article and [illegible] of the Confession, but only to the protestant religion therein contained, this point was never doubted. And whether this answer be true, and reconcileable in any consonant to the words of the Test, or a circulating evasion enervating all its force, let others judge. But the advocate says, When it was moved in parliament to read the Confession, it was waved. Most true; and the reasons given by the bishops for it was, That it was notour, they knew it, and it was already insert in the acts of parliament. And, the truth was, the reading of it would have spent more time than was allowed on examining the whole Test. It was likewise late after a long sederunt, and it was resolved to have the act passed that night, and so it went on. But it was likewise moved to read the Covenant, seeing it was to be disclaimed, and this was flatly refused. And will the advocate thence infer, That by the Test the Covenant is not abjured, albeit it be most certain that many in the parliament at that time, had never read the one or the other. But to follow the advocate's excursions and answer them more particularly. The motion for reading, the Confession being made on this very occasion, Because it was to be insert in the Test and sworn to, concludes enough against him. For nobody can be so effronted as to say, it was used in parliament as an argument not to read it, because it was not to be sworn to: but (though it cost a debate) it was plainly agreed to be sworn to, and therefore insert. 2dly, Can any man doubt, the Confession was to be sworn to, when it is notour that several that were members of parliament, and, by reason of offices they enjoyed, were called to swear the Test, pretending, with reason, tenderness of an oath, did, before swearing, make a fashion at least of reading and studying the Confession, to satisfy themselves how far they might swear it.

And that this was done by an hundred I can attest themselves. Lastly, It is certain that, when, in the end of October, the bishop of Edinburgh had quarrel sir George Lockhart, for causing the Confession to be insert in the Test, and he answered that without it a Turk might sign the Test, it was not then pretended by the bishop that the confession was not to be sworn to, and therefore he at that time had no reply.

But this is a debate, I confess, not altogether necessary for my present task, only this by [illegible] may [illegible] ground enough for the earl to believe the Confession was [illegible]. And all that [illegible] before the council's [illegible], having sworn [illegible], and for [illegible] I know, [illegible] being by the council's act [illegible] the earl might [illegible] this opinion. And seeing [illegible] contradictions were alleged [illegible] [illegible] the earl did scruple, [illegible] his [illegible] explanation [illegible] acceptance.

[illegible]

The advocate, in his book of Pleadings makes this a stretch and says his majesty's [illegible] [illegible] And his [illegible] hath [illegible] expressed his sense of the [illegible] made by some against the earl, at that time. It is well known the family of Argyle is both ancient and honourable, and hath been loyal and serviceable to the crown [illegible] several hundreds of years, but they must now be destroyed, for having done, and being able as they say, to do too much, which others neither can nor will do.

Neither is the advocate ignorant that the only failing that family hath been charged with in all that long tract of time, was a compliance of the late marquis of Argyle, the earl's father, in the time of the late usurpation, by sitting in the then parliament of England, some years after all the standing forces of the kingdom were broken, his majesty beyond sea, the whole country over-run, the usurpers universally acknowledged, and neither probability of restitution, nor possibility of shelter left to any that were most willing to serve his majesty, as the advocate himself hath published in his printed Pleadings, in which he likewise lays out the special and extraordinary circumstances which the marquis was necessitated to do what he did. And the compliance charged on him was so common, that all others were pardoned for the [illegible] except he alone, though he had such favourable arguments to plead, and though he pleaded the same indemnity as it saved others. And seeing he submitted, and surrendered up himself, and lost his life, and estate, at the same time of the compliance that he [illegible] for, the earl his son was actually serving and suffering for his majesty, as you find in the former part of this letter, the earl's restitution was no less than his and his family might well expect of his majesty's goodness and justice. It is true, the earl was again accused and condemned (which may appear incredible to such as know not all particulars) upon the [illegible] of leasing making, and with as [illegible] ground, if possible, as now, and was pardoned by his majesty, for which he both then and doth always acknowledge, that he owes to his majesty both his life and his fortune. But upon this occasion, and being [illegible] as he is, he hopes his majesty will not take it ill that he say, That his majesty's mercy was in this case determined by justice. And for proof that his majesty did then know him to be innocent, did not his majesty then say, It was impossible to take a man's life upon so small an account. Though nevertheless it had been done, if his majesty had not interposed and pardoned him. Did not the Chancellor Clarendon (who was patron to the most considerable of the earl's pursuers) hearing of his condemnation, Bless God he lived not in a country where there were such laws (he should have said such judges) And I believe many more will say the same now. Did it not plainly appear, at that time, that his principal pursuers were very bitter, malicious, and unjust to him? For the earl had not only served his majesty in that troublesome and hazardous appearance in the hills, but he had been particularly useful to earl Middleton, then his majesty's lieutenant general, and had stood by him, when these deserted him, whom notwithstanding he took afterwards by the hand, when he was his majesty's commissioner in the year 1661, and then designed new interests and new alliances, whereof some did hold, and some never held. And then indeed it was, that he and others thought it proper for them to destroy the family of Argyle, to make their own fortunes; but it pleased God and his majesty to dispose otherwise: Then it was that the earl was go

hotly pursued for his life; having at that time no fortune, all being in his majesty's hands: Then was the accusation of Treason likewise urged by the same persons and must have carried, but it was not found necessary, Leasing-making being sufficient to take his life; and, as it falls out, when any game is started, and the hounds in chase, all the little curs run along: So the earl wanted not then many pursuers that are now scarce to be heard of. And further, some of the parties themselves confessed the particulars to the earl afterwards, who yet now return to act their former parts, and that they had then laid down a resolution to intrap him, 'per fas, aut nefas;' but notwithstanding all this ill humour and violence, all the ground they could get for a quarrel, in two years time, was one single letter, among many they intercepted, the occasion and import whereof was as follows: About a twelvemonth after the death of the late marquis of Argyle, the earl his son being, by the loss of his estate and burden of his debts, brought into straits, a friend from Edinburgh wrote to him then at London, to do what he could for himself at court, and the sooner the better; for he needed neither expect favour nor justice from some in Scotland; and, if matters were delayed, his father's whole estate would be begged away in parcels. His friend likewise complained, that the earl did not write to inform his friends in Scotland; and on this he insisted several post-days, which, at last, drew an answer from the earl, that he had been to wait upon his majesty, and had found him both just and kind to him and doubted not the effects of his royal favour: that he was sensible of his loss by delay, yet must proceed discreetly, and not press to give his majesty trouble, but must take his majesty's method, and wait his time; That he judged, much of what his friend told him was true, but he must have patience: It was his misfortune that some took pains to make his majesty believe, that the parliament was his enemy, and the parliament to believe the king was his enemy; and by such informations he was like to be a sufferer, but he hoped in God all should be well. This blast must blow out, and will blow over: The king will see their tricks. And upon this letter, specially those last words, the earl was accused of leasing making betwixt king and parliament, and that he expected changes; and so had a great deal of the same stuff laid to his charge, as now you have heard: And if the now register will produce the earl's principal letter, and the paper the earl gave in to the parliament, these two would clear all, the case then, and now, as you may see, *Mutatis mutandis*, being much the same, and some of the same tools used. But to go on, the earl's words in that letter being clear and plain, viz. That he complained of others that reported lies to the king and parliament, but did himself report none to either; He acknowledged the letter, which could never have been proven to be his; and as soon as he heard that it was intercepted, did render himself to his majesty before he was called for: But, which very much troubled him, had not access. Yet his majesty was so gracious, that instead of sending him prisoner to Scotland with a guard (as was much pressed) he allowed him to go down on a verbal bail: And his majesty was pleased to say, that he saw nothing in the earl's letter against his majesty or the parliament: but believed the earl did design to reflect on the earl of Middleton. The earl came to Edinburgh, a fortnight before the day appointed by his majesty, and thought to have had the liberty of the city, till that day should come; but was sent to the castle the next day after his arrival: Upon which he advertised his majesty of his condition, who would hardly believe they would take his life, till it was told plainly it was designed, and if he died it lay at his majesty's door; upon which his majesty was graciously pleased to send immediately an order to the earl of Middleton, not to proceed to execution against him: Yet, the sentence of death was pronounced, and the day of execution remitted by the parliament to the earl of Middleton: Which he accepted of, albeit he had no particular instruction for it from his majesty, which, before a year went about, earl Middleton found could not be justified by him, and some of the earl's chief accusers were declared by his majesty to be themselves leasing-makers; And then the earl by his majesty's favour and goodness, was restored to a part of his predecessor's estates and titles, which he took as thankfully, as if a new estate, and new and greater honours had been conferred upon him. And though his majesty was pleased, at the granting of these titles, to say, He could help them when he pleased; yet his majesty knows, that the earl never troubled him about any such matter, nor solicited him now these eighteen years, for any title, office, or employment, (though he confesses he had of all sorts) nor hath he been burthensome to his majesty's exchequer (500*l.* yearly for four or five years that the earl served in the treasury, being all that ever he touched of his majesty's money) albeit few attended more, and none so much that lived at his distance. He was also twice at London, to kiss his majesty's hand, but still on his own charges; Which things are not said to lessen his majesty's bounty and goodness, whereof the earl still retains all just, tender, and dutiful impressions; but to answer the advocate, and to teach others to hold their peace, that cannot say so much.

His life is known to have been true, honest, and of a piece, and all along he hath walked with that straightness, that he can compare his integrity with all that now attacque him.

By all which it is apparent, that what the advocate here pretends for an aggravation, may well be accounted a second part of the earl's persecutions; but cannot, in the least impair either his innocence, or his honour.

Seeing therefore the ground of the earl's present accusation, with all he either designed,

said, or did, in this matter, was only that, when called, nay required to take the Test, and after leave first obtained from his highness and council, he did in their presence, before the giving of his oath, declare, and propose to them the sense wherein he was willing to take it; That this his sense neither contains, nor insinuates, the least slander, reproach, or reflection, either upon the king, the parliament, or any person whatsomever; but, on the contrair, is in effect tenfold more agreeable to the words of the Test, and meaning of the parliament that framed it, than the explanation emitted by the council: and was also most certainly, the first day, by them accepted; and, when the next day challenged, by him offered to be retracted, and refused to be signed: That the whole indictment, and more especially that part of it about the treason, is a mere rhapsody of the most irrational, absurd, and pernicious consequences, that ever the sun beheld, not only forcing the common rules of speech, charity, and humanity; but traversing all the topics of law, reason, and religion, and threatning no less, in the earl's person, than the ruin of every man's fortune, life, and honour; That the earl's defences, and grounds of exculpation, were most pregnant and unanswerable, and either in themselves notour, or offered to be instantly verified. And lastly, that the aggravations pretended against him do either directly make for him, or most evidently discover the restless malice of his implacable enemies: Shall our gracious king, who not only clearly understands right and hates oppression, but also to all his other excellent qualities, hath by his gentleness and clemency, even towards his enemies, added that great character of goodness, upon vain and false insinuations, and unreasonable and violent stretches, not only take away the life of an innocent person, but of one who himself and his family (be it said without disparagement) have for a longer time, and more faithfully, and signally served his majesty and the crown, than any person, or family of his degree and quality, of all his persecutors, can pretend to? Shall his numerous family, hopeful children, his friends and creditors, all be destroyed? Shall both former services be forgot, innocence oppressed, and all rules of justice, and laws of society and humanity for his sake overturned? Shall not only the earl be cut off, and his noble and ancient family extinguished, but his blood and memory tainted with as black and horrible a stain, as if he had conspired with Jacques Clement, Ravillack, the gunpowder miscreants, the bloody Irish rebels, and all the other most wicked and heinous traitors of that gang? And all this for a mere imaginary crime whereof it is most certain, that no man living hath, or can have, the least real conviction, and upon such frivolous allegations as all men see to be, at the top, mere moon-shine; and at the bottom, villany unmixed.

After clearing these things, the earl, it seems, intended to have addressed himself to his majesty's advocate in particular, and to have told him, that he had begun very timeously in parliament to fall first on his heritable jurisdictions, and then upon his estate, and that now he was fallen upon his life and honour, whereby it was easy to divine that more was intended, from the beginning, than the simple taking away of his offices: seeing that some of them, on his refusing the Test, were taken away by the certification of the act of parliament, and that those that were heritable he offered in parliament, to present and surrender to his majesty on his knee, if his maejsty, after hearing him, should think it fit; only he was not willing to have them torn from him, as hath been said; and if that were all were designed, as was at first given out, the advocate need not have set him on high, as Naboth, and accuse him as a blasphemer of God and the king.

Then turning his speech to the lords of justiciary, he thought to have desired that they would yet seriously consider his words, in their true sense and circumstance, his own explanation of his explication, and especially the foregoing matter of fact to have been laid before them, with his defences, and grounds of exculpation; as also have told them, that they could not but observe how that he was singled out amongst thousands, (against whom much more than all he is charged with could be alledged) and that they must of necessity acknowledge (if they would speak out their own conscience) that what he had said was spoke in pure innocence, and duty, and only for the exoneration of himself, as a christian, and one honoured to be of his majesty's privy council (where he was bound, by his oath, to speak truth freely) and not to throw the smallest reproach on either person or thing. Adding, that he was loath to say any thing that looks like a reflection upon his majesty's privy-council; but if the council can wrong one of their own number, he thought he might demand, if he had not met with hard measure? For first he was pressed, and persuaded to come to the council; then they receive his explanation, and take his oath, then they complain of him to his majesty, where he had no access to be heard; and by their letter, under their hands affirm, that they had been careful not to suffer any to take the Test with their own explanations, albeit that they had allowed a thing very like it, first to earl Queensberry, then to the clergy: And the president, now chancellor, had permitted several members of the college of justice to premise, when they swear the Test, some one sense, and some another, and some nonsense, as one saying he took it *in sano sensu*; another making a speech that no man understood; a third, all the time of the reading, repeating, 'Lord have mercy upon me miserable sinner!' Nay, even an advocate, after being debarred a few days, because albeit no clerk, yet he would not take it without the benefit of his clergy, viz. the council's explanation, was yet thereafter admitted without the warrant of the council's act: but all this in the case of so many other was right and good.

Further the council expressly declare the earl to be guilty, before he had ever said one word in his own defence. Thereafter some of them become his assizers, and others of them witnesses against him; and after all, they do of new concern themselves, by a second letter to his majesty (wherein they assert, that after full debate, and clear probation, he was found guilty of treason, &c.) to have a sentence past against him, and that of so high a nature, and so dreadful a consequence, as suffers no person to be unconcerned, far less their lordships his judges, who upon grounds equally just, and, which is more, already predetermined by themselves, may soon meet with the same measure, not only as concealers of treason, but upon the least pretended disobedience or non-compliance with any act of parliament: and, after all, must infallibly render an account to God Almighty. He bids them therefore lay their hands to their hearts, and whatever they shall judge, he is assured that God knows, and he hopes all unbiassed men in the world will, or may know, he is neither guilty of treason, nor any of the crimes libelled. He says he is glad how many out-do him in asserting the true Protestant religion, and their loyalty to his majesty; only, he adds, if he could justify himself to God, as he can to his majesty, he is sure he might account himself the happiest man alive. But yet, seeing he hath a better hope in the mercy of God through Jesus Christ, he thereupon rests whether he finds justice here on earth, or not. He says, he will add nothing to move them either to tenderness or pity: he knows that not to be the place, and pretends to neither from them; He pleads his innocence, and craves justice, leaving it to their lordships to consider not so much his particular case, as what a preparative it may be made, and what may be its consequences: And if all he hath said, do neither convince, nor persuade them to alter their judgment, yet he desires them to consider, whether the case do not, at least, deserve to be more fully represented, and left to his majesty's wisdom and justice, seeing that if the matter pass upon record for treason, it is undoubted, that hundreds of the best, and who think themselves most innocent, may, by the same methods, fall under the like condemnation, whenever the king's advocate shall be thereto prompted.

And thus you have a part of what the earl intended to have said, before pronouncing sentence, if he had not made his escape before the day: yet some things I perceive by his notes are said in his own breast, as only proper to be said to his majesty. I find several quotations out of the advocate's printed books, that, it seems, he was to make some use of: but, seeing it would have been too great an interruption to have applied them to the places designed, I have subjoined them together, leaving them to the advocate's own, and all men's consideration.

It was by some remarked, that when the lords of justiciary, after the ending of the first day's debate, resolved that same night to give judgment upon it, they sent for the lord Nairn one of their number, an old and infirm man, who being also a lord of the session, is so decayed through age, that he hath not for a considerable time, been allowed to take his turn, in the outer-house (as they call it) where they judge lesser causes alone: but notwithstanding both his age, and infirmity, and that he was gone to bed, he was raised and brought to the court, to consider a debate, a great deal whereof he had not heard, in full court; and withal, as is informed, while the clerk was reading some of it fell of new asleep.

It was also remarked, that the lords of justiciary being, in all, five, viz. the lord Nairn above mentioned, with the lords Collintoun, Newtoun, Hirkhouse, and Forret, the libel was found relevant only by the odds of three to two, viz. the lord Nairn aforesaid, the lord Newtoun, since made president of the session, and the lord Forret, both well enough known, against the lord Collintoun, a very ingenious gentleman, and a true old cavalier, and the lord Hirkhouse, a learned and upright judge: as for the lord justice general, who was also present, and presided, his vote, according to the constitution of the court, was not asked.

But to return to my Narrative, the earl, as I have already told you, did not think fit, for reasons that you shall hear, to stay till his majesty's return came to the council's last letter, but, taking his opportunity, made his escape out of the castle of Edinburgh, upon Tuesday the 20th of December, about eight at night, and, in a day or two after, came his majesty's Answer here subjoined.

The King's ANSWER to the Council's LETTER.

C. R. *December* 18, 1681.

'Most dearly, &c. having this day received 'your letter of the 11th instant, giving an ac'count that our advocate having been ordered 'by you to insist in that process raised at our 'instance against the Earl of Argyle, he was, 'after full debate and clear probation, found 'guilty of treason, and leasing-making, be'twixt us, our parliament, and our people, and 'the reproaching our laws, and acts of parlia'ment: we have now thought fit, notwith'standing of what was ordered by us in our 'letter to you of the 15th of November last, 'hereby to authorize you to grant a warrant to 'our justice general, and the remanent judges 'of our justice court, for proceeding to pro'nounce a sentence, upon the verdict of the 'jury, against the said earl; nevertheless, it is 'our express pleasure, and we do hereby re'quire you, to take care, that all execution of 'the sentence be stopped, until we shall think 'fit to declare our further pleasure in this affair: 'for doing whereof, &c.'

Which Answer being read in council on the Thursday, and the court of justiciary, accor-

ding to it's last adjournment, being to meet upon the Friday, after a little hesitation in council, whether the court of justiciary could proceed to the sentence of forfaulture against the earl, he being absent, it was resolved in the affirmative; and what were the grounds urged, either of hesitation or resolution, I cannot precisely say, there being nothing on record that I can learn. But that you may have a full and satisfying account, I shall briefly tell you what was ordinarily discoursed, a part whereof I also find in a petition given in by the countess of Argyle to the lords of justiciary, before pronouncing sentence, but without any Answer or effect. It was commonly said, that by the old law, and custom, the court of justiciary could no more in the case of treason than of any other crime proceed further against a person not compearing, and absent, than to declare him out-law and fugitive: and that, albeit it be singular, in the case of treason, that the trial may go on, even to a final sentence, though the party be absent, yet such trials were only proper to, and always reserved for parliaments: and that so it had been constantly observed until after the rebellion in the year 1666: but there being several persons notourly engaged in that rebellion, who had escaped, and thereby withdrawn themselves from justice, it was thought, that the want of a parliament, for the time, ought not to afford them any immunity; and therefore it was resolved by the council, with advice of the lords of session, that the court of justiciary should be summoned, and to proceed to trial, and sentence, against these absents, whether they compeared or not, and so it was done: only because the thing was new, and indeed an innovation of the old custom, to make all sure, in the first parliament held thereafter, in the year 1669, it was thought fit to confirm these proceedings of the justiciary in that point, and also to make a perpetual statute, that, in case of open rebellion, and rising in arms against the king and government, the treason, in all time coming, might, by an order from his majesty's council, be tried, and the actors proceeded against by the lords of justiciary, even to final sentence, whether the traitors compeared or not. This being then the present law and custom, it is apparent in the first place, that the earl's case, not being that of an open rebellion, and rising in arms, is not at all comprehended in the act of parliament, so that it is without question that if in the beginning he had not entered himself prisoner, but absented himself, the lords of justiciary could not have gone further, than, upon a citation, to have declared him fugitive. But others said, that the earl having both entered himself prisoner, and compeared, and after debate having been found guilty, before he made his escape, the case was much altered. And whether the court could, notwithstanding of the earl's intervening escape, yet go on to sentence, was still debatable; for it was alledged for the affirmative, that seeing the earl had twice compeared, and that, after debate, the court had given judgment, and the assize returned their verdict, so that nothing remained but the pronouncing of sentence, it was absurd to think that it should be in the power of the party, thus accused, and found guilty, by his escape to frustrate justice, and withdraw himself from the punishment he deserved. But on the other hand it was pleaded for the earl; that first, it was a fundamental rule, that until once the cause were concluded, no sentence could be pronounced: next that it was a sure maxim in law, that in criminal actions there neither is nor can be any other conclusion of the cause than the party's presence and silence; so that, after all that had past, the earl had still freedom to add what he thought fit in his own defence, before pronouncing sentence, and therefore the lord of justiciary could no more proceed to sentence against him being escaped, than if he had been absent from the beginning, the cause being in both cases equally not concluded, and the principle of law uniformly the same, viz. that in criminals (except in cases excepted) no final sentence can be given in absence: for, as the law, in case of absence from the beginning, doth hold that just temper as neither to suffer the contumacious to go altogether unpunished, nor, on the other hand, finally to condemn a party unheard. And therefore doth only declare him fugitive, and there stops: so in the case of an escape, before sentence, where it cannot be said the party was fully heard, and the cause concluded, the law doth not distinguish, nor can the parity of reason be refused. Admitting then that the cause was so far advanced, against the earl, that he was found guilty; yet, 1. This is but a declaring of what the law doth as plainly presume against the party absent from the beginning, and consequently, of itself, can operate no further. 2dly, The finding of a party guilty is no conclusion of the cause. And, 3dly, as it was never seen nor heard that a party was condemned in absence (except in excepted cases) whereof the earl's is none, so he having escaped and the cause remaining thereby unconcluded, the general rule did still hold, and no sentence could be given against him.

It was also remembered, that the diets and days of the justice court are *peremptour;* and that in that case, even in civil, far more in criminal courts and causes, a citation to hear sentence is constantly required: Which induced some to think, that at least the earl should have been lawfully cited to hear sentence before it could be pronounced. But it is like this course, as confessing a difficulty, and occasioning too long a delay, was therefore not made use of. However, upon the whole, it was the general opinion, that seeing the denouncing the earl fugitive would have wrought much more in law than all that was commonly said, at first, to be designed against him: And that his case did appear every way so favourable, that impartial men still wondered how it came to be at all questioned, it had been better to have sisted the process, with his escape, and

taken the ordinary course of law, without making any more stretches.

But, as I have told you, when the Friday came, the lords of justiciary, without any respect, or answer given to the petition abovementioned, given in by the countess of Argyle to the court for a stop, pronounced sentence, first in the court, and then caused publish the same, with all solemnity, at the Mercat Cross of Edinburgh.

"For as much as it is found by an assize that 'Archibald earl of Argyle is guilty and culpable of the crimes of Treason, Leasing-making, and Leasing-telling, for which he was detained within the castle of Edinburgh, out of which he has now since the said verdict made his escape: Therefore the lords commissioners of justiciary discern and adjudge the said Archibald earl of Argyle to be execute to the death, demained as a traitor, and to underlie the pains of treason, and other punishments appointed by the laws of this kingdom, when he shall be apprehended, at such a time and place, and in such manner as his majesty in his royal pleasure shall think fit to declare and appoint: And his name, memory, and honours, to be extinct: And his arms to be riven forth, and delete out of the Books of Arms, swa that his posterity may never have place nor be able hereafter to bruick or joyse any honour, offices, titles, or dignities, within this realm in time coming and to have forfaulted, amitted, and tint, all and sundry his lands, tenements, annualrents, offices, titles, dignities, tacks, steedings, rowmes, possessions, goods, and geere whatsomever pertaining to him, to our sovereign lord, to remain perpetually with his highness in property. Which was pronounced for doom, 23 Dec. 1681.'

After the reading and publishing whereof, the earl's coat of arms, by order of the court, was also torn and reversed, both in the court and at the Mercat-cross: Albeit some thought that this was rather a part of the execution, which his majesty's letter discharges, than a necessary solemnity, in the publication; and the advocate himself, says, p. 61, of his Printed Criminals, that it should only be practised in the crime of perduellion, but not in other treasons.

The Reasons and Motives of the Earl's Escape, with the Conclusion of the whole Narrative.

The earl's escape was at first a great surprise, both to his friends and unfriends: for, as it is known that his process, in the beginning, did appear, to the less concerned, more like a piece of pageantry, than any reality; and even by the more concerned was accounted but a politic design, to take away his offices, and lessen his power and interest: So neither did any of his friends fear any greater hazard, nor did most of his unfriends imagine them to be more apprehensive. Whereby it fell out, that upon the report of his escape, many, and some of his well wishers, thought he had too lightly abandoned a fair estate, and the probable expectation he might have had of his majesty's favour: As also some, that were judged his greatest adversaries, did appear very angry, as if the earl had taken that course, on purpose to load them with the odium of a design against his life. And truly, I am apt to think, it was not only hard and uneasy for others to believe, that a person of the earl's quality, and character, should upon so slender a pretence, be destroyed, both as to life, and fortune, but also that he himself was slow enough to receive the impressions necessary to ripen his resolution; and that if a few accidents, as he says himself, happening a little before his escape, had not as it were opened his eyes, and brought back, and presented to him several things past, in a new light. and so made all to operate to his final determination, he had stayed it out to the last.

Which that you may the better understand, you may here consider the several particulars, that, together with what he himself hath since told some friends, apparently occurred to him in these his second thoughts, in their following order.

And first you have heard, in the beginning of this narrative, what was the first occasion of the earl's declining in his highness's favour: You may also remember, that his majesty's advocate takes notice, that he debated against the act enjoining the Test, in the parliament. And, as I have told you, he was indeed the person that spoke against excepting the king's brothers, and sons, from the oath then intended for securing the protestant religion, and the subject's loyalty, not thinking it fit to compliment with a privilege where all possible caution appears rather to be necessary: And this a reverend bishop told the earl afterwards had downright fired the kiln. What thereafter happened in parliament, and how the earl was always ready to have laid all his offices at his majesty's feet: And how he was content, in council, to be held a refuser of the Test, and thereby incur an entire deprivation of all public trust, is above fully declared; and only here remembered, to shew what reason the earl had, from his first coming to Edinburgh, in the end of October, to think that something else was intended against him than the simple divesting him of his employments and jurisdictions. And yet such was his assurance of his innocence, that when ordered by the council to enter his person in prison under the pain of treason, he entered freely, in an hackney coach, without either hesitation or noise, as you have heard.

2ndly. The same day of the earl's commitment, the council met, and wrote (as I have told you) their letter to his majesty, above set down, Num. 22. Wherein they expressly charge him with reproaching, and depraving; but yet neither with perjury nor treason; and a few days after, the earl wrote a letter to his highness; wherein he did endeavour to remove

his offence, in terms that, it was said, at first had given satisfaction: But yet the only return the earl had, was a criminal summons containing an indictment, and that before any answer was come from his majesty. And then, so soon as his majesty's answer came, there was a new summons sent him, with a new indictment, adding the crimes of treason and perjury to those of reproaching and depraving, which were in the first libel, as you have heard above; whereby you may perceive, how early the design against the earl began to grow, and how easily it took increase, from the least encouragement.

3rdly. When the earl petitioned the council for advocates to plead for him: Albeit he petitioned twice, and upon clear acts of parliament, yet he had no better answer than what you have above set down. And when the earl's petition, naming sir George Lockhart as his ordinary advocate, was read in council, his highness openly threatened, that in case sir George should undertake for the earl, he should never more plead for the king, nor him. But the earl taking instruments upon sir George's refusal, and giving out, that he would not answer a word at the bar, seeing the benefit of lawyers, according to law, was denied him; sir George, and other lawyers, were allowed to assist him, but still with a grudge. Likewise afterwards, they were questioned and convened before the council, for having, at the earl's desire, signed their positive opinion of the case. At which time it was also said in council by his highness, that their fault was greater than the earl's: However, we see that as he was the occasion of the anger, so he hath only found the smart of it.

4thly. The whole process, with the judgment of the lords of justiciary, and verdict of the assize, whereby the earl was found guilty, as you have seen (notwithstanding of what hath so plainly appeared, and was so strongly pleaded in his behalf) of leasing-making depraving, and treason, is of itself a clear demonstration, that either the highest punishment was intended for so high a guilt; or that, at least, it was no small humiliation that some designed for him: It being equally against reason, and prudence, setting aside the interest of justice, to strain things of this nature beyond the ends truly proposed, and which, in effect, are only the more to be suspected, the more they are concealed.

5thly. The process being carried on to the verdict of the assize, and the council being tied up by his majesty's letter, before pronouncing sentence, to send a particular account to his majesty of what the earl should be found guilty of, for his majesty's full information: The council doth indeed dispatch away a new letter immediately, for his majesty's leave to proceed; but instead of that particular account required by his majesty, for his full information, all the information was ever heard of to be sent by the council, was what is contained in the body of the letter, wherein they briefly, but positively, affirm, That after a full debate, and clear probation, he was found guilty of treason. Which, all men must say, was far better contrived to prompt his majesty to a speedy allowance, than to give him that particular information of the case which his majesty's letter expressly requires, and the earl expected should have been performed.

But further, the council was commanded to sign this letter, not simply in the ordinary form, but by a special command laid on every member, and the clerk appointed to go about and get their subscriptions, telling them they were commanded; and complaining to the duke when any scrupled to do it. The strictness of which orders is apparent enough from the very subscriptions, where you may not only read the names of bishops subscribing *in causa sanguinis*, but some of the earl's friends and relations who wanted courage to refuse; and, in effect, how many of all the members did it willingly, is hard to say, seeing generally they excuse the deed in private.

6thly. About a week or two before the trial, the earl had notice, that at a close juncto, where were persons of the greatest eminency, it was remembered by one present, how that anno 1663, the earl had been pardoned by his majesty, after he had been found guilty by the earl of Middleton and that parliament. And that then it was looked on as an error in the earl of Middleton, that he had not proceeded to execution, albeit his majesty had given command to the contrary, because (as it was said) it would have been but the same thing to him. But now, adds this kind remembrancer, the case is much more easy: now his royal highness is on the throne: it might have cost earl Middleton a frown, but now it can signify nothing, but will rather be commended in his royal highness, as acting freely like himself. The stop of the sentence looks like a distrust; but this will vindicate all, and secure all. And as the first part of the story the earl remembered well he had heard it from the same person, An. 1664, and had reported it to the duke of Lauderdale a little after; so the second part being of a very well known dialect, could not but give the earl the deeper impressions. It was further told the earl, at the same time when the council's letter to obtain his majesty's assent to the pronouncing sentence, and leaving all to discretion, was sent, that it was thought fit that nothing should appear but fair weather till the very close. Yet was the earl so confident of his own innocence, and his majesty's justice, that he did not doubt but his majesty, seeing the process, would at least put a stop to the sentence. But after the council's letter was gone, in such terms as you have seen, to seek liberty from his majesty to proceed to sentence (without either double, or abbreviate of the process sent with it) and no doubt smooth insinuations made with it, that all designed was to humble the earl, or clip his wings: and that this letter was hasted away by a fleeing pac-

quet, to prevent the earl's application, which it could not but do; and so could not but have weight, and prevail with his majesty, (to whom the earl's petition, as coming too late, was indeed never presented) then, and not till then, the earl began to have new thoughts.

7thly. The earl's trial having been upon Monday and Tuesday, the 12th and 13th of December; upon the 14th, the council's letter was dispatched; and upon the 15th, the earl intreated, by a friend, for liberty to speak to his royal highness; whose answer, was, that it was not ordinary to speak to criminals, except with rogues on some Plot, where discoveries might be expected: yet his highness said, he would advise upon it. But, upon Friday the 16th, he did refuse it. Yet the earl did renew his suit, and urged, That he had sent a petition to his majesty, which was the first he had sent upon that occasion, and that, before the return should come, he was desirous to have his highness's answer, that he might owe some part of the favour he expected, to his highness.

But on Monday morning, the 19th, the earl was told, he was not like to have any access; and in the afternoon, he heard that the return of the council's express was looked for, on Thursday the 22nd, being the council day. And further that the justice court (which according to its custom had sat the same Monday, and, in course, should have adjourned till Monday the 26th of December, or, because of Christmas, to the first Monday of January) was, for the earl's sake, adjourned till Friday the 23rd, to the end, that immediately upon the king's return, they might pronounce sentence. He was moreover informed, that his royal highness was heard say, That if the express returned not timously, he would take upon himself what was to be done. Which being general, and dark, was the more to be suspected. All this, the earl told, made him the same Monday late, cast in his thoughts whether it were not fit for him to attempt an escape; but his doubtings were so many he could resolve nothing, that night, except to put off till Wednesday. Yet on Tuesday morning he began to think, if he did at all design to escape, he had best do it that same evening. However he was, even then, not fully resolved, nor had he as yet spoke one word of it to any mortal. But about 10 o'clock this Tuesday, his highness's absolute refusal to suffer the earl to see him, until his majesty's return came, was confirmed: and about noon the earl heard that some troops, and a regiment of foot were come to town; and that the next day he was to be brought down from the castle to the common jail (from which criminals are ordinarily carried to execution) and then he resolved to make his escape that very night, and yet did not conclude it thoroughly till five o'clock in the evening: at which time he gave directions about it, not thinking to essay it, till near ten: but at seven, one coming up from the city, and telling him that new orders were privately given for further securing of him; that the Castle guards were doubled, and none suffered to go out without showing their faces, and that some ladies had been already put to do it, and therefore dissuading him to attempt any escape, because it was impossible: the earl said No, then it is full time. And so he made haste, and within half an hour after, by God's blessing, got safe out, questioned pretty warmly by the first centry, but not at all by the main-guard; and then, after the great gate was opened, and the lower guard drawn out double, to make a lane for his company, one of the guard who opened the gate, took him by the arm, and viewed him; but it pleased God he was not discerned. When he was out, he was not fully resolved whether to go. Home he had judged safest; but he thought it might breed mistakes and trouble that he designed not: so he resolved to go for England, and to take the road, that by post he might be his majesty's first informer of his escape. But being disappointed of horses that he expected, he found that the notice of his escape was got before him; and soon after as he came the length of Newcastle, heard that his majesty had given way to pronounce sentence against him, according as he had apprehended from the circumstances and other grounds I have told you; which made him judge, it would be an undiscreet presumption, in that state, to offer himself to his majesty, while he knew none durst address him, and so he rather chused to shift in the wide world, till his majesty might be at some greater freedom both to understand his case, and apply suitable remedies. His majesty's clear and excellent understanding, and gracious and benign disposition, do fully assure him, that his majesty doth not in his thoughts, charge him with the least disloyalty, and that he hath no complacence in his ruin. But if his majesty do, at present, lie under the pressure of some unlucky influences, not so easy to his royal inclinations, the earl, it seems, thinks it reasonable to wait patiently for a better opportunity. It may indeed appear strange, that innocence and honour oppressed in his person, almost beyond a parallel, should not, ere now, have constrained him to some public vindication; especially when to the horrid sentence given against him, his adversaries have further prevailed to cause his majesty dispose, not only of his heritable offices and jurisdictions (the pretended eye-sore); but also upon his whole estate and fortune, with as little consideration of the earl's personal interest, as if he had fallen for the blackest treason, and most atrocious Perduellion. But, besides that some things are of themselves so absurdly wicked, that all palliating pretences do only render them the more hateful; and the very simple hearing doth strike with an horror, not to be heightened by any representation: next that the earl, being so astonishingly overtaken for words, as fairly and honestly uttered as he could possibly devise, doth, with reason, ap-

prehend that there is nothing he can say in this matter, though with the serenest mind and in the greatest truth and sobriety, that may not be construed to flow from a design to lay blame where hitherto he hath been tender to give any ground of offence. I say (besides these things) he is withal (I know) most firmly persuaded, that, if ever he shall have the happiness to be once heard by his majesty, and in his presence allowed to explain a few particulars, in duty here omitted, his majesty's justice and goodness will quickly dispel all the clouds that now hang over him, and restore him to that favour wherein he hath sometime reckoned himself very happy, and which he will ever be most ready to acknowledge. And therefore all that in the mean time he judged necessary, or would give way to, was that for preserving the remembrance of so odd a transaction, until a more seasonable juncture, some memorials should be drawn, and deposited in sure keeping; which being grown under my hand unto this narrative, I thought I could not better observe his order, than by transmitting it to your faithful custody. I have carefully therein observed the truth, in point of fact, avouching nothing but upon the best and clearest evidence can possibly be expected; nor have I, as to the manner, licenced or indulged myself in any severity of expression, which, I thought, could be justly, in such a case, omitted, without betraying the cause. Yet if you now, or any other hereafter, shall judge, that I do sometime exceed, let it not be imputed to him; for as he did indeed charge me to guard against any more warm or vehement expression, than the merit and exigence of the subject do indispensibly require; so I am assured that he silently and patiently waits on the Lord, committing his way to him, and trusting in him, that he may bring it to pass; and that He shall bring forth his righteousness as the light, and his judgment as the noon-day."

The following extract from an intercepted letter of the duke of York's to one of his friends, is published in sir John Dalrymple's Memoirs, Appendix to Part I. as strongly marking what Dalrymple calls the apathy of the character of the duke of York:

"EDINBURGH, *Dec.* 13, 1681.

"Lord Argyle's trial began yesterday, and their forms in the justice court are so tedious, that they could not make an end of it then, but will, as I believe, this evening: and have reason to believe the jury will find the bill, and not Ignoramus; and that little lord will be once again at his majesty's mercy."

285. Proceedings before the KING in Council, against ARTHUR Earl of ANGLESEY,* Lord Privy Seal, upon account of a Book reflecting on the Conduct of James Duke of Ormond, Lord Lieutenant of Ireland: 34 CHARLES II. A. D. 1682.

To the King's Most Excellent Majesty.

The Duke of Ormond, your Majesty's Lieutenant of Ireland, and Steward of your Majesty's Houshold, most humbly represents:

THAT the earl of Anglesey, lord privy seal, in the year 1681, caused a book to be printed (whereof he hath acknowledged himself to be the author) intituled 'A Letter from a person 'of honour in the country, written to the earl 'of Castlehaven, being Observations and Re'flections upon his lordship's Memoirs concern'ing the wars of Ireland.'

That in the said book there are divers passages and expressions which are not only untrue, but reflecting in a high degree upon his late majesty's government, and particularly in

* From a pamphlet (which has been collated with the Register of the Privy Council) published, as it is said, by lord Anglesey, under the title of "A true Account of the whole "Proceedings betwixt his Grace James duke "Ormond, and the Right Hon. Arthur earl of "Anglesey, late Lord Privy-Seal, before the "King and Council, and the said Earl's Let"ter of the 2nd of August to his Majesty on "that occasion. With a Letter of the now "Lord Bishop of Winchester's to the said "Earl, of the means to keep out Popery, and "the only effectual expedient to hinder the "growth thereof, and to secure both the "Church of England and the Presbyterian "party. London: Printed for Thomas Fox, "at the Angel and Star, in Westminster-hall, "1682:" and containing the following Address to the Reader:

"That there hath been a Controversy between the duke of Ormond and the earl of Anglesey, the immediate consequence of which hath been the removal of the earl from a place of great honour and trust under his majesty, for which he was in every respect extraordinarily well qualified, perhaps no man questions. And many may be likely to say, that the more fatal such quarrels amongst great personages are to either side, the more instructive they commonly prove to the rest of mankind, who are thereby let into a prospect of those things which were thought too sacred for the view of the prophane vulgar.

"As every inferior soldier may learn skill

relation to the rebellion and war in Ireland, and to the several cessations and peaces made by his, and your majesty's authority and command.

That in the said book the lord privy seal hath maliciously endeavoured to calumniate and asperse the duke of Ormond, by calling in question his faithfulness and loyalty to his late majesty, the sincerity of his profession in point of religion, and insinuating that the cessations and peaces (destructive as he says to the English and Protestants) were advised and procured by him the said duke, out of his affection to the Irish popish rebels, because he was allied to many of them in blood and by marriages.

That the lord privy seal, in the course of above twenty years free and friendly acquaintance and correspondence with the duke of Ormond, never thought fit to give him any intimation of his lordship's intention to write a history of the wars of Ireland, and other transactions there, wherein both the duke, and his lordship (though of opposite parties) had a great part, but chose rather to seek for information from the earl of Castlehaven, and to publish his "Observations on the Earl of Castlehaven's Memoirs," in a conjuncture when his reflections in his book and his Letter * of the 7th of December, 1681, to the duke of Ormond, might not only do most mischief to him, but to the govern-

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and address, by seeing two generals engage in the sight of their armies, so certainly this paper battle between these great ones may be of use to all sorts of men that have the least grain of that commendable ambition, to propound to themselves the greatest examples. Wherefore I conceive no man, of which side soever fortune or choice hath placed him, can blame me for procuring and exposing to public view authentic transcripts of what hath passed in this affair.

"The bare curiosity to know how such men write, were almost enough to tempt any one to peruse these papers, but then when they relate to the history of unmovable affairs, of which either of the parties may say,

'Quorum pars magna fui.'

"And when they were so great men in themselves, and their parts in the history so great that they may be compared to Cæsar writing the Commentaries of his own enterprises; I should think him very dull that need be courted to be a reader.

"But these papers carry in them what I hope will further recommend and endear them to the greater part of this nation; most of them being in defence of the poor English Protestants in Ireland, to some of which the earl of Anglesey hath most generously asserted the glory of their martyrdom, and to others, the unblemished honour of preventing the utter ruin and extirpation of the rest.

"The earl of Castlehaven, who had been too fortunate an head to the Roman Catholic rebels in Ireland, had not only in print [E. Castlehaven's Memoirs, p. 12] justified his own engagement with that bloody party, but would make that chiefly a defensive war, which was certainly the effect of an universal conspiracy amongst the papists there. Nor is it to be doubted but there were encouragers in England. This engaged the earl of Anglesey, amidst his many avocations, to ward off the second blow against them who had suffered almost beyond all example before: and his interposition extracted from the earl of Castlehaven a Confession, [Pref. to the Memoirs], that he himself acted as a rebel, and that all the water in the sea cannot wash that rebellion off that nation, which was begun most bloodily on the English in that kingdom in a time of a settled peace, without the least occasion given.

"I must confess there are several passages in the letter to the earl of Castlehaven, wherein the duke of Ormond seems concerned to vindicate his own actions. How far the charge or the defence is made good, it is not for me to judge: nor shall I in the least enter into the merits of it.

"I am sure the earl of Anglesey made a most noble declaration, fit to be written in letters of gold; 'Truth,' says he, 'being the greatest and best friend, I had rather one or several persons and families should lie under the consequence of its impartiality, than that the English nation and Protestant religion should suffer by a timorous unworthy concealing or withholding any part of it.'

"This being the said earl's avowed principle, methinks he ought to be importuned by a public Address, that what he hath meditated and hath been 'preparing from records and authentic unquestionable relations and transactions of that bloody tragedy and matchless defection from the crown and very nation of Englishmen,' may soon see the light."

* The following Letters had passed between the duke of Ormond and the Lord Privy Seal, on the subject of the 'Letter from a Person of Honour,' &c.

"My Lord; *Nov.* 12, 1681.

"It is now, I think, more than a year, since I first saw a little book, written by way of letter, called Observations and Reflections, on my lord of Castlehaven's Memoirs: wherein, though there are some things that might lead the reader to believe that your lordship was the author, yet there were many more I thought impossible should come from you; for it affirms many matters of fact positively, which are easily and authentically to be disproved; and from those matters of fact, grossly mistaken, it deduces consequences, raises inferences, and scatters glances injurious to the memory of the dead, and the honour of some living. Among those, that, by the blessing of God, are yet living, I find myself worst treated. Twenty years after the king's restoration, and forty after the beginning of the Irish Rebellion, as if it had been all that while reserved for me,

ment. The duke of Ormond humbly conceives that at least while the lord privy-seal and he have the honour to be of your majesty's privy council, and in the stations they are, it will not be fit for him to publish such an Answer to the lord privy-seal's book and letter, as might otherwise be necessary in vindication of truth, his late majesty's justice and honor, and his own integrity.

It is therefore most humbly proposed, that your majesty would be pleased to appoint a committee of your privy council to look over

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and for such times as these, we are fallen into, when calumny (though the matter of it be never so groundless and improbable) meets with credulity; and when liberty is taken to asperse men, and represent them to the world, under the monstrous and odious figures of papists, or popishly affected; not because they are so thought, by those that employ the representers, but because they are known to be too good Protestants, and too loyal subjects, to join in the destruction of the crown and church. Besides, the treatise came forth, and must have been written, when I had but newly received repeated assurances of the continuance of your friendship to me; wherein, as in one of your letters you are pleased to say, you had never made a false step; for these reasons, I was not willing to believe that book to be of your lordship's composing, and hoped some of the suborned libellers of the age, had endeavoured to imitate your lordship, and not you them: but I was, in a while after, first, by my son Arran, and afterwards by the bearer, sir Robert Reading, assured your lordship had owned to them that the piece was your's, but professed the publication to be without your order; and that you did not intend to do, or think that you had done, me any injury, or prejudice: if your lordship really thought so, the publication might have been owned, as well as what was published; but then let the world judge, whether pen, ink, and paper, are not dangerous tools in your hands? When I was thus assured your lordship was the author, it cost me some thoughts how to vindicate truth, my master the late king, myself, my actions, and family, all reflected on, and traduced by that pamphlet: I found myself engaged in the service of our present king, and that in a time of difficulty and danger, and in such times, for the most part, it has been my lot to be employed in public affairs; and though I had not been so taken up, yet I well knew that writing upon such occasions is no more my talent, than it is my delight; and, to say truth, my indisposition to the exercise, might help to persuade me, that the book, though honoured with your lordship's name, would, after it had performed it's office in coffee-houses, and served your lordship's design in that conjuncture, expire, as writings of that nature and force usually do: and herein I rested without troubling myself, or any body else, with animadversions on your lordship's mistakes, which are so many, and so obvious, that I wonder how you could fall into them. I will add to this, that I have been in expectation, that by this time your Complete History would have come forth; wherein, if I may judge by the pattern, I have just cause to suspect, that neither the subject, or myself, will be more justly dealt with, than in that occasional essay; and, I would have been glad to have seen all my work before me, in case I should think fit to make a work of it. The delay of your publishing that History, and the consideration of your lordship's age, and mine, are the occasions of this letter; whereby, I inform you, that as no man now alive is better able than I am, to give an account of the principal transactions during the rebellion in Ireland; so no man is possessed of more authentic commissions, instruments, and papers, all which, or transcripts of them, you might have commanded before you set forth your reflections. But, possibly, to have stayed for them, might have lost you a seasonable opportunity of publishing your abhorrence of the Irish rebellion, and your zeal against popery: what your lordship might then have had, you may yet have, because I had rather help to prevent than detect errors; but then, I must first know to what particular part of your history you desire information, and how you deliver those parts to the world, and to posterity. If after this offer, your lordship shall proceed to the conclusion, and publication of your history, and not accept of it, I must, before-hand, appeal from you, as from an incompetent judge of my actions, and a partially engaged and unfaithful historian."

"ORMOND."

The Earl of Anglesey's ANSWER was as follows:

"My Lord,

"Your grace's of the 12th of November, I received towards the end of that month, and was not a little surprized, after being threatened above a year, with your grace's Answer, to the Observations and Reflections on my lord Castlehaven's Memoirs, which your grace takes notice you had seen above a year before, to find them only most satirically burlesqued, and my intentions in the writing of them, most unnaturally misinterpreted, and misjudged, without giving instance of any one particular, which could so much transport your grace, or interest you to judge of a letter of a mine to another, with so invective heat and mistake. Your grace's letter, therefore, consisting only of generals, I can no otherwise adapt my answer, (after a most serious revision of my book upon this occasion) but by giving the reverse of your grace's strained and erroneous affirmatives, by my plain and true negatives; till your grace shall administer occasion, by communicating the particular animadversions, your grace hath been so long (as I hear) about. The reasons leading your grace to believe it impossible I could be the author of that discourse, I

the lord privy-seal's book and to call his lordship and the duke of Ormond before them, and if upon report from them, it shall appear to your majesty that the earl of Anglesey, has fallen into the mistakes and errors herein laid to his charge, that then your majesty would be pleased to consider of the best and most authentic means how reparation may be made to all that are in-

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cannot admit, though they import a fair opinion of me; and that in the beginning of your letter, your grace had better thoughts than when your hand was in and heated. I do therefore absolutely deny, that I affirm any matter of fact, positively in that book, which are easily, or authentically (or at all) to be disproved. Or that, from those matters of fact, grossly mistaken, it deduces consequences, raises inferences, and scatters glances injurious to the memory of the dead, and the honour of some living; among which, your grace finds yourself worst treated. This being so, your grace's unjust inferences from the time of it's writing, and the misjudging the design of the author, give no countenance, or occasion, to your grace's rhetorical character of the times, though I join in all, but the opinion your grace seems to have taken up, that there is a plot (other than that of the papists) to destroy the crown and church; a discovery worthy the making, if your grace knows and believes what you write; but how I am concerned to have it mentioned to me, I know not, your grace can best tell what you intend to insinuate thereby. These are your grace's reasons, why you were not willing to believe that book of my composing; yet you cannot leave me without a sting, in your expressing the hopes which succeeded them, viz. That some of the suborned libellers of the age, had endeavoured to imitate me, and not I them. Whether I should imitate suborned libellers, or they me, would be all one for my reputation; because I were grossly criminal in the first, and must have been so before in your grace's opinion, or they could not imitate me in the second: your grace will want instances in both, except this of your own making; and therefore, there must be some other reason why your grace did not believe (if really you did not) that discourse to be of my composure. But this admitted for truth, (as it is undoubtedly) your grace, in the next place, calls the world to judge, whether pen, ink, and paper, are not dangerous tools in my hands. I remember the times, when they were serviceable to the king's restoration, and constant service of the crown, or craved in aid by your grace, that you did not account them so: and it is much to my safety, that they are not so in your grace's hands, though I find them as sharp there, as in any man's alive. Your grace being at length assured I was the author, your next care was to spend some thoughts to vindicate truth, the late king, yourself, your actions, and family, all reflected upon and traduced (as your grace is pleased to fancy) by that pamphlet. But your grace had no cause to trouble your thoughts with such vindications, unless you could shew, where in that book they are reflected upon and traduced, no such thing occurring to me, (upon the strictest revisal) nor ever shall be objected to me with justice and truth. After your grace hath brought it to the coffee-houses, (where I believe it never was, till your grace preferred it to that office) and where you have doomed it to expire, as writings, of that nature and force use (you say) to do, (for which I shall not be at all concerned) you rested, without troubling yourself or any body else with animadversions upon my mistakes, which your grace is pleased to say, are so many and so obvious, (though you name none, nor do they occur to others) that you wonder how I could fall into them. If your grace believes yourself in this, you seem to have forgot the long time you spent in considering and animadverting upon that despicable pamphlet, with your labours whereon I was threatened by some of your grace's relations for many months; and your grace hath redeemed the delay, by the virulent general reflections you have now sent me, which yet I doubt not will evaporate or shrink to nothing, when your grace shall seek for instances to back them, whereof if you can find any, I claim in justice they may be sent me. Your grace adds, that you have been in expectation, that by this time my Complete History would have come forth, wherein (if you may judge by the pattern) your grace saith, you have just cause to suspect, that neither the subject, nor yourself, will be more justly dealt with than in that occasional essay; and therefore, offer me all the helps of authentic commissions, transactions, and papers, your grace is possessed of, whereof you inform me none hath more. This is an anticipating jealousy, which no man living can have ground for, and when my History shall be completed, (which is now delayed for those assistances your grace is so well able, and so freely offers to afford me) though my weakness may be exposed, my integrity and impartiality shall appear, and your unjust suspicion will, I doubt not, cease, if truth may be welcome to you, and not accounted one of the dangerous instruments in my hand; by which having incurred your anger and enmity in the first essay, I have slender hopes to be more acceptable in the second; though I resolve to hold to the first approved law of a good and faithful historian, which is, that he should not dare to say any thing that is false; and that he dare not but say any thing that is true; that there be not so much as suspicion of favour or hatred in his writing. And this might give a supersedeas to your grace's unreasonable appeal before a *gravamen*, though I never intended, by relating the truth of things past, to become a judge of your grace's or any other man's actions, but barely *Res gestas narrare*, for the information, correction, and instruction

jured by the earl of Anglesey's book and letter, and to prevent the credit his great place, supposed knowledge (especially in the affairs of Ireland) and his pretended candour and impartiality may give to his writings, in present and future times. ORMOND.

(A true Copy.) JOHN NICHOLAS.

At the Court at Hampton-Court, June 17, 1682.

By the King's most excellent Majesty, and the Lords of his Majesty's most honourable Privy-Council.*

The annexed representation of his grace the duke of Ormond, lord lieutenant of Ireland, &c. being this day presented and read to his majesty in council. His majesty taking the contents thereof into his royal consideration as a matter of very great importance, was pleased

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of this age and posterity. Your grace desiring to know to what particular parts of my History I would have information, I shall at present only mention these. The intrigues of the cessation and commissions for them, and the two peaces of 1646 and 1648, forced upon the king by the rebellious Irish. The grounds and transactions about depriving sir William Parsons from being one of the lords justices, and then dismissing him; sir Adam Loftus, vice-treasurer; sir John Temple, master of the Rolls; sir Robert Meredith, chancellor of the exchequer, &c. from the council table. The mystery of Glamorgan's peace and his punishment, the several ungrateful expulsions of your grace, by the confederate Roman Catholics. The passages concerning the parliament's present of a jewel to your grace. The battles, reliefs, sieges, and chief encounters, in your grace's time. The proceedings between your grace and the Roman Catholic assembly of the clergy of 1666, with the commission for their sitting. The Plot for surprizing the castle of Dublin, in which Warren and others were concerned with the examinations and what offenders were executed, &c. and any thing else your grace judgeth of import, to have conveyed to posterity. Other parts of the History shall be proposed to your grace in my progress, and before I put my last hand to it, with a resolution, that though I may have been sometimes mistaken in judgment, yet as I never did promote the report of a matter of fact, which I knew to be false, so I never would. Which I am induced the rather to mention because your grace saith, you had rather help to prevent than to detect errors."

"ANGLESEY."

It appears that so early as the year 1646, disagreements had subsisted between these two noblemen when in Ireland. In this year, 1682, lord Anglesey had drawn up and presented to the king a very bold, loyal, and patriotic Memorial, intitled, 'The Account of Arthur Earl of Anglesey, Lord Privy-Seal to your most excellent Majesty, of the true State of your Majesty's Government and Kingdoms, April 27, 1682.'—In one part of which he says:

"The fatal cause of all our mischiefs present, or apprehended, and which, if not by wisdom antedated, may raise a fire, which may burn and consume to the very foundations, is the unhappy perversion of the duke of York, (the next heir to the crown) in one point of religion; which naturally raises jealousy of the power, designs, and practices, of the old enemies of our religion and liberties, and undermines and emasculates the courage and constancy, even of those and their posterity, who have been as faithful to, and suffered as much for, the crown, as any the most pleased, or contented in our impending miseries can pretend to have done." And concludes in these words, "Though your majesty is in your own person above the reach of law, and sovereign of all your people, yet the law is your master and instructer how to govern; and your subjects assure themselves, you will never attempt the enervating that law, by which you are king, and which you have not only by frequent declarations, but by a solemn oath upon your throne, been obliged in a most glorious presence of your people to the maintenance of; and that therefore, you will look upon any that shall propose or advise to the contrary, as unfit persons to be near you; and on those who shall persuade you it is lawful, as sordid flatterers, and the worst and most dangerous enemies you and your kingdoms have. What I set before your majesty, I have written freely, and like a sworn faithful counsellor, perhaps not like a wise man, with regard to myself, as they stand; but I have discharged my duty, and shall account it a reward, if your majesty vouchsafe to read, what I durst not but write, and which I beseech God to give a blessing to."

It seems probable that this Memorial gave great offence to the king, and that the duke of Ormond was prevailed upon to exhibit this charge against lord Anglesey, in order to furnish a plausible pretence of justification for his removal from office, which measure it had been previously resolved to take. See the Biographia Britannica, art. Annesley, Arthur. See too, Carte's Life of the duke of Ormond. See likewise in Mr. Hargrave's learned Preface to lord Hale's Treatise on the "Jurisdiction of the Lords' House of Parliament," some particulars respecting lord Anglesey's deep conversancy in the Records and Law of Parliament.

* It appears by the entries, of the presents, in the council books (to which I have had access, through the obliging civility of Mr. Chalmers,) that the duke of Ormond attended as a privy counsellor, at all the boards which were held on this business, and that the lord privy seal attended those which were held on the 13th and 27th days of July.

to declare that he would hear the matter thereof in council. And did order that a copy of the said representation be delivered to the earl of Anglesey, lord privy-seal, and that his lordship do attend his majesty in council on Friday next, at three of the clock in the afternoon at Whitehall, when his majesty hath appointed to take that business into further consideration.

JOHN NICHOLAS.

The earl of Anglesey, lord privy-seal, being by the said Order of his majesty in council, of June 17th, appointed to be at council at White-hall, June 23rd, being not able to stand by reason of the gout, yet got out of his bed, and was carried thither; where when the king came, he spake to his majesty (as I am well informed) to this effect.

"Sir; I am in the first place to beg your majesty's pardon for my obedience to your order for appearing here this day, being in no condition of health to have left my bed, and altogether unfit for the presence of the king.

"And indeed I expected that the duke of Ormond would rather have complained and printed against the earl of Castlehaven his Memoirs; which aspersed and scandalized your royal father's government, and represented the Protestants of Ireland as rebels, and the confederate Irish papists as loyal subjects, than against me, who had vindicated his majesty's government, and his Protestant faithful subjects so effectually in my Letter to the said earl, that his lordship in an Epistle to the Reader which he after added to his Memoirs, confessed himself and the Irish confederates the rebels: 'And that all the water in the sea would not wash that rebellion off that nation.'

"This is the first quarrel I ever had with any man, and your majesty sees how it is brought upon me, and cannot but believe it very unwelcome to me from one who hath so many years professed friendship to me. But that which troubles me in it is, that it is pretended to be upon account of my failing in duty to his late majesty and yourself, whereas if I can pretend to merit any thing, it is for exemplary and considerable faithfulness and service to you both.

"Sir, That I may not trouble you with much discourse, I have reduced the vindication of my innocence to writing, which I present for my answer to the duke of Ormond's accusation; and to which I shall add no more but my desire, That though the duke of Ormond hath thought fit to attack me thus causelessly, all the contention hereafter between him and me may be who shall serve your majesty best, and cost you least."

In the next place all the papers written and printed, that had passed between the duke and the Lord Privy Seal, were read as they lay in order, and both the lords discoursed and bandied the matter fully, which the king heard with great patience: The duke of Ormond notwithstanding doing right to the Lord Privy Seal, as to acknowledge that none had been more active and instrumental in his majesty's happy Restoration, or carried it on with more success in great dangers and difficulties, than his lordship. In conclusion the duke was ordered to charge the Lord Privy Seal by particulars in writing, that he might know what to answer, generals not being sufficient, and so that business was left at that time.

Now follows the Lord Privy Seal's Answer to the duke of Ormond's Representation or Complaint against him.

To the King's most Excellent Majesty.

The Earl of Anglesey, Keeper of your Majesty's Privy Seal, (misled by an ill Precedent admitted) most humbly represents:

That having this 18th day of June, received in bed, (where he had continued for above a month last past, very much afflicted with the gout, and deprived of the use of hands and legs, and by reason of pains and sicknesses getting little rest, which he hath reason to believe was well known to the duke of Ormond;) your majesty's order in council of the 17th, with a copy of the Representation of the said duke annexed, and command to attend your majesty in council on Friday next, at three o'clock in the afternoon at Whitehall, which he resolves by God's blessing to do if he shall be in a capacity of health and strength to be carried thither, without peril of his life; which he doth not believe that the duke himself thinks, after a year and a half concerning himself in this controversy, is to be adventured to gratify a hasty proposal, upon his changing his way of proceeding.

In the mean time, That your majesty may not be under the least prepossession by what the duke hath represented with heat, and sharpness against the said earl, he doth humbly offer to consideration, that though the duke appear before your majesty, as a representer, the said earl cannot but look upon him as a petitioner, the title by which all subjects that complain, address to your majesty, and for want of which he hath observed many suitors rejected with their requests.

And therefore your majesty is desired to be informed in the first place by a deduction, of all that hath passed between the duke and the earl in this affair, which is as followeth:

The Book complained of was written about two years ago by mere accident of the earl of Castlehaven's sending his printed Memiors, to the earl then at Blethington, in Oxfordshire, where having read the same, and conceiving the English, and Protestants to be unjustly dealt with therein, and the Irish foul cause professedly justified, though the most execrable rebellion that ever was in the world; the earl could not digest the same, but upon a bare old memory without help of writings or notes, immediately put pen to paper, and the 8th of July wrote a letter to the said earl of Castlehaven, which he believes his lordship hath yet to shew, though when it appeared afterwards in print, about October 1680, one was sent to his lord-

ship taking notice thereof, and asking him what he had done with the said letter, who then confessed he had lent it to a friend, but he would recover it again. The letter being thus printed, the duke of Ormond had soon sight of it, for in his letter to the earl of Anglesey of November the 12th, 1681, he takes notice that he had seen it a year before, and writes his pleasure of it so satirically, that the said earl returned his answer of the 7th of October following, which the said duke takes notice of in his said representation, though he never before acknowledged the receipt thereof, nor was pleased to make any reply to it, though it gave him sufficient occasion: thus, when the said earl expected a reply, things stood till the same Complaint made to your majesty, which he humbly submits whether it be fit to be received or proceeded upon in council, after so open a litigation thereof in print, wherein the said duke had appealed to the people, and accused the earl with as much acrimony as it was possible for the duke's sharp pen to do, it being as the said earl conceives, below the dignity of your majesty and the board, after the duke has proceeded so far in a private quarrel of his own making, without success, (and that those the duke had appealed to seemed generally satisfied that the earl had fully vindicated himself from the aspersions laid upon him by the duke's said letter) for your majesty to be addressed to so late, and in a cause so concluded; wherein the earl had justified himself in the method the duke himself led him, and is ready to proceed further so to do, if the duke shall please to reply in maintenance of his printed charge.

However the earl not knowing what course in this affair will be pursued, or directed, saith that he doth not disown the Book mentioned in the duke's representation, so far as he hath acknowledged the same in a letter written by him to the said duke.

But denies that in the same book or letter, there are divers, or any passages and expressions which are not only untrue, but reflecting in a high degree upon his late majesty's government, and particularly in relation to the rebellion and war in Ireland, and to the several cessations and peaces made by his, and your majesty's authority and command, which the said earl hath formerly intimated in writing to the said duke in answer to a letter of his insinuating the same thing, and urging for particulars which the said earl could never yet obtain.

The said earl is no further charged with maliciously calumniating and aspersing the said duke, and insinuating several particulars to that purpose, but the passages in the said books of that import are still reserved, and not thought fit by the said duke, to be expressed so as the earl may know what, or how to answer,

And the said earl is not ignorant that malicious calumny or scandal against so great a person as the duke of Ormond, is severely punishable by law.

What to say more herein the said earl knows not, till the duke gives more clear and particular occasion.

Whosoever shall take notice of what the duke asserts of his and the earl's free converse and friendship for above 20 years, and (which the earl adds, and the duke cannot forget) the real and adventurous friendship which the earl hath engaged in with and for the duke, he cannot but wonder as others do, that they are so easily cancelled and turned into rancour and ill returns, without demonstrating a change in the earl, which may satisfy inquiring men the duke hath a cause.

For else it seems wonderful and past belief to intelligent men, that the earl, who professeth that he bears malice to no person living, nor ever had quarrel with any man, that counts it his great misfortune in his old age, when he was preparing to go to his grave in peace and in perfect charity with all men, he should be attacked by one who hath professed friendship to him above these twenty years, and as he finds by letters and otherwise was intimately a friend to his father: as it is miraculous to the same degree, that the earl in his circumstances should willingly be drawn into controversy with so great and fortunate a man, and so ancient a friend as the duke of Ormond.

But since it hath been the duke's pleasure or humour so violently, and so many ways to assault the earl, he must not take it ill that he cannot bear wounds patiently, and without just resentment.

The duke complains further, that in the course of above 20 years free and friendly acquaintance and correspondence with him, the earl never thought fit to give him any intimation of his intent to write a History of the wars of Ireland, and other transactions there.

The said earl cannot recollect with certainty whether he did or no, but he very well remembereth that many years ago he acquainted sir George Lane then the duke's secretary, and now viscount of Lanesborrow (and who told him he had the custody of all the duke's papers and writings of public affairs) with his intended History of Ireland, who promised him the assistance of them, but he could never yet obtain any from him: nor from the duke himself, since he made a free offer and promise of them by his letter of the 12th of November, threatening to appeal from the earl as a partially engaged, and unfaithful historian if he accepted them not, he being as he wrote, more desirous to prevent than rectify errors and mistakes. The earl having this noble encouragement from so great a person, (and who was to make so great a part of it) to proceed in his History, by his letter of the 7th of October, acknowledged and accepted the duke's favour, expecting the performance thereof, but never heard since from the duke till by his representation to your majesty, wherein he seems to forget or retract all that had passed, though the earl had given him all the assurance a man of honour could do, that he would be exactly faithful and impartial in the History, and now shews that he

is unwilling any History should be written by the earl, whose candor and impartiality he will yet allow to be but pretended, and threfore proposeth that your majesty will prevent the credit which they, his great place, and supposed knowledge (especially in the affair of Ireland) may give to his writings in these and future times; never considering that himself hath greater places. Yet the earl doth not apprehend their giving credit to any thing the duke hath or shall write against the truth, which the earl is resolved to tie himself strictly and authentically to if he be suffered to go on, and not discouraged in his design with which he intended to close his labours in this life, for the good of England, and the safety of that poor kingdom of Ireland, harrassed by rebellions and massacres, and which must expect and undergo more (still preparing) unless prevented by wise councils here, upon the warnings that a true account of former times and failings may give us.

And since the earl hath been versed above 40 years in public affairs, without blemish or dishonour, and intends by your majesty's permission, to dedicate his History to yourself, which sure he would not be so weak as to offer if any thing were to be in it of the nature the duke presageth, the earl therefore hopes the duke may at least trust your majesty's wisdom with the publishing of what you shall have the perusal of if you judge it worth your reading before it go to the press, being intended both for the honour of the late king and of your majesty, and not to gratify any private humour or party, or to disguise or cover the errors or miscarriages of any subject whatsoever.

As to the duke's reflection, that the earl chose rather to seek for information from the earl of Castlehaven than from him, the contrary doth appear ever since the earl had any hopes given him of the duke's assistance, with such authentic instruments and writings as may contribute to the History, which the earl cannot but yet expect, and he never desired other informations from the said earl of Castlehaven, than in the military actions wherein the duke employed him as a general, and never thought of making other use of them than as they concurred with, cleared and confirmed the true account the earl was possessed of in those affairs before.

As to the duke's insinuating (where he mentions the war of Ireland and other transactions there, wherein they had both a great part) that they were of opposite parties, since he accounts it serviceable to his design of aggravating to the utmost against the earl, the occasion is willingly embraced to give your majesty a brief and true information of the part the earl had both in Ireland and England, in the late unhappy time.

The earl was (under the authority his late majesty had entrusted both houses of parliament with, for ordering and governing the affairs in Ireland, after the horrid rebellion begun) instrumental there to preserve the British and Protestant interest, countries and garrisons, from being swallowed up by Owen Oneill's barbarous army, or falling into the bloody Irish hands. He also held correspondence with and offered assistance to the then marquis of Ormond, to preserve the English and save the city of Dublin, and other English garrisons and quarters from the treacherous Irish, who broke all faith with the marquis.

He likewise sent to the marquis the late king's majesty's positive prohibition in writing against making any peace, or having at all further dealing with the Irish, and used his most earnest persuasions herein, foreseeing it would be destructive to the English, and mischievous to the late king; and still offered assistance to the marquis to encourage him in vigorous opposing the Irish, and to enable him to disappoint their treachery, and the consequence of their faith-breaking.

The said earl after the peace notwithstanding made with the Irish confederate rebels, and their shameful and treacherous breach of it, with design and endeavour to surprize the marquis and all the English garrisons in Leinster, and after they had so handled their business as to get the commissioners of parliament, (which were arrived at Dublin by the marquisses invitation, to receive the city of Dublin, and all other garrisons and strengths under his command, and secure them against the Irish, for which end they had brought forces, shipping, provisions, and ammunition of all sorts with them) to be rejected and sent away by the marquis.

He upon a second invitation of the marquis to the parliament, (upon the Irish rebels continued breaches and treacheries) went again for Ireland, after he had used all his interest to persuade them to send again, though they were very unwilling, and it was much opposed by reason of the former unexpected disappointment.

And was the chief employed in commission from the parliament with an army of horse and foot, furnished with all things necessary to deliver the marquis and English from the Irish treacheries and designs, and to receive the city of Dublin and other garrisons, into the parliament's custody, who were trusted, and able to preserve the same for the crown, if we could agree upon articles for that purpose, which by the blessing of God the earl did to the marquis and the late lord chancellor Eustace, (whom the marquis chiefly trusted therein) to their great satisfaction, as well as his own and the English and protestants; and after he and the rest of the commissioners had received the city of Dublin and other garrisons and conveyed the marquis with the honour due to his quality, to the sea-side to take shipping for England, as the articles gave leave; and had spent some time to lay the foundations which after happily succeeded, for the total reduction of the Irish, and breaking their cursed confederacy and power for treachery, and final subduing them to the crown of Eng-

land, with the forfeiture of all their estates, for the satisfaction of adventurers and soldiers, and the vast increase of the revenue of the crown.

The earl returned for England as he had leave to do, before he went, where by his interest in parliament he secured to the marquis the 13,000*l.* &c. agreed by the articles for the surrender of Dublin, &c. to be paid him, though much endeavour was used by the lady viscountess Moore and others, upon legal pretences to deprive him of it; so that he lost not one penny of it, and then the said marquis thought and held the said earl his real friend, and a punctual performer of public faith.

In England the Earl's part was as followeth:

To preserve the church in its legal establishment to the last, to defend the king and the laws, against usurpation and arbitrary government, to adventure his estate and life to save his from execrable murder, and never to sit still till he and his friends, his late majesty's and your faithful subjects, had compassed your majesty's happy restoration, with the apparent and imminent hazard of their lives, whereof the said duke had vast benefits without danger.

Now if the duke will give the earl information of his part, as an opposite party in the said transactions, he promiseth they shall not want their due place and regard in history, when all done by both shall be truly and exactly recorded.

The earl doth not know what the duke means by saying, that at least while the Lord Privy-Seal and he have the honour to be of your majesty's privy-council, and in the stations they are, it will not be fit for him to publish such an Answer to the Lord Privy-Seal's Book and Letter, as might otherwise be necessary in vindication of truth; unless he would insinuate it fit for the earl to be displaced to make room for that long threatened Answer, that so he might have the more home and fuller stroke at the earl before your majesty, when he hath endeavoured but cannot hurt him before your people.

And it appears that it is but a new fancy and consideration taken up by the duke, for when he was pleased not only to write but print his virulent Letter of the 12th of November, against the earl, it had not it seems affected his thoughts as of any import, and this also shews, that it is too late and dishonourable an appeal to be made to your majesty, after the duke hath done it without success in print to the people, and would never in probability have been attempted, but that he thinks he hath arrived in a more happy conjuncture, or hath entertained some groundless hopes of favour by the earl's depression, which he will never in the least apprehend from a just master that he hath faithfully served so long.

And therefore the earl conceiving that the duke hath already in print charged him with all he hath to say, and more than he can make good; and there being an obligation of honour lying upon him to publish any Answer to the lord privy seal's book which (without deference or respect to him) would be necessary in vindication of truth, and the said earl no ways apprehending the dint of such an answer; humbly beseecheth your majesty that the duke may be at liberty and encouraged in his worthy design for vindication of truth by his answer without regard to the earl, who is ready and willing to be trampled upon for the truth's sake, and dreads much more what the duke may with vain hopes whisper or insinuate to your majesty, than any thing he can or shall think fit to publish for that end.

The earl, though he acknowledgeth your majesty's favour in the office he enjoys, it being a testimony of your gracious acceptance of his long, faithful and unblemished service; yet for the duke (who hath partaken more deeply of your royal bounty and favour than any other subject (to say no more) to go out of his way after he had deciphered the earl sufficiently by his title of honour and name of office, to mention his great place seems to be rather in undervaluing than with intention to allow your majesty's poor officer what his predecessors, though some of them were of inferior quality to his, have enjoyed without envy or scorn, from the greatest subjects.

And I can truly say, that I have not paid my debts incurred in your majesty's service, nor preferred my many children, nor grown rich by my service and great place, though my ancestors and I have received titles of honour and marks of favour from your majesty and predecessors, for divers generations.

As to the duke's proposal, that your majesty will be pleased to appoint a committee of your privy council, to look over the Lord Privy Seal's Book, and to call the said earl, and duke of Ormond, before them, and to report to your majesty how reparation may be made to all that are injured by the earl's mistakes and errors, in his said Book and Letter.

The earl saith, the duke seems to conceive that your majesty and council have more leisure than the earl dares presume, and the earl hopes the duke may content himself by your majesty's favour to govern one kingdom under you, without involving this in his concerns, or offering to impose his dictates upon your majesty and council of England, who have wisdom to appoint committees, or take other course for business (properly before them) without the direction of the parties concerned, which most men in modesty forbear to give.

And though the duke seems in great haste to have mistakes and errors fixed upon the earl, he on the contrary (and though time will shew that all that are will appear to be on the duke's part) presumes not to give your majesty trouble herein, or to pursue the duke for what is common to mankind.

And he conceives it an employment below your majesty and council, to be set upon an essay to find matter to justify what the duke hath injuriously published against the earl,

which course being his first choice, he may freely pursue if he please.

As to the duke's objection, That the earl saith the cessations and peaces were destructive to the English and Protestants, he believes the duke will not say the earl was the first that said so by above 30 years, for it hath been printed long ago, and the truth of history and public acts will evince it, must the earl only be restrained from saying what he thinks, and the duke knows he thought near 40 years ago, and endeavoured to prevent as much as he could, and believes he can make good that time was when the duke was much of the same opinion.

It was indeed an unhappiness to conclude cessations and peaces, that neither the Irish nor English were satisfied with, and my unhappiness is not small to be the only Englishman reproached for an opinion they generally had, and felt by sad and dismal effects.

If the earl hath dealt more plainly with the duke than his nature, averse to contention (and who hath had quarrels with none in the whole course of his life) inclines him to, he hopes your majesty will consider that to be taxed of untruth and reflection on his late majesty's honour and justice, and branded as a malicious calumniator, a close concealed and disguised enemy to your majesty, a designer of mischief to the duke and the government, and one who chose the most effectual conjuncture for those things, with pretence only of candour and impartiality, are provocations unusual and not easily borne by persons of honour, and might the better have been forborn, because after all this loud noise and criminal charge, the duke himself dwindles it into bare mistakes and errors, which who lives that is not guilty of, and the earl conceives, is a task very improper to be laid upon your majesty to examine, especially in cases of controversy thereupon between your majesty's subjects.

Thus the earl thought he had reason first to complain, if he could have thought it decent to trouble your majesty with private disputes (after the duke had scandalized him in print, for which he prays and hopes reparation) in obedience to your majesty's order hath represented what he conceived expedient upon this occasion wherewith if the duke be not satisfied,

It is desired that he would in due form of law, and by legal and certain articles charge the said earl with particulars, to which he may answer by advice of council, and if he vindicates not himself, let him be exposed to the censure of this present age and posterity, and incur your majesty's displeasure, less than which cannot be aimed at by the duke, who to satisfy his unjust and causeless animosity, makes use of his power to alienate from the earl your majesty's favour, good opinion and confidence, after above 23 years faithful and diligent service, wherein the said earl hath almost worn out his strength and life, without conviction of any failure or transgression, which surely the said duke would never do (after he had privately quarrelled the earl, and exposed him the worst he could in print, and this affair having taken a circuit of almost two years) unless he conceived he had met with some extraordinary juncture to bear down the earl, nor trouble your majesty and council, when so great affairs are before them, with such private concerns and complaints, after so long a run, and using other ways unsuccessfully, to vindicate himself from what was never intended as a charge against him.

I conclude praying (as I have heartily endeavoured) for the glory and prosperity of your majesty's government, to be equal to the greatest of your royal predecessors, wishing your majesty many such subjects as I have been and am, whom the duke of Ormond seems so earnest to rid your majesty of; or leave under a black character, and misrepresentation in your service which he shall never be able to compass. ANGLESEY.

At the Court at White-Hall, the 13th day of July, 1682.—By the King's Most Excellent Majesty, and the Lords of his Majesty's most Honourable Privy-Council.

Upon reading this day at the board, a Paper delivered in by his grace the duke of Ormond. His majesty in council was pleased to order, That a copy of the said Paper be sent to the right hon. the earl of Anglesey, lord keeper of the privy-seal, (which is accordingly hereunto annexed) who is to return an Answer thereunto, to his majesty in council upon Thursday the 20th instant, at Hampton court, at 9 in the morning. PHIL. LLOYD.

I. The cessations and peaces dishonourable to the crown of England, p. 27.

II. Of advantage only to the Irish, ibid.

III. Destructive to the English Protestants, ibid.

IV. That therefore the lords justices and council, were from the beginning averse to them, p. 60.

V. That for the same reasons the chief, and most of the English nobility in Ireland, and the generality of the English, Scotch and Irish Protestants, of all qualities and degrees, sooner or later opposed both the cessations and peaces, p. 65.

VI. That amongst them were found the earls of Kildare, Thomond, &c. ibid.

VII. And that the two first peaces were against law, and several acts of parliament in both kingdoms, p. 64.

The council not sitting the 20th of July, though the Lord Privy Seal who received the 13th, the particular charges of the duke of Ormond against him then delivered in, answered them the 14th, yet gave not in his answer till the next council held at Hampton-court the 27th of July, which was as followeth:

July 14th, 1682.

The ANSWER of Arthur Earl of Anglesey, Lord Privy Seal, to the PAPER delivered by the Duke of Ormond at Council, July 13, 1682, as a Charge of Particulars against him.

Saving still the benefit of his former Answer delivered in the 23d of June, and what was then done at council, the said earl further saith:

That it is to be considered that all the said particulars were passages in a private letter to a friend, not designed for public view. That the earl of Castlehaven to whom it was written being convinced thereby, as appears by a second epistle to the reader added to his Memoirs, wherein he saith that his acting as a confederate catholic was in plain English as a rebel, That he doth not excuse the rebellion, for all the water of the sea cannot wash it off that nation, it having been begun most bloodily on the English in that kingdom, in a time of a settled peace, without the least occasion given. A noble and remarkable confession of one who had been long of the supreme council of the confederate Irish. And which makes it the more wonderful, that the duke of Ormond should be so severe a censor on a Letter which had so good an effect on him it was written to.

In the next place the said earl saith, That since the duke of Ormond thought it fit to concern himself in a Letter not written to him, he should have been so impartial as to have taken notice of this passage therein, p. 61, 'Your lordship having been privy to all the cabals and secret councils against the English and Protestants, will I hope if you find any thing written by me, questionable or doubtful in your opinion, favour me with your severest reflections thereupon, for as I desire nothing but exact truth wherever it light, so if by any inadvertency or want of full information, I should err or come short in the least, your lordship shall find me ready to retract or supply, but never to persist in it,' whereby it appears, that the earl of Anglesey had no intention to injure any man, as he is not conscious he hath.

These things premised, the said earl gives this short answer or rather justification to the said particular charges.

First, to that marked, No. 1, 2, 3, which are all but one clause in the letter, p. 27, viz. that the cessations and peaces were of advantage only to the Irish, and highly dishonourable to the crown of England, and destructive to the English and Protestants.

Answer. The said earl passing by the Irish and Papists, being the chief promoters of them, the English and Protestants sent agents to Oxford, purposely to oppose and divert the influence thereof, and to hinder agreements with the Irish, which they foresaw would be destructive to the English and Protestants, the whole passages of the proceedings herein, were published in 1644, in a book, intitled "The False and Scandalous Remonstrance of the Inhuman and Bloody Rebels of Ireland, together with an Answer thereunto on behalf of the Protestants of Ireland;" the perusal whereof will fully justify the earl in what he hath written, besides the two houses of parliament, their declarations and reasons against both cessations and peaces: but to put it past dispute, the earl refers to his majesty's declaration, and the act for the settlement of Ireland, in which the duke of Ormond himself had a great hand, and gave the royal assent, p. 10, &c.

By which his majesty that now is in full parliament declares, that his royal father had been forced to the cessation and peace which he had made with the Irish, and that, he was thereby compelled to give them a full pardon, in the same act his majesty also declares, that he himself was necessitated to make the second peace with the Irish upon difficult conditions.

If all this do not prove the cessations and peaces dishonourable to the crown of England, of advantage only to the Irish and destructive to the English and Protestants, I submit to judgment.

And why else were the peaces upon hearing all parties laid aside, and the Irish their estates divided among the English?

2d Charge.—That therefore the lords justices and council were from the beginning averse to them, page 60.

Answer.—To prove that the justices and council were from the beginning averse to the cessations and peaces, I refer to their many letters, which I have ready to produce, in some whereof the duke of Ormond, then earl, joined, by which they declare the horridness and universality of the rebellion, and the design of the Irish to extirpate the English, and to cast off the English government, and that there was no way of recovering that kingdom to the crown of England, but by a vigorous and total reducing them to obedience.

But when other councils were taken up, one of the lords justices, and divers of the chief officers and counsellors of greatest experience in that kingdom, and who best understood how to deal with that people, were displaced, and affairs put into other hands; the grounds and proceedings and success whereof, the duke of Ormond can better relate than I.

3d Charge.—Concerning the Protestants of all degrees sooner or later opposing both the cessations and peaces, and the nobility named that did so, p. 65.

Answer.—This is matter of fact unquestionable, and without which and their subduing the Irish to the crown of England (who were sheltered and protected by the cessations and peaces) their estates could never have been granted to the English and Protestants as they are, if there were any mistake in the enumeration of the nobility, (which is possible) the letter being written by memory and far from books and papers, it will not be great or ma-

terial, and is easily amendable without varying the case.

4th Charge.—That the two first peaces were against law, and several acts of parliament in both kingdoms, p. 64.

Answer.—They are not only against the whole scope of the laws in Ireland and England, for establishing the Protestant Religion and suppression of popery, but against these particular acts of parliament, viz. 2 Eliz. c. 1, 2, in Ireland and 28 H. 8, c. 13, &c. And in England the statutes of the 17 Car. 1, c. 34, 35, 36, 37, in one of which it is provided, that all pardons granted to any of the rebels of Ireland, without assent of parliament shall be void, and yet by the cessations they were reprieved, and by both the peaces fully pardoned.

And in the same act, it is also enacted, that whosoever shall make any promise or agreement to introduce or bring unto the realm of Ireland the authority of the see of Rome in any case whatsoever, or to defend or maintain the same, shall forfeit all his lands, tenements and hereditaments, goods and chattels.

After some debate of the said Charges and Answers at council, the lords concerned being withdrawn, this resolution passed by the lords on the Lord Privy-Seal's Letter to the earl of Castlehaven (viz.) That it was a scandalous libel against his late majesty, against his now majesty, and against the government: but no particular clauses were mentioned to ground that censure upon, and when the parties were called in again, the lord chancellor only told the Lord Privy-Seal, that the king conceived him faulty in the clause, p. 32. of the said Letter to the earl of Castlehaven, wherein the committees of the parliament of Ireland were mentioned, as having been in at the intrigues of the popish faction at court, but that the council had appointed his lordship to be heard next council day August 3d, when he was to produce the vouchers mentioned in his answer, as appears, by the order following.

At the court at Hampton-court, this 27th day of July, 1682.

By the King's Most Excellent Majesty, and the Lords of his Majesty's most Honourable Privy-Council.

It was this day ordered by his majesty in council, that the right honourable the earl of Anglesey, lord privy-seal, do on Thursday next, being the 3rd of August, produce to his majesty in Council, appointed at Hampton-court, at nine in the morning, the vouchers mentioned by his lordship in his answer this day read at the board to the Paper delivered in the 13th instant by his grace the duke of Ormond.

PHI. LOYD.

It was this day ordered by his majesty in council, that the right hon. the earl of Castlehaven do attend this board on Thursday the 3rd of August next at nine in the morning at the council chamber at Hampton court, about a book published, intitled, "His lordships Memoirs," concerning the late wars in Ireland.

The lord privy-seal continuing extreme ill of the gout, and finding himself prejudged by the Lords the said 27th day of July, Aug. 2nd, wrote the following Letter to his majesty, and sent it inclosed to the lord president to be presented, which was done accordingly.

"May it please your majesty;

"Having received your majesty's order in council of the 27th of July, to produce the 3rd of August next, at Hampton-court, to your majesty in council, the vouchers mentioned by me in my answer to the paper delivered, in the 14th instant by the duke of Ormond, and the increase of my fit of the gout, occasioned by my last attendance incapacitating me personally to obey the said order, I hold it my duty to yield the obedience I am able by this humble address to your majesty.

"I find by the entry of the last council days proceedings, that beyond what the lord chancellor declared to me, at the board, of your majesty's judgment of a clause, in the 32nd page of my Letter to the earl of Castlehaven, which was not so much as mentioned in the duke of Ormond's said Paper; A resolve passed by the council on that Letter, to this effect; That it was a scandalous libel against your majesty's royal father, against your majesty, and against the government, but I find no clauses, whereon such judgment is grounded, your majesty may imagine with what amazement, as well as trouble this came to my knowledge, I should with less concern have seen a dagger at my old faithful heart, than to have received the wound I have from your royal hand, after 23 years faithful and diligent service under great trusts.

"I do not know, by what right or authority the council table, who are limited by the laws in their jurisdiction, take upon them the trial of a peer for pretended libelling, though I shall be glad to see their zeal against real libelling, which is the dangerous and countenanced sin of the age.

"I am supported at present under my misfortune in this, that your majesty, who hath so often declared to your people, that you will govern according to law, will not deny your old servant a fair and legal trial, in some one of your courts of justice, upon the points, whereof the duke of Ormond hath accused me, before they take any impression on your majesty to my prejudice; and then, I no ways doubt, by a due administration of the laws, I shall by jurors legally impannelled and untampered with, which is the right of every subject, be represented to your majesty in this affair, under a character more suitable to that unblemished reputation and honour, with which, I am arrived at old age. But if the duke of Ormond upon his prosecution of me, before those judges who have power to hear and determine, shall by supplying his defect of proof in council convict me for a libeller, in any one point of his

charge, I shall not only deserve your majesty's censure, but the utmost severity of the law in my punishment, which may gratify the ambition of some who promote, and wait for my supplanting.

"The only passage that I yet know of, which your majesty seems to take offence at, being that in page the 32nd, of the Irish committees, bring in at the intrigue of the popish faction at court, &c. since it was suddenly and unexpectedly urged against me at council, not being one of the particulars, I was ordered to answer that day, I could then only answer what occurred to me on that surprise, without so much as my reading the clause, viz. that first, negatively, by those words was not meant his late majesty or his council, but the popish faction then haunting the court, like locusts against the laws, which prohibit their approach to it, and as many as will be owned then papists at court, and were capable of intriguing, I do not scruple to say, I intended them, and such there were of my knowledge at that time, who may be justly suspected, to have laid the design of all the calamities of this kingdom and Ireland that ensued.

"And as long as any such shall dare to come to court, and by their faction spread libels to the scandal of all legal proceedings, and the exasperating your people daily in affront, of the wise provision the laws of the land have made against them, neither your majesty nor your kingdoms can be safe, but the seeds of sedition will grow up to confusion.

"And for your majesty's further satisfaction, of my harmless intention in that expression, now I have perused it at leisure, I find that in that clause, I assert nothing positively, but when with disjunctive particles I had mentioned divers particulars, which were in that juncture the jealousy and discourse of times, and even the boast of the Irish themselves.

"I conclude, that I would not take upon me to determine any thing, but that soon after the said committees return for Ireland brake out that execrable and unparalleled rebellion of the papists.

"By this time your majesty and the council will, I hope, see cause to think, that a summons for me to produce vouchers after they have given so terrible a judgment against me comes too late, and that if I were in a condition to attend at the day appointed, it would be no contempt to decline making of further defence before the lords, who have prejudged me, and condemned me as guilty, before the hearing of the cause be concluded, which I hope no other court will do, and was never that I know done by them till now in my case, nor do I hear, that the duke of Ormond is censured for the scandalous pamphlet, which he owned at council, to have published against me, whereof I complained: I must therefore hope, that what I have delivered in council already, will be better and more impartially considered, without my giving your majesty further trouble therein.

"And as I have spent the best of my days in your service without reproach, so I hope still to stand justified to all the world, what I resolve whilst I live to be, your Majesty's most obedient and most faithful devoted subject and servant, ANGLESEY."

London, Aug. 2d, 1682.

The said Letter was read at council August 3rd, but nothing appears entered to be done thereupon, but the earl of Castlehaven was called in several times and questioned, about his printed Memoirs answered by the earl of Anglesey lord privy seal, which he acknowledged to be his, and in conclusion his book was by his majesty and council, judged to be a scandalous libel against the government, but no further proceeding was had against his lordship.

But August the 9th, 1682, the following warrant of the king, was brought by Sir Lionel Jenkins secretary of state, to the Lord Privy-Seal in the evening, being then at his lordship's house in Drury-lane.

To our Right Trusty, and Right well beloved Cousin and Counsellor, Arthur Earl of Anglesey, Keeper of our Privy Seal.

Our will and pleasure is, that immediately upon sight hereof you deliver up our privy seal, appointed by our letters patents, to remain during our pleasure in your custody, into the hands of our right trusty, and well beloved counsellor sir Lionel Jenkins, knight, our principal secretary of state, and for so doing, this shall be your warrant. Given at our court at Windsor the 8th day of August, 1682, in the 34th year of our reign. By his majesty's command, CONWAY.

What passed between the Lord Privy Seal, and Mr. Secretary appears not, further, than what follows under the said Secretary's hand and seal, but it is said the Lord Privy Seal with his duty to the king, desired the secretary (which he promised) to let his majesty know that at the signification of his majesty's pleasure he delivered the seal more joyfully than ever he received it.

ANGLESEY-HOUSE, *Aug.* 9, 1682.

In pursuance of his majesty's Warrant bearing date yesterday, being the 8th day of this present month of August, which warrant was in these words, viz.

C. R. Our will and pleasure is, that immediately upon sight hereof you deliver up our privy-seal, appointed by our letters patents, to remain during our pleasure in your custody, into the hands of our right trusty and well beloved counsellor, Sir Leoline Jenkins, knight our principal secretary of state, and for so doing this shall be your warrant. Given at our court at Windsor the 8th day of August, 1682. In the 34th year of our reign, By his majesty's command, CONWAY,

To our right trusty and right well beloved cousin and counsellor Arthur earl of Anglesey, Keeper of our Privy-Seal.

The right honourable the said earl of Anglesey, delivered into my hands his majesty's privy-seal, sealed up with his lordships seal at arms, being put into the purse, given by his majesty for carrying the said privy seal, which said privy-seal. I received at eight o'clock in the evening of the said 9th of August, Witness my hand and seal, L. JENKINS.

FINIS. Now to shew, that Dr. Morley the learned bishop of Winchester, is of the same opinion with the earl of Anglesey, for the keeping out of popery, now it seems to be flowing in upon us, it hath been thought fit, to fill up this last sheet with the following letter of the said bishop, written to the said earl above ten years ago, when the papists warmly set upon their design to introduce popery, and many years before their desperate plot since discovered (for which so many have suffered by the hand of justice) was ripe for execution.

Which Letter was received by the said earl from the said bishop, July the 9th, 1672, by the hands of the lord Cornbury, now earl of Clarendon.

"My Lord; Yours by my lord of Cornbury, I received this morning from his own hands, and this is to return you my humble thanks, for the favourable opinion of me you are pleased to express in it, which as to the zeal I have for the Protestant religion, I hope I may without vanity own to be true, but must acknowledge I want these abilities to defend it, which you seem to think I have, but thanks be to God, our church wants not those that have, and can and will answer all that hath been, or is, or can be objected against her, or any of the doctrines, which in opposition to the church of Rome are professed by her; neither do I know any one book or any one argument, (worth the taking notice of) written or urged by any Romanist, for them or against us, in any material point of difference betwixt us, that hath not been clearly and fully answered over and over again, by some or other of our own church of England, to say nothing of those eminently learned and pious divines of the other reformed protestant churches beyond the seas; so that to answer every impertinent pamphlet that comes forth, which hath nothing but what hath been so often answered before in it, is but 'actum agere et stultes labor ineptiarum,' and therefore the wise man that bids us, forbids us too; to answer a fool in his folly, his meaning is, that after we have answered him once, we should answer him no more, especially such kind of fools, 'quos non persuadebis etiamsi persuaseris.' and such are all those who contend for interest and not for truth: Demetrius will hold his conclusion, that Diana is a goddess, as long as he hath nothing to live by, but the making of shrines, but is there then nothing to be done will you say to keep out popery, now it seems to be flowing in upon us? yes no doubt there is, and I hope there will be, when his majesty shall see a convenient time for it, but it will not be done, when it is done by writing, or answering of books, pro and con, of which there will never be an end. But how is it to be done then? I answer, 'viderent illi qui ad clavum sedent,' let them look to it, who sit at the helm. I am ready to obey, whatsoever I shall be commanded to that purpose, as far as my conscience will permit,* and I thank God I have done so both formerly, and in my late visitation of my whole diocess, which perhaps you may have heard of, little to my credit if the pseudo-catholics have informed you of it, but I care not what they or any other heretics, or schismatics do, or can say of me; as long as I do that and no more than what my duty to God and the king, and the place I hold in the church requires of me.†

"You know what I was for in the late sessions of parliament, (I mean not a comprehension,) but a coalition or incorporation of the presbyterian party, into the church as it is by law established, and I am still of the same opinion, that it is the one only effectual expedient, to hinder the growth of popery, and to secure both parties, and I am very confident, that there are no presbyterians in the world (the Scotch only excepted) that would not conform to all that is required by our church, especially in such a

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* Sir John Dalrymple (First Appendix to Memoirs of Great Britain and Ireland, 289), informs us, that, lord Dartmouth's manuscript notes on Burnet, contain the following passage:

"P. 590, Not long before his (bishop Morley's) death (for he then kept his chamber) my father carried me with him to Farnham Castle. I was not above 12 years old, but remember the bishop talked much of the duke, and concluded with desiring my father to tell him from him that if he depended upon non-resistance he would find himself deceived, for there were very few of that opinion, though there were not many of the Chrrch of England that thought proper to contradict it in terms, but was very sure they would in practice. My father told me he had frequently put king James in mind of Morley's last message to him, though to very little purpose: for all the answer was, that the bishop was a very good man, but grown old and timorous."

† Bishop Morley was at this time 74 years of age, and he lived 12 years afterwards. He had attended the excellent lord Capel to his execution, (See vol. 4, p. 1236, of this Collection;) and he had been one of the Commissioners at the Savoy Conference, (See vol. 6, p. 1.) What bishop Burnet in his account of that transaction says of him may be seen in vol. 6, p. 61, 62, in addition to which, when he mentions Morley's death, he says, "he was in many respects a very eminent man, zealous against popery, and yet a great enemy to the dissenters: he was considerably learned, and had a great vivacity of thought, but he was too soon provoked, and too little master of himself upon those occasions." 1 Hist. of Own Times, 590.

juncture of time as this is, which is all I have to say as to that particular at this distance.

"My Lord the visit your son made me, I took for a great honour and favour from him, especially considering how much good I have heard of him, which I hope will increase every day more and more in him, that the succeeding age may be the better for him. My Lord, I am, your lordship's very humble servant,

GEOR. WINTON."

Farnham Castle, July 4, 1672.

For the right hon. the Earl of Anglesey.

286. Proceedings against TEMPERANCE LLOYD, MARY TREMBLES, and SUSANNA EDWARDS, for Witchcraft: 34 CHARLES II. A. D. 1682.*

A True and Impartial RELATION of the CONFESSIONS of THREE WITCHES.

Devon. ss.—Biddiford, ss.

The Information of Dorcas Coleman, the wife of John Coleman, of Biddiford aforesaid, Mariner, taken upon her oath before Thomas Gist, Mayor of the borough, town, and manor of Biddiford aforesaid, and John Davie, Alderman, two of his Majesty's Justices of the Peace within the same borough, &c. the 26th day of July, A. D. 1682.

THE said informant upon her oath saith, That about the end of the month of August, in the year of our Lord God 1680, she was taken in tormenting pains, by pricking in her arms, stomach, and heart, in such a manner, as she was never taken so before.

Upon which, she this informant did desire one Thomas Bremincom to repair to Dr. Beare for some remedy for these pains. And very shortly afterwards the said Dr. Beare did repair unto this informant.

And upon view of her body he did say, that it was past his skill to ease her of her said pains; for he told her that she was bewitched.

And further saith, That at the time of her tormenting pains, she this informant did see her the said Susanna Edwards in her chamber: And that she this informant would point with her finger at what place in the chamber the said Susanna Edwards would stand, and where she would go.

And further saith, That she hath continued so ever since, more or less every week.

And saith, That when the said Susanna was apprehended concerning Grace Barnes of Biddiford aforesaid, that this informant did go to see the said Susanna. And that when the said Susanna was in prison, she did confess unto this informant, that she had bewitched her, and done her some bodily harm by bewitching of her.

And thereupon she fell down on her knees, and desired this informant to pray for her the said Susanna Edwards.

THOMAS GIST, Mayor,
JOHN DAVIE, Alderman.

Devon. ss.—Biddiford, ss.

The Information of Thomas Bremincom, of Biddiford, in the county aforesaid, gent. taken upon his oath before us, Thomas Gist Mayor of the borough, town, and manor of Biddiford aforesaid, and John Davie, Alderman, two of his Majesty's Justices of the Peace within the same borough, &c. the 26th day of July, A. D. 1682.

The said informant upon his oath saith, That about two years ago, Dorcas Coleman the wife of John Coleman of Biddiford aforesaid, mariner, was taken very sick, and in her sickness this informant did repair unto one Dr. Beare for some remedy for these pains. The said Mr. Beare being come unto her, and upon view of her body did say, that it was past his skill to ease her, by reason that she was bewitched.

And further saith, That after that the said Mr. Beare had left her, he this informant did see one Susanna Edwards, of Biddiford aforesaid, widow, to come into her chamber to visit her the said Dorcas.

This informant further saith, That as soon as the said Dorcas did see the said Susanna Edwards, she did strive to fly in the face of the said Susanna; but was not able to get out of the chair wherein she sat. This informant, and John Coleman the said Dorcas's husband, did strive to help her out of the chair: Upon which the said Susanna Edwards began to go backwards for to go out of the chamber.

And further saith, That when the said Susanna was almost gone out of the chamber, the said Dorcas did slide out of the chair upon her back, and so strive to go after the said Susanna.

* From a Pamphlet, entitled, 'A true and 'impartial Relation of the Informations against 'three Witches, viz. Temperance Lloyd, Mary 'Trembles, and Susanna Edwards: Who were 'indicted, arraigned, and convicted at the Assizes holden for the county of Devon, at the 'Castle of Exon, Aug. 14, 1682. With their 'several Confessions, taken before Thomas 'Gist, mayor, and John Davie, alderman, of 'Biddiford, in the said county, where they 'were inhabitants. As also their speeches, 'confessions, and behaviour, at the time and 'place of execution, on the 25th of the said 'month. London: Printed by F. Collins.'

See other Cases for Witchcraft, *ante*, vol. 2, p. 1049; vol. 4, p. 817; vol. 6, p. 647; and the Case of Wenham, A. D. 1712, *post*.

But this informant and her said husband seeing her in such a sad condition, did endeavour to take her up from the ground, but could not, until that the said Susanna was gone down over the stairs.

This informant further saith, That at the same time of her tormenting pains, and when she could neither see nor speak, by reason that her pains were so violent upon her, this informant hath seen her, the said Dorcas, to point with her hand which way the said Susanna Edwards was gone.

And further saith, That immediately after he hath gone out at the fore door of the house where the said Dorcas doth live, and hath seen the said Susanna Edwards to go the same way that the said Dorcas did point with her hand.

THOMAS GIST, Mayor.
JOHN DAVIE, Alderman.

Devon. *ss.* Biddiford, *ss.*

The Information of John Coleman, of Biddiford, in the county aforesaid, mariner, taken upon his oath before Thomas Gist, Mayor of the borough, town, and manor of Biddiford aforesaid, and John Davie, Alderman, two of his Majesty's Justices of the Peace within the same borough, &c. the 26th day of July, A. D. 1682.

The said informant upon his oath saith, That Dorcas Coleman his wife has been a long time sick in a very strange and unusual manner: And he hath sought far and near for remedy.

And saith, That one doctor George Beare being advised with concerning her sickness, in this deponent's absence, (whilst he was at sea) the said Mr. Beare hath (as this informant was told by his said wife, and his uncle Thomas Bremincom, at his return) said, that it was past his skill to prescribe directions for her cure, because that the said Dorcas was bewitched.

This informant further saith, That about three months now last past, his said wife was sitting in a chair, and being speechless, he this informant did see one Susanna Edwards of Biddiford aforesaid, widow, to come into the chamber under a pretence to visit her.

Whereupon this informant's wife did strive to come at her the said Susanna, but could not get out of the chair.

Upon which this informant and the said Thomas Bremincom did endeavour to help her out of the chair; and the said Susanna did go towards the chamber-door.

And further saith, That when the said Susanna was come at the chamber-door, she the said Dorcas (remaining speechless as aforesaid) did slide out of the chair upon her back, and so strove to come at her the said Susanna; but was not able to rise from the ground, until the said Susanna was gone down the stairs.

And further saith, That the said Dorcas hath continued in such a strange and unusual manner of sickness ever since unto this day, with some intermissions.

THOMAS GIST, Mayor.
JOHN DAVIE, Alderman.

Examined with the original whereof this is a true copy. John Hill, Town-Clerk.

Devon. *ss.* Biddiford, *ss.*

The Information of Grace Thomas, of Biddiford, in the county aforesaid, spinster, taken upon her oath the 3d day of July, in the 34th year of the reign of our sovereign lord Charles the Second, by the grace of God, of England, Scotland, France and Ireland king, defender of the faith, &c. before us Thomas Gist, Mayor of the borough, town, and manor of Biddiford aforesaid, and John Davie, Alderman, two of his majesty's Justices of the Peace within the same borough, &c.

The said informant upon her oath saith, That upon or about the 2d day of February, which was in the year of our Lord 1680, this informant was taken with great pains in her head and all her limbs, which pains continued on her till near or upon the first day of August then following; and then this informant's pains began to abate, and this informant was able to walk abroad to take the air: But in the night season she was in much pain, and not able to take her rest.

This informant further saith, That upon or about the 30th day of September now last past, this informant was going up the high street of Biddiford, where this informant met with Temperance Lloyd of Biddiford aforesaid, widow, and she the said Temperance did then and there fall down upon her knees to this informant, and wept, saying, Mrs. Grace, I am glad to see you so strong again.

Upon which this informant said, Why dost thou weep for me? Unto which the said Temperance replied, I weep for joy to see you so well again, as the said Temperance then pretended.

This informant further saith, That in that very night she this informant was taken very ill with sticking and pricking pains, as though pins and awls had been thrust into her body, from the crown of her head to the soles of her feet; and this informant lay as though it had been upon a rack.

And saith, That these pricking pains have continued upon her body ever since; and that her pains are much worse by night than by day.

This informant further saith, That on Thursday the first day of June last past in the night, she this informant was bound and seemingly chained up, with all her sticking pains gathered together in her belly; so that on a sudden her belly was swoln as big as two bellies, which caused her to cry out, I shall die, I shall die; and in this sad condition this informant lay as though she had been dead for a long space (which those persons that were in

the chamber with her this informant did compute to be about two hours.)

And this informant further saith, That on Friday night last, being the 30th day of June, this informant was again pinched and pricked to the heart, with such cruel thrusting pains in her head, shoulders, arms, hands, thighs, and legs, as though the flesh would have been then immediately torn from the bones with a man's fingers and thumbs.

And further saith, That she was even plucked out over her bed, and lay in this condition for the space of three hours (as she was informed by some of the said persons then in this informant's chamber.)

This informant further saith, That upon the first day of this instant July, as soon as the aforesaid Temperance Lloyd was apprehended and put in the prison of Biddiford, she this informant immediately felt her pricking and sticking pains to cease and abate.

And saith, That she hath continued so ever since unto this time; but is still in great weakness of body.

And further saith, That she believeth that the said Temperance Lloyd hath been an instrument of doing much hurt and harm unto her body, by pricking and tormenting of her in manner as before in this her information she hath set forth.

THOMAS GIST, Mayor.
JOHN DAVIE, Alderman.

Devon. *ss.*—Biddiford, *ss.*

The Information of Elizabeth Eastchurch, the wife of Thomas Eastchurch of Biddiford, in the county aforesaid, gent. taken upon her oath before us Thomas Gist, Mayor of the borough, town, and manor of Biddiford aforesaid, and John Davie, Alderman, two of his majesty's Justices of the Peace within the the same borough, &c. the 3d of July, in the 34th year of the reign of our sovereign lord Charles the Second, &c. A. D. 1682.

The said informant upon her oath saith, That upon the 2d day of this instant July, the said Grace Thomas, then lodging in this informant's said husband's house, and hearing of her to complain of great pricking pains in one of her knees, she this informant did see her said knee, and observed that she had nine places in her knee which had been prickt; and that every of the said pricks were as though it had been the prick of a thorn. Whereupon this informant afterwards, upon the same 2d day of July, did demand of the said Temperance Lloyd, whether she had any wax or clay in the form of a picture, whereby she had pricked and tormented the said Grace Thomas?

Unto which the said Temperance made answer, that she had no wax nor clay, but confessed that she had only a piece of leather which she had pricked nine times.

THOMAS GIST, Mayor.
JOHN DAVIE, Alderman.

Devon. *ss.*—Biddiford, *ss.*

The Information of Anne Wakely, the wife of William Wakely, of Biddiford, in the county aforesaid, husbandman, taken the 3d day of July, A. D. 1682.

The said informant upon her oath saith, That upon the 2d day of July, instant, she this deponent, by order of the said Mr. Mayor, did search the body of the said Temperance Lloyd, in the presence of Honor Hooper, and several other women.

And upon search of her said body, she this informant did find in her secret parts, two teats hanging nigh together like unto a piece of flesh that a child had suckt. And that each of the said teats was about an inch in length. Upon which this informant did demand of her, the said Temperance, whether she had been sucked at that place by the black man? (meaning the Devil.)

Whereunto the said Temperance did acknowledge, that she had been sucked there often times by the black man; and the last time that she was sucked by the said black man, was the Friday before she was searched, (which was the 30th day of June last past.)

And this informant further saith, That she hath been an attendant of the said Grace Thomas about six weeks now last past: And that on Thursday now last past (which was the 29th of June last past) in the morning, she, this informant did see something in the shape of a magpie, to come at the chamber-window where the said Grace Thomas did lodge. Upon which this informant did demand of the said Temperance Lloyd, whether she did know of any bird to come and flutter at the said window.

Unto which question the said Temperance did then say, that it was the black man in the shape of the bird; and that she the said Temperance, was at that time down by the said Thomas Eastchurch's door of the house, where the said Grace Thomas did lodge.

THOMAS GIST, Mayor.
JOHN DAVIE, Alderman.

The like is deposed by Honor Hooper, servant unto the said Thomas Eastchurch, as appears by her information, taken upon her oath the day and year abovesaid, before the said Thomas Gist Mayor, and John Davie Alderman, two of his majesty's Justices of the Peace, within the borough, town, and manor of Biddiford.

THOMAS GIST, Mayor.
JOHN DAVIE, Alderman.

Devon. *ss.*—Biddiford, *ss.*

Temperance Lloyd, her Examination taken the 3d day of July, in the 34th year of the reign of our sovereign lord Charles the Second, by the grace of God, of England, Scotland, France and Ireland, king, defender of the Faith, &c. before us, Thomas Gist, Mayor of the borough, town,

and manor of Biddiford aforesaid, and John Davie, Alderman, two of his Majesty's Justices of the Peace within the same borough, &c.

The said informant being brought before us by some constables of the said borough, upon the complaint of Thomas Eastchurch of Biddiford aforesaid, gent. and charged upon suspicion of having used some magical art, sorcery, or witchcraft, upon the body of Grace Thomas of Biddiford aforesaid spinster; and to have had discourse or familiarity with the Devil in the shape of a black man: And being demanded how long since she had discourse or familiarity with the Devil in the likeness or shape of a black man,

Saith, That about the 30th day of September last past, she met with the Devil in the shape or likeness of a black man, about the middle of the afternoon of that day, in a certain street or lane in the town of Biddiford aforesaid, called Higher Gunstone lane: And then and there he did tempt and solicite her to go with to the house of the said Thomas Eastchurch, to torment the body of the said Grace Thomas; which this examinant at first did refuse to do: But afterwards by the temptation and persuasion of the Devil in the likeness of a black man as aforesaid, she did go to the house of the said Thomas Eastchurch, and that she went up the stairs after the said black man; and confesseth, that both of them went up into the chamber where she the said Grace Thomas was, and that there they found one Anne Wakely the wife of William Wakely of Biddiford, rubbing and stroking one of the arms of the said Grace Thomas.

And the said examinant doth further confess, That she did then and there pinch with the nails of her fingers the said Grace Thomas in her shoulders, arms, thighs and legs; and that afterwards they came down from the said Grace Thomas, her chamber into the street together; and that there this examinant did see something in the form or shape of a grey or braget cat; and saith that the said cat went into the said Thomas Eastchurch's shop.

The said examinant, being further demanded, whether she went any more unto the said Thomas Eastchurch's house, saith and confesseth, that the day following she came again to the said Thomas Eastchurch's house invisible, and was not seen by any person; but there this examinant did meet with the braget cat as aforesaid; and the said cat did retire and leap back into the said Thomas Eastchurch's shop.

The said examinant, being further demanded when she was at the said Thomas Eastchurch's house the last time, saith, that she was at the said Mr. Eastchurch's house upon Friday the 30th day of June last past; and that the Devil in the shape of a black man was there with her: And that they went up again into the said chamber, where she found the said Grace Thomas lying in her bed in a very sad condition. Notwithstanding which, she this examinant and the said black man did torment her again: And saith and confesseth, that she this examinant had almost drawn her out of her bed, and that on purpose to put her the said Grace out of her life.

And further saith, that the black man (or rather the Devil) did promise this examinant that no one should discover her.

And further confesseth, that the said black man (or rather the Devil, as aforesaid) did suck her teats which she now hath in her secret parts: And that she did kneel down to him in the street, as she was returning to her own house, and after that they had tormented the said Grace Thomas in manner as last above mentioned.

Being demanded of what stature the said black man was, saith, that he was about the length of her arm: And that his eyes were very big; and that he hopt or leapt in the way before her. and afterwards did suck her again as she was lying down; and that his sucking was with a great pain unto her, and afterwards vanished clear away out of her sight.

This examinant doth further confess, That upon the 1st day of June last past, whilst the said Mr. Eastchurch and his wife were absent, that the said examinant did pinch and prick the said Grace Thomas (with the aid and help of the black man, or rather the Devil) in her belly, stomach, and breast; and that they continued so tormenting of her about the space of two or three hours, with an intent to have killed her.

And further saith, that at the same time she did see the said Anne Wakely rubbing and chafing of several parts of the said Grace Thomas her body: Although the said Anne Wakely, being present at taking of this examination, doth affirm that she did not see the said examinant.

THOMAS GIST, Mayor.
JOHN DAVIE, Alderman.

Devon. *ss.*—Biddiford *ss.*

Whereas the said Temperance Lloyd hath made such an ample Confession and Declaration concerning the said Grace Thomas, we the said Mayor and Justices were induced to demand of her some other questions concerning other witcheries which she had practised upon the bodies of several other persons within this town, viz.

She the said examinant did confess, That about the 14th day of March, which was in the year of our Lord 1670, she was accused, indicted, and arraigned, for practising witchcraft upon the body of one William Herbert late of Biddiford aforesaid, husbandman: and that although at the trial of her life at the castle of Exeter, she was there acquitted by the judge and jury then; yet this examinant doth now confess, that she is guilty thereof, by the persuasion of the black man; and that she did prick the said William Herbert unto death.

THOMAS GIST, Mayor,
JOHN DAVIE, Alderman.

Devon, ss.—Biddiford, ss.

And whereas upon or about the 15th of May, which was in the year of our Lord 1679, she was accused before the then Mayor and Justices of the town of Biddiford aforesaid, for practising witchcraft upon the body of one Anne Fellow the daughter of Edward Fellow of Biddiford, gent. And although her body was then searched by four women of the town of Biddiford aforesaid, and the proofs then against her not so clear and conspicuous, the said Mr. Fellow did not further prosecute against her; yet this examinant doth now confess that the said black man or Devil, (or some other black man or Devil) with her this said examinant, did do some bodily hurt to the said Anne Fellow, and that thereupon the said Anne Fellow did shortly die and depart this life.

THOMAS GIST, Mayor,
JOHN DAVIE, Alderman.

Devon. ss.—Biddiford, ss.

Whereas we, Thomas Eastchurch and Elizabeth Eastchurch his wife, Honor Hooper, and Anne Wakely, upon yesterday, which was the 3d of July, 1682, did give in and deliver our several Informations upon our oaths, before our oaths, before Thomas Gist, Mayor of the burough, town, and manor of Biddiford aforesaid, and John Davie alderman, two of his majesty's Justices of the Peace within the said borough, &c. of Biddiford, against Temperance Lloyd of Biddiford aforesaid, widow, for using and practising of witchcraft upon the body of Grace Thomas of the same town, spinster, as by our several examinations it doth and may appear.

But because we were dissatisfied in some particulars concerning a piece of leather which the said Temperance had confessed of unto the said Elizabeth Eastchurch, in such manner as is mentioned in the said Elizabeth Eastchurch's examination, and we conceiving that there might be some inchantment used in or about the said leather :therefore upon this present 4th day of July, we, with the leave and approbation of the said Mr. Gist the Mayor, did bring the said Temperance into the parish church of Biddiford aforesaid, in the presence of Mr. Michael Ogilby rector of the same parish-church, and divers other persons, where the said Temperance was demanded by the said Mr. Ogilby how long since the Devil did tempt her to do evil.

Whereupon she the said Temperance did say and confess, that about twelve years ago she was tempted by the Devil to be instrumental to the death of William Herbert named in her said examination.

And that the Devil did promise her that she should live well and do well. And she did then also confess that she was thereupon an instrument of the death of the said William Herbert.

And as to the said Grace Thomas, she further said and confessed, that on Friday was sevennight, (which was the 23d day of June last past) she the said Temperance came into the said Thomas Eastchurch's shop in the form and shape of a cat; and fetcht out of the same shop a puppet or picture, (commonly called a child's baby) and that she carried the same up into the chamber where the said Grace Thomas did lodge, and left it about the bed whereon the said Grace Thomas did lie; but would not confess that she had prickt any pins in the said puppet or baby-picture, although she were demanded particularly that question by the said Mr. Ogilby.

Also the said Temperance did then and there confess, that she was the cause of the death of Anne Fellow, the daughter of Edward Fellow named in her said examination.

Also she did then and there confess, That she was the cause of the death of one Jane Dallyn the late wife of Symon Dallyn of Biddiford, mariner, by pricking of her in one of her eyes, which she did so secretly perform, that she was never discovered or punished for the same.

Also the said Temperance Lloyd did confess and declare, that she did bewitch unto death one Lydia Burman of Biddiford aforesaid, spinster, because she had been a witness against her the said Temperance at the trial for her life and death at the assizes when she was arraigned for the death of the said William Herbert, and had deposed that the said Temperance had appeared unto her in the shape of a red pig at such time as the said Lydia was brewing in the house of one Humphry Ackland of Biddiford aforesaid.

Being further demanded again in what part of the house of the said Mr. Eastchurch, or in what part of the bed whereon the said Grace Thomas lay, she left the puppet or baby-picture above mentioned, saith, that she would not nor must not discover; for if she did discover the same, that the devil would tear her in pieces.

And afterwards the said Mr. Ogilby desired the said Temperance to say the Lord's Prayer and her Creed, which she imperfectly performing, the said Mr. Ogilby did give her many good exhortations, and so departed from her.

In witness whereof, we have hereunto set our hands this 4th day of July, in the 34th year of the reign of our sovereign lord Charles the 2nd, by the grace of God, of England, Scotland, France and Ireland king, defender of the faith, Anno Dom. 1682.

July 4, 1682, sworn before us,
THOMAS GIST, Mayor,
JOHN DAVIE, Alderman.

Devon. ss.—Biddiford, ss.

The Information of Thomas Eastchurch of Biddiford, in the County aforesaid, gent. taken upon his oath before us, Thomas Gist, Mayor of the borough, town, and manor of Biddiford aforesaid, and John Davie, Alderman, two of his majesty's Justices of the Peace within the same borough, &c. the 3d day of July, A. D. 1682.

The said informant upon his oath saith, That upon yesterday, which was the 2d day of July,

he did hear the said Temperance Lloyd to say and confess, that about the 30th day of September last past, as she was returning from the bakehouse with a loaf of bread under her arm, towards her own house, she the said Temperance Lloyd did meet with something in the likeness of a black man, in a street called Higher Gunstone-Lane within this town, and then and there the said black man did tempt and persuade her to go to this informant's house to torment one Grace Thomas, who is this informant's sister-in-law.

That the said Temperance did first refuse the temptation, saying that the said Grace Thomas had done her no harm. But afterwards, by the further persuasion and temptation of the said black man, she did go to this informant's house, and that she went up the stairs after the black man: and confessed that both of them went into the chamber where this informant's said sister-in-law was, and that there they found one Anne Wakely, the wife of William Wakely of Biddiford, rubbing of one of the arms and one of the legs of the said Grace Thomas.

And this informant further saith, That the said Temperance did also confess, that the black man did persuade the said Temperance to pinch the said Grace Thomas in the knees, arms, and shoulders; intimating with her fingers how she did it. And that when she came down the stairs again into the street, she saw a braget cat go into this informant's shop; and that she believed it to be the Devil.

And this informant did hear the said Temperance to say and confess, that on Friday-night last (which was the 30th day of June) the black man did meet with her near her own door, about ten o'clock of that same night, and there did again tempt her to go to this informant's house, and to make an end of the said Grace Thomas.

Whereupon the said Temperance did go to this informant's house with the said black man, and that she went into the chamber where the said Grace Thomas lay.

And further did confess, That she did pinch and prick the said Grace Thomas again in several parts of her body, (declaring with both of her hands how she did do it). And that thereupon the said Grace Thomas did cry out terribly. And confessed that the said black man told her that she should make an end of her the said Grace Thomas.

And further she the said Temperance did say and confess, that the said black man did promise her the said Temperance that no one should discover her or see her.

And she also confessed, that about twelve o'clock of that same night the black man did suck her in the street in her secret parts, she kneeling down to him. That he had blackish clothes, and was about the length of her arm. That he had broad eyes, and a mouth like a toad, and afterwards vanished clear away out of her sight.

This informant further saith, That he heard the said Temperance to confess, that about the first day of June last past the said black man was with her again, and told her, that on that night she the said Temperance should make an end of the said Grace Thomas; and confessed that she the said Temperance had that night griped the said Grace Thomas in her belly, stomach, and breast, and clipt her to the heart.

And that the said Grace Thomas did cry out pitifully. And that the said Temperance was about the space of two hours tormenting of her. And that one Anne Wakely (with several other women) were then present in the chamber, but could not see her the said Temperance; and that the black man stood by her in the same room also.

This informant further saith, That he supposed that the said Grace Thomas in her sickness had been afflicted through a distemper arising from a natural cause, did repair unto several physicians, but that she the said Grace could never receive any benefit prescribed by them.

THOMAS GIST, Mayor.
JOHN DAVIE, Alderman.

Devon. ss—Biddiford, ss.

The Information of William Herbert, of Biddiford, in the county aforesaid, blacksmith, taken upon his oath the 12th day of August, in the 34th year of the reign of our sovereign lord Charles the Second, by the grace of God, of England, Scotland, France, and Ireland king, defender of the faith, &c. before Thomas Gist, Mayor of the borough, town, and manor of Biddiford aforesaid, and John Davie, Alderman, two of his majesty's Justices of the Peace within the same borough, &c.

This informant upon his oath saith, That near or upon the 2d day of February, which was in the year of our Lord God 1670, he did hear his father William Herbert to declare on his death bed, that Temperance Lloyd of Biddiford aforesaid, widow, had bewitched his said father unto death.

This informant's father further declaring unto this informant, that he with the rest of his relations, should view his father's body after his decease; and that by his body they should see what prints and marks the aforesaid Temperance Lloyd had made upon his body. And further saith, that his said father did lay his blood to the charge of the said Temperance Lloyd, and desired this informant to see her apprehended for the same; which was accordingly done: And saith, that she was accused for the same, but that she was then acquitted at the assizes.

This informant further saith, That upon the fourth day of July now last past, he went to the prison of Biddiford, where the said Temperance was, (she being then in the said prison concerning Mrs. Grace Thomas) and demanded of her whether she had done any bodily harm or hurt unto the said William Herbert

deceased, this informant's late father; unto which she answered and said, Surely William I did kill thy father.

This informant did demand of her further, whether she had done any hurt or harm to one Lydia Burman late of Biddiford, spinster. Unto which the said Temperance Lloyd answered and said, that she was the cause of her death.

This informant demanded of her the said Temperance, why she had not confessed so much when she was in prison last time? She answered, that her time was not expired; for the devil had given her greater power, and a longer time.

And this informant did hear the said Temperance Lloyd to confess, that she was the cause of the death of Anne Fellow the daughter of Edward Fellow of Biddiford, gent. And also that she the said Temperance was the cause of the bewitching out of one of the eyes of Jane the wife of one Simon Dallyn of Biddiford aforesaid, mariner.

Thomas Gist, Mayor.
John Davie, Alderman.

Examined with the original whereof this is a true copy. John Hill, Town-Clerk.

Devon. *ss.*—Biddiford, *ss.*

The Information of John Barnes, of Biddiford, in the county aforesaid, yeoman, taken upon his oath before us Thomas Gist, Mayor of the borough, town, and manor of Biddiford aforesaid, and John Davie, Alderman, two of his majesty's Justices of the Peace within the same borough, &c. the 18th day of July, A. D. 1682.

The said informant upon his oath saith, That upon Easter-Tuesday, (which was the 18th day of May last past) this informant's wife was taken with very great pains of sticking and pricking in her arms, stomach, and breast, as though she had been stabbed with awls, being so described unto him by the said Grace, in such manner, as this informant thought that she would have died immediately; and in such sad condition she the said Grace hath continued unto this present day, in tormenting and grievous pains.

And further saith, that upon Sunday last, which was the 16th day of July instant, about ten of the clock in forenoon, this informant's said wife was again taken worse than before, insomuch as four men and women could hardly hold her.

And at that same time, one Agnes Whitefield, the wife of John Whitefield of Biddiford aforesaid, cordwainer, being in this informant's house, and hearing somebody out at the door, she did open the door, where she found one Mary Trembles of Biddiford aforesaid, single woman, standing with a white-pot in her hands, as though she had been going to the common bakehouse. And thereupon this informant's wife did ask of the said Agnes Whitefield who it was that was at the door? Unto which the said Agnes Whitefield answered and said, that it was Mary Trembles. Then this informant's wife did reply and said, that she the said Mary Trembles was one of them that did torment her, and that she was come now to put her the said Grace out of her life.

Thomas Gist, Mayor.
John Davie, Alderman.

Devon. *ss.*—Biddiford, *ss.*

The Information of Grace Barnes the wife of John Barnes of Biddiford, in the county aforesaid, yeoman, taken upon her oath before Thomas Gist, mayor of the borough, town, and manor of Biddiford aforesaid, and John Davie, Alderman, two of his majesty's Justices of the Peace within the same borough, &c. the 2d day of August, A. D. 1682.

The said informant upon her oath saith, That she hath been very much pained and tormented in her body these many years last past, insomuch that she hath sought out for remedy far and near, and never had any suspicion that she had had any magical art or witchcraft used upon her body until it was about a year and a half ago, that she was informed by some physicians that it was so.

And further saith, That thereupon she this informant had some suspicion of one Susanna Edwards of Biddiford aforesaid, widow, because that she the said Susanna would oftentimes repair unto this informant's husband's house upon frivolous or no occasions at all.

And further saith, That about the middle of the month of May last past, she was taken with very great pains of sticking and pricking in her arms, breast, and heart, as though divers awls had been pricked or stuck into her body, and was in great tormenting pain for many days and nights together, with a very little intermission.

And saith, That upon Sunday the 16th day of July last, she was taken in a very grievous and tormenting manner; at which instant of time one Agnes Whitefield, the wife of John Whitefield, of Biddiford, was in this informant's husband's house, who opening the door, and looking out, found one Mary Trembles of Biddiford, single woman, standing before the door. And thereupon this informant did ask of the said Agnes Whitefield who it was that stood at the door; who answered, that it was the said Mary Trembles. Upon which this informant was fully assured that the said Mary Trembles, together with the said Susanna Edwards, were the very persons that had tormented her, by using some magical art or witchcraft upon her said body as aforesaid.

Thomas Gist, Mayor.
John Davie, Alderman.

Devon. ss. Biddiford ss.

The Information of William Edwards, of Biddiford, in the county aforesaid, blacksmith, taken upon his oath before us Thomas Gist, Mayor of the borough, town, and manor of Biddiford aforesaid, and John Davie, Alderman, two of his Majesty's Justices of the Peace within the same borough, &c. the 18th day of July, A. D. 1682.

The said informant upon his oath saith, That upon the 17th day of July instant this informant did hear Susanna Edwards to confess, that the Devil had carnal knowledge of her body; and that he had sucked her in her breast and in her secret parts.

And further saith, That he did hear her the said Susanna to say, that she and one Mary Trembles of Biddiford aforesaid, single woman, did appear hand in hand invisible in John Barnes's house of Biddiford aforesaid, where Grace the wife of the said John Barnes did lie in a very sad condition.

And further saith, That he did then also hear the said Susanna to say, that she and the said Mary Trembles were at that time come to make an end of her the said Grace Barnes.

Thomas Gist, Mayor.
John Davie, Alderman.

Devon. ss. Biddiford, ss.

The Information of Joan Jones, the wife of Anthony Jones of Biddiford, in the county aforesaid, husbandman, taken upon her oath before us, Thomas Gist, Mayor, and John Davie, Alderman, the 18th day of July, A. D. 1682.

The said informant upon her oath saith, That upon the 18th day of July instant, she this informant being present with Susanna Edwards of Biddiford aforesaid widow, there came in to see the said Susanna one John Dunning of Great Torrington, which said John Dunning this informant did hear him to demand of the said Susanna Edwards how and by what means she became a witch.

Unto which question the said Susanna did answer, that she did never confess afore now, but now she would.

And further saith, that she did hear the said Susanna Edwards to confess unto the said John Dunning, that she was on a time out gathering of wood, at which time the said Susanna Edwards did see a gentleman to draw nigh unto her; whereupon she was in good hopes to have a piece of money of him.

This informant further saith, that the said John Dunning did demand of her the said Susanna, where she did meet with the said gentleman; she the said Susanna did answer, that it was in Parsonage Close. And further saith, That after the said John Dunning was gone, this informant did hear the said Susanna Edwards to confess, that on Sunday the 16th of July instant, she with Mary Trembles, and by the help of the Devil, did prick and torment Grace the wife of John Barnes of Biddiford aforesaid.

And this informant further saith, That she did hear the said Susanna Edwards and Mary Trembles to say and confess, that they did this present day, being the 18th of July instant, torment and prick her the said Grace Barnes again.

And further saith, That she did hear the said Mary Trembles to say unto the said Susanna Edwards; O thou rogue, I will now confess all: For it is thou that hast made me to be a witch, and thou art one thyself, and my conscience must swear it.

Unto which the said Susanna replied unto the said Mary Trembles, I did not think that thou wouldest have been such a rogue to discover it.

And further saith, That the said Susanna Edwards did say and confess, that the devil did oftentimes carry about her spirit.

And further saith, That she did hear the said Susanna to say and further confess, that she did prick and torment one Dorcas Coleman the wife of John Coleman of Biddiford aforesaid, mariner.

And further saith, That she did hear the said Susanna Edwards to confess, that she was sucked in her breast several times by the devil in the shape of a boy lying by her in the bed; and that it was very cold unto her. And further saith, that after she was sucked by him, the said boy or devil had the carnal knowledge of her body four several times.

And this informant further saith, That her husband Anthony Jones, observing her the said Susanna to gripe and twinkle her hands upon her own body, said unto her, Thou Devil, thou art now tormenting some person or other. Whereupon the said Susanna was displeased with him, and said, Well enough, I will fit thee; And at that present time the said Grace Barnes was in great pain with prickings and stabbings unto her heart, as she did afterwards affirm.

This informant further saith, That one of the constables and her said husband, with some others, were sent by Mr. Mayor to bring the said Grace Barnes unto the town-hall of Biddiford aforesaid; which they did accordingly do: and immediately, as soon as he with others had led and with much ado brought the said Grace Barnes into the town-hall, she the said Susanna Edwards turned about and looked upon her said husband, and forthwith this informant's said husband was taken in a very sad condition as he was leading and supporting the said Grace Barnes up the stairs of the said town-hall before the said Mayor and Justices; insomuch that he cried out, Wife, I am now bewitched by this Devil, meaning Susanna Edwards; and forthwith leapt and capered like a madman, and fell a shaking, quivering, and foaming, and lay for the space of half an hour like a dying or dead man. And

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at length, coming to his senses again, her said husband did declare unto this informant, th[at] the said Susanna Edwards had bewitched hi[m].

And this informant further saith, That she did never know her said husband Anthony Jones to be taken in any fits or convulsions, but a person of a sound and healthy body ever since he had been this informant's husband.

THOMAS GIST, Mayor.
JOHN DAVIE, Alderman.

Devon. *ss.*—Biddiford *ss.*

The Information of Anthony Jones of Biddiford, in the county aforesaid, husbandman, taken upon his oath before us Thomas Gist, Mayor of the borough, town, and manor of Biddiford aforesaid, and John Davie, Alderman, two of his majesty's Justices of the Peace within the same Borough, &c. the 19th day of July. A. D. 1682.

The said informant upon this oath saith, That yesterday whilst the said Susanna Edwards was in the town-hall of Biddiford concerning the said Grace Barnes, he did observe the said Susanna to gripe and twinkle her hands upon her own body, in and unusual manner: whereupon this informant did say unto her, thou Devil, thou art now tormenting some person or other. Whereupon the said Susanna was displeased with this Informant, and said, Well enough, I will fit thee. And of that present time the said Grace Barnes was in great pains with prickings and stabbings unto her heart, as the said Grace did afterwards affirm.

This Informant further saith, That one of the constables and he, with some others, being sent by the order of Mr. Mayor to bring the said Grace unto the town-hall of Biddiford aforesaid; immediately, as soon as they had brought the said Grace unto the town-hall, she the said Susanna turned about and looked upon this informant, and forthwith this informant was taken in a very sad condition as he was coming up the stairs of the said town-hall before the Mayor and Justices; insomuch that he cried out, Wife I am now bewitched by this devil Susanna Edwards.

THOMAS GIST, Mayor.
JOHN DAVIS, Alderman.

Devon. *ss.*—Biddiford, *ss.*

The Examination of Mary Trembles of Biddiford in the county aforesaid, single woman, taken before Thomas Gist, Mayor of the borough, town, and manor of Biddiford, aforesaid, and John Davie, Alderman, two of his majesty's Justices of the Peace within the same borough, &c. the 18th day of July, A. D. 1682.

The said examinant being brought before us, and accused for practising of witchcraft upon the body of Grace Barnes the wife of John Barnes, of Biddiford aforesaid yeoman, was demanded by us how long she had practised witchcraft, said and confessed, that about three years last past, one Susanna Edwards of Biddiford aforesaid widow, did inform her, that if she would do as she the said Susanna did, that this examinant should do very well. Whereupon this examinant did yield unto the said Susanna Edwards, and said that she would do as the said Susanna did.

And this examinant further confesseth, That the said Susanna Edwards did promise that this examinant should neither want for money, meat, drink, nor clothes.

And further confesseth, That after that she had made this bargain with the said Susanna Edwards, that the Devil in the shape of a lion (as she conceived) did come to this examinant, and lay with her, and had carnal knowledge of her body. And that after the Devil had had knowledge of her body, that he did suck her in her secret parts, and that his sucking was so hard, which caused her to cry out for the pain thereof.

And further confesseth, That on Tuesday in Easter-week, which was the 18th day of May last past, she this examinant did go about the town of Biddiford to beg some bread, and in her walk she did meet with the said Susanna Edwards, who asked for this examinant where she had been. Unto whom this examinant answered, that she had been about the town, and had begged some meat, but could get none. Whereupon this examinant together with the said Susanna Edwards, did go to the said John Barnes's house, in hope that there they should have some meat. But the said John Barnes not being within his house, they could get no meat or bread, being denied by the said Grace Barnes and her servant, who would not give them any meat. Whereupon the said Susanna Edwards and this informant went away from the said John Barnes his house. And afterwards on the same day the said Susanna Edwards did bid this examinant to go to the said John Barnes his house again for a farthing's worth of tobacco. Whereupon this said examinant did go, but could not have any; whereof this examinant did acquaint the said Susanna Edwards, who then said that it should be better for her the said Grace if that she had let this said examinant to have had some tobacco.

And further confesseth, That on the 16th day of this instant month of July, she this examinant, with the said Susanna, did go to the said John Barnes his house in Biddiford aforesaid, and went at the fore-door invisibly into the room, where they did pinch and prick the said Graces Barnes almost unto death; and that she saw the said John Barnes in bed with his wife on the inner side of the bed.

The said examinant being further demanded how many times the Devil had had the carnal knowledge of her body besides the time above mentioned; she saith and confesseth, That the Devil hath had the carnal knowledge of her body three other times; and that the last of the said three times was upon the said 16th day of July as she was going towards the

common bakehouse. And that at that time she, with the help of the Devil, would have killed the said Grace Barnes, if that she the said examinant had not spilt some of the meat she was then carrying unto the said Bakehouse.

THOMAS GIST, Mayor.
JOHN DAVIE, Alderman.

Devon. ss.—Biddiford, ss.

The Examination of Susanna Edwards of Biddiford aforesaid, in the county aforesaid, widow, taken the 10th day of July, A. D. 1682.

The said examinant being brought before us, and accused for practising of witchcraft upon the body of Grace Barnes, the wife of John Barnes of Biddiford aforesaid yeoman, was demanded by us how long since she had discourse or familiarity with the Devil; saith, That about two years ago she did meet with a gentleman in a field called the Parsonage Close in the town of Biddiford. And saith that his apparel was all of black. Upon which she did hope to have a piece of money of him. Whereupon the gentleman drawing near unto this examinant, she did make a curchy or courtesy unto him, as she did use so to do to gentlemen.

Being demanded what and who the gentleman she spake of was, the said examinant answered and said, That it was the Devil.

And confessed, That the Devil did ask of her whether she was a poor woman? unto whom she answered that she was a poor woman; and that thereupon the Devil in the shape of the gentleman did say unto her, that if this examinant would grant him one request that she should neither want for meat, drink, nor clothes: whereupon this examinant did say unto the said gentleman, (or rather the Devil) In the name of God, what is it that I shall have? Upon which the said gentleman vanished clear away from her.

And further confesseth, That afterwards there was something in the shape of a little boy which she thinks to be the Devil, came into her house and did lie with her and that he did suck her at her breast.

And confesseth, that she did afterwards meet him in a place called Stambridge-lane, in this parish of Biddiford, leading towards Abbotisham (which is the next parish on the west of Biddiford aforesaid) where he did suck blood out of her breast.

And further confesseth that on Sunday, which was the 16th day of July instant, she this examinant, together with Mary Trembles of Biddiford aforesaid, single woman, did go unto the house of John Barnes of Biddiford aforesaid, yeoman, and that nobody did see them; and that they were in the same room where Grace the wife of the said John Barnes was, and that there they did prick and pinch the said Grace Barnes with their fingers, and put her to great pain and torment, insomuch that the said Grace Barnes was almost dead.

And confesseth, That this present day she this examinant did prick and torment the said Grace Barnes again, (intimating with her fingers how she did it.) And also confesseth, that the Devil did intice her to make an end of her the said Grace Barnes; and that he told her that he would come again to her once more before she should go out of town. And confesseth, that she can go unto any place invisible, and yet her body shall be lying in her bed. And further confesseth, that the devil hath appeared unto her in the shape of a lion, as she supposed.

Being demanded whether she had done any bodily hurt unto any other person besides the said Grace Barnes, saith and confesseth, that she did prick and torment one Dorcas Coleman, the wife of John Coleman of Biddiford aforesaid mariner. And saith, that she gave herself to the Devil when she did meet with him in Stambridge-Lane, as aforesaid. And saith, that the said Mary Trembles was a servant unto her this examinant, in like manner as she this examinant was a servant unto the Devil (whom she called by the appellation of a gentleman as aforesaid.)

THOMAS GIST, Mayor.
JOHN DAVIE, Alderman.

[Examined with the Original, whereof this is a true copy. John Hill, Town-Clerk.]

The Substance of the LAST WORDS and CONFESSIONS of Susanna Edwards, Temperance Lloyd, and Mary Trembles, at the time and place of their Execution; as fully as could be taken in a case liable to so much noise and confusion, as is usual on such occasions.

Mr. *H.* Mary Trembles, What have you to say as to the crime you are now to die for?

Mary. I have spoke as much as I can speak already, and can speak no more.

H. In what shape did the Devil come to you?

Mary. The Devil came to me once, I think, like a lion.

H. Did he offer any violence to you?

Mary. No, not at all, but did frighten me, and did nothing to me: and I cried to God, and asked what he would have, and he vanished.

H. Did he give thee any gift, or didst thou make him any promise?—*Mary.* No.

H. Had he any of thy blood?—*Mary.* No.

H. Did he come to make use of thy body in a carnal manner?

Mary. Never in my life.

H. Have you a teat in your privy-parts?

Mary. None. The Grand Inquest said it was sworn to them.

H. Mary Trembles, Was not the devil there with Susan when I was once in the prison with you, and under her coats? the other told me that he was there, but is now fled; and that the devil was in the way when I was going to Taunton with my son who is a minister. Thou speakest now as a dying woman,

and as the Psalmist says, I will confess my iniquities and acknowledge all my sin. We find that Mary Magdalen had seven devils, and she came to Christ and obtained mercy: and if thou break thy league with the devil, and make a covenant with God, thou mayest also obtain mercy. If thou hast any thing to speak, speak thy mind.

Mary. I have spoke the very truth, and can speak no more: Mr. H. I would desire they may come by me, and confess as I have done.

H. Temperance Lloyd, Have you made any contract with the devil?—*Temp.* No.

H. Did he ever take any of thy blood?

Temp. No.

H. How did he appear to thee first or where in the street? in what shape?

Temp. In a woful shape.

H. Had he ever any carnal knowledge of thee?—*Temp.* No, never.

H. What did he do when he came to thee?

Temp. He caused me to go and do harm.

H. And did you go?

Temp. I did hurt a woman sore against my conscience: he carried me up to her door, which was open: the woman's name was Mrs. Grace Thomas.

H. What caused you to do her harm? what malice had you against her? did she do you any harm?

Temp. No, she never did me any harm: but the Devil beat me about the head grievously because I would not kill her: but I did bruise her after this fashion [laying her two hands to her sides.]

H. Did you bruise her till the blood came out of her mouth and nose?—*Temp.* No.

H. How many did you destroy and hurt?

Temp. None but she.

H. Did you know any mariners that you or your associates destroyed by overturning of ships and boats?

Temp. No; I never hurt any ship, bark, or boat in my life.

H. Was it you or Susan that did bewitch the children?

Temp. I sold apples, and the child took an apple from me, and the mother took the apple from the child; for the which I was very angry: but the child died of the small pox.

H. Do you know one Mr. Lutteril about these parts, or any of your confederates? did you or them bewitch his child?—*Temp.* No.

H. Temperance, How did you come in to hurt Mrs. Grace Thomas? did you pass through the key-hole of the door, or was the door open?

Temp. The Devil did lead me up stairs, and the door was open: and this is all the hurt I did.

H. How do you know it was the Devil?

Temp. I knew it by his eyes?

H. Had you no discourse or treaty with him?

Temp. No; he said I should go along with him to destroy a woman, and I told him I would not: he said he would make me; and then the Devil beat me about the head.

H. Why had you not called upon God?

Temp. He would not let me do it.

H. You say you never hurted ships nor boats; did you never ride over an arm of the sea on a cow?

Temp. No, no, master, it was she, meaning Susan.

When Temperance said it was Susan, she said She lied, and that she was the cause of her bringing to die: for she said when she was first brought to gaol, if that she was hanged, she would have me hanged too; she reported I should ride on a cow before her, which I never did.

H. Susan, Did you see the shape of a bullock? at the first time of your examination you said it was like a short black man, about the length of your arm.

Sus. He was black, Sir.

H. Susan, Had you any knowledge of the bewitching of Mr. Lutteril's child, or did you know a place called Tranton Burroughs?

Sus. No.

H. Are you willing to have any prayers?

Then Mr. H. prayed, whose prayer we could not take; and they sung part of the 40th Psalm, at the desire of Susanna Edwards: as she mounted the ladder, she said, The Lord Jesus speed me; though my sins be as red as scarlet, the Lord Jesus can make them as white as snow: the Lord help my soul. Then was executed.

Mary Trembles said, Lord Jesus receive my soul; Lord Jesus speed me; and then was also executed.

Temperance Lloyd said, Jesus Christ speed me well: Lord forgive all my sins; Lord Jesus Christ be merciful to my poor soul.

Mr. *Sheriff.* You are looked on as the woman that has debauched the other two: did you ever lie with Devils?—*Temp.* No.

Sh. Did not you know of their coming to gaol?—*Temp.* No.

Sh. Have you any thing to say to satisfy the world?

Temp. I forgive them, as I desire the Lord Jesus Christ will forgive me. The greatest thing I did was to Mrs. Grace Thomas; and I desire I may be sensible of it, and that the Lord Jesus Christ may forgive me. The Devil met me in the street, and bid me kill her; and because I would not, he beat me about the head and back.

Mr. *Sh.* In what shape or colour was he?

Temp. In black, like a bullock.

Sh. How do you know you did it? how went you in, through the key-hole, or the door?—*Temp.* At the door.

Sh. Had you no discourse with the Devil?

Temp. Never but this day six weeks.

Sh. You were charged about 12 years since, and did you never see the Devil but this time?

Temp. Yes, once before: I was going for brooms, and he came to me and said, This poor woman has a great burthen; and would help

ease me of my burthen: and I said, The Lord had enabled me to carry it so far, and I hope I shall be able to carry it further.

Sh. Did the Devil never promise you any thing?—*Temp.* No, never.

Sh. Then you have served a very bad master, who gave you nothing. Well, consider you are just departing this world: do you believe there is a God?—*Temp.* Yes.

Sh. Do you believe in Jesus Christ?

Temp. Yes; and I pray Jesus Christ to pardon all my sins. And so was executed.

The severity with which witches had in Scotland been treated, may be seen in the Notes to the Case of the Essex Witches, *ante*, vol. 4, p. 817, and to the Trial at Bury, vol. 6, p. 647. Fountainhall (Decisions, vol. 1, p. 304), notices a Case which occurred very shortly after this trial of Lloyd, Trembles, and Edwards; and from his report, it seems, that the wretched prisoner in that case was exempted from the operation of any active cruelty. "Oct. 1st, 1684, one Marion Purdy, dwelling at the West Port of Edinburgh, once a milk-wife, and now a beggar, is apprehended as a witch, and many delations of malifices, by laying on diseases, frenzies, &c. come in against her. She died of cold and poverty in prison about the Christmas; the king's Advocate giving no great notice to such informations against witches."

287. Proceedings between the KING and the CITY OF LONDON, on an Information in nature of a QUO WARRANTO,* in the King's Bench: 33—35 CHARLES II. A. D. 1681—1683.

Mich' 33 Car. 2, in B. R. Rot. 137. Sir Robert Sawyer, knt. his Majesty's Attorney General, against the Lord Mayor, and Commonalty, and Citizens of London.

The Information in nature of a Quo Warranto sets forth,

THAT the mayor, and commonalty, and citizens of the city of London, by the space of a month then last past, and more, used, and yet do claim to have and use, without any lawful warrant, or regal grant, within the city of London aforesaid, and the liberties and privileges of the same city, the liberties and privileges following, viz.

I. To be of themselves a Body Corporate and Politic, by the name of Mayor and Commonalty, and Citizens of the City of London.

II. To have Sheriffs Civitat' et Com' London' et Com' Midd'. and to name, elect, make, and constitute them.

III. That the Mayor and Aldermen of the said City should be Justices of the Peace, and hold Sessions of the Peace.

All which Liberties, Privileges, and Franchises, the said Mayor and Commonalty, and Citizens of London, upon the King did by the space aforesaid usurp, and yet do usurp.

* "The court," says Burnet, "finding that the city of London could not be wrought on to surrender their Charter, resolved to have it condemned by a judgment in the King's-bench. Jones had died in May: So now Pollexphen and Treby were chiefly relied on by the city in this matter. Sawyer was the attorney general, a dull hot man, and forward to serve all the designs of the court. He undertook by the advice of Sanders, a learned but a very immoral man, to overthrow the Charter. When the matter was brought near judgment, Sanders, who had laid the whole thing, was made chief justice. Pemberton, who was not satisfied in the point, being removed to the common pleas upon North's advancement. Dolben, a judge of the King's-bench, was found not to be clear: So he was turned out, and Withins came in his room. When sentence was to be given, Sanders was struck with an apoplexy: So he could not come into court: But he sent his judgment in writing, and died a few days after. The sentence was given without the solemnity that was usual upon great occasions: The judges were wont formerly in delivering their opinions to make long arguments in which they set forth the grounds of law on which they went, which were great instructions to the students and barristers: But that had been laid aside ever since Hale's time.

"The judgment now given was, that a city might forfeit its charter; that the male-versations of the common council were the acts of the whole city, and that the two points set forth in the pleadings were just grounds for the forfeiting of a Charter. Upon which premisses the proper conclusion seemed to be, that therefore the city of London had forfeited their Charter: But the consequences of that were so much apprehended, that they did not think fit to venture on it: So they judged, that the king might seize the liberties of the city. The attorney general moved, contrary to what is usual in such cases, that the judgment might not be recorded. And upon that new endeavours were used to bring the common council to deliver up their Charter: Yet that could not be compassed, though it was brought much nearer in the numbers of the voices than was imagined could ever be done." 1 Own Times, 534.

Roger North is very copious upon this subject. From his connection with sir Dudley North, it was natural that he should feel a lively interest in the proceedings concerning the city of London, during the latter part of the reign

Plea.

The mayor and commonalty, and citizens, appear by their attorney, and plead,

I. As to their being a Body Politic and Corporate, they prescribe, and say,

1. That the city of London is, and time out of mind hath been, an ancient city, and that the citizens of that city are, and by all that time have been, a body corporate and politic, by name of Mayor and Commonalty, and Citizens of the City of London.

That in Magna Charta de libertatib' Angliæ, in the parliament holden 9 Hen. 3, it was enacted, 'Quod civitas London' habeat omnes 'libertates suas antiquas, et consuetudines suas.'

That in the parliament, 1 Edw. 3, that king by his charter De assensu Prelatorum, Comitum, Baronum, 'et totius communitatis regni sui,'

of Charles the Second, and wherever he mentions them in his "Examen," his partiality is displayed in a degree which very much weakens his testimony, though certainly the force of his arguments such as they are is not affected by it. "Testimony," says Boyle, 'is like the shot of a long-bow, which owes its efficacy to the force of the shooter; argument is like the shot of the cross-bow, equally forcible, whether discharged by a giant or a dwarf.'

North's account (abusive as usual of Kennet) is as follows:

"I know no transaction, in this reign, more disingenuously traduced, than that known by the word Charters; which mean the Quo Warrantos brought against some corporations for seising their franchises into the king's hands for abuses of them. Whereupon, and upon voluntary surrenders of some, diverse new Charters were granted, with some alterations and restrictions. The author here distinguisheth neither things, times, manners, or intentions, but supposeth the worst of all alike. And then he transcribes, out of a cankered libel, an hellish parcel of invectives against the government, upon that occasion; wherein all orders are scandalized, the holy scriptures and religion brought in to compliment the infernal sarcasm, and then concludes with panegyric; but it is bestowed upon attainted rebels and rebellion. This frustum of a libel is grafted into his pious History, as an account of that remarkable proceeding, where every one may read what I care not to repeat.

"But, as to the matter itself, I think I may distinguish it into three orders, which I term 1. Quo Warrantos. 2. Surrenders. 3. Regulations. Which partition may be marked. 1. good, 2. indifferent, and 3. bad. First, by Quo Warranto's I mean such as were ordered against those corporations that had enormously offended by breach of his majesty's laws, and who set up the authority of their trust, not for the due execution of, but for the protecting from, the law, persons that were notorious offenders against it; and out of this list I will not except the great city of London itself, as may appear with good reason afterwards. And, within this view, and going no farther, I must affirm that there never was a piece of more necessary justice in the English state, nor more beneficial to all the people in general, than the prosecuting those Quo Warranto's was. And to shew there was absolute need of it, I affirm also that the first overture was not from the court, nor from such black designs as the author and his fellow libellers suggest; but from the counties where the abuses where grievance insufferable. And for redress of them, the gentlemen of the counties applied to the king by such means as they had. The mischief lay in towns that had justices of their own with a clause that the justices of the country 'ne intromittant;' so, by excluding the country justices, they were become the ordinary asylums for all sorts of rogues that fled from the justice of the sessions, and particularly those that were tumultuous and seditious, and there found protection. And particularly, the town of Pool in Dorsetshire was of this order, and, if I mistake not, Taunton Dean another. Others there were in the West of England complained of; and so much in earnest, that the grand juries in Dorsetshire and Devonshire, or one of them (for I do but just recollect some particulars) presented these places as common nuisances. And, upon the application of the gentlemen to the judges of assize, the matter was laid before the king, and Quo Warranto's ordered to be prosecuted against the chief of them. And, upon that some were reduced, others, knowing themselves to be obnoxious, submitted; and then their Charters came to be surrendered, and new ones granted in lieu of them. In which no alterations were made, but such as respected the law, and the good government of the country; such as laying the towns open to the justices of the counties, if they found cause to interpose there, and to act with the justices of the place, and sometimes to be of the body, and capable of the offices of authority in the corporations. And if any honest Englishman can be of opinion that such changes were not much for the better, especially as to diverse factious, or rather mercenary, corporations, I must crave leave to differ from him. And this method was observed in most instances of that reign, without any of the hideous characters which the faction, now in our latter times, have bestowed upon it. And I limit this division of a laudable proceeding, without any abuse at all, until the time that sir George Jefferies was Lord Chief Justice of the King's bench, and sworn of the privy council, which let him into the means, as his way was, to push things beyond their due bounds.

"And, after that time, the abuse began to grow, but not to any great inconvenience, and, for that reason, I give this class the character of indifferent. Divers inducements then brought in Charters to be surrendered in order to the renewal of them. For it being observed

and by authority of the same parliament, having recited that the same citizens, at the time of the making Magna Charta, and also in the time of Edward the Confessor, William the Conqueror, and other his progenitors, had divers liberties and customs, wills and grants by authority aforesaid, That the same citizens shall have their liberties according to Magna Charta.—And that for any personal trespass 'alicujus ministri ejusdem civitatis, libertas 'civitatis illius in manus ejusdem Domini 'Regis Edw. 3, vel heredum suorum, non

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that such compliments of the towns were graciously accepted, and the prevailing with others to come in, was accounted good service, and, by a sort of mode or custom, the tendency of loyalty itself was that way; this circumstance was the occasion that many towns came in and took the opportunity to be remunerated with considerable privileges, respecting their common profit and trade, which were commonly granted as they desired. And as to the changes made, with respect to the law and government of the country, the inhabitants were commonly not very solicitous, but submitted those matters to the king's pleasure. But the worst inducement was when pick-thank courtiers, for ostentation of merit, frighted the people with the law and charges, and procured summons of Quo Warranto to be served upon them; and having, by such undue means, brought in the charters, set a value upon themselves at court, as for so much good service done. There was a memorable passage of this nature. When the Lord Chief Justice Jefferies went the Northern circuit, he had taken upon him, and accordingly valued himself to the king for doing great matters towards bringing in of charters, as it was called; and, by his own contrivance (as I have very good reason to guess) to procure for himself as great an authority in the Northern circuit (which he was appointed for) as was possible, the king was persuaded to present him with a ring, publicly taken with his own finger, in token of his majesty's acceptance of his most eminent services. And this by way of precursor; which being blazoned in the Gazette, his lordship went down into the country as, from the king Legatus a Latere, esteemed a mighty favorite: which, together with his lofty airs, made all the charters, like the walls of Jericho, fall down before him: and he returned laden with surrenders, the spoils of towns; which, with certain other performances in that voyage, not a subject here, advanced his pretensions to favour at court. The process was indeed pleasant: the king by public favours arms a man with power by which he doth great things, and then those great things entitle him to favour, as flowing from him, which indeed flowed from the king's authority and favour shewed him. And so in the city, upon the strength of an old drunken acquaintance, he seemed, and thereupon pretended to have an interest, which procured him the countenance of his majesty's favour at court; and that turned to a real interest in the city; which in truth was the king's authority, and not his, although, (as a personal merit) he assumed it. But to conclude; we are to consider here, none could blame the king for desiring to put the corporations in a better order; for whoever saw or knew, as we did, how his majesty was affronted by faction fastening upon the populace of those abused towns, would think neither his honour, government, or person safe without it.

"Thus far the alteration of charters, however growing into abuse (I mean as to the management in the country; for the court, to do right, was very just and careful of the towns) were of no desperate ill consequence. I know it hath been in every one's mouth to object that all was done to influence elections to the parliament; and, as the way of objectors is, they run the consequences to extremity, and called it packing a parliament, and corrupting the very fountain of the laws. Now if we will profess any ingenuity, we must own that, at that time, the crown had need of a better interest than it had in the choice of members, to maintain a due balance; that an adverse party might not carry every thing in their model against the crown, as was most notoriously the case of the Oxford and Westminster parliaments. And it was better if it had, or could have, been done thus, than by setting up new boroughs, which the king might do at pleasure. I would have folks, that object this, consider what is the consequence of splitting freeholds and suborning unqualified countrymen to forswear themselves to vote in a party; and who are the greatest traitors to the public? But what was the harm if the best of those, interested in the county elections, had also voices in the boroughs, whereby they might shew the deluded not to say bribed towns, a better choice than they could, or at least would, have found for themselves? I say if this had been generally done, as it was not, what cause was there to grumble? But it could not be done in the way of renewals of charters, for these seldom touch the right of election that goes most upon prescription, and is the same as in London, whatever becomes of the corporation. And admit the advantage in the election of a chief magistrate is gained to the court side by a renewal, which they may say will incline to his party in the management and return: and will not they do the same, if they come in by a faction, for favour of that? On which side should the balance turn? But hath not the king the nomination of all the sheriffs of counties (except one) in England? And yet no complaint was then heard of injustice, nor is the parliament the more packed for all that. Extremes are never to be argued against the sacred trust of government; for then we must have no power to keep the peace, trust nor government at all, that is, no liberty, property, nor security for either. For a power to do right always includes a power to do wrong. I cannot but conclude this reflection with observing that, as

'capeﾭretur, sed hujusmodi minister prout qualitatem transgressionis puniretur.'

They plead also,

That in the parliament holden 7 R. 2. 'Omnes consuetudines, libertates, franchesia, et privilegia civitatis predict' tunc civibus civitatis illius, et eorum successoribus, licet usi non fuerint, vel abusi fuerint, authoritate ejusdem parliamenti ratificat' fuerunt.'

Then they plead the confirmation of several later kings by their charters; as of

King Henry 6. by his charter, dated 26th October, 23 Hen. 6.

King Edward 4. by his charter, dated 9th November, 2 Ed. 4.

King Henry 7. by his charter, dated 23rd July, 20 H. 7.

King James 1. by his charter, dated 25th September, 6 Jac. 1.

King Charles 1. by his charter, dated 18th October, 14 C. 1.

King Charles 2. by his charter, dated 24th January, 15 C. 2.

Ac eo warranto they claim to be, and are a body politic, &c. and traverse their usurping upon the king.

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the government, at that time, had gained a vast strength by popular reputation, if it had gained also a firmer legal dependance and alliance between the crown and people, so as both should have need the good will of each other, and faction have had no encouragement to work the mischief of both by creating distrusts, fears, and jealousies to divide them, a better service had been done to the people of England, than when the Capite Tenures of estates were taken away, and a common nuisance, the excise, planted in the room of them.

"Now, as to the last order of charters, called regulations, which properly belongs to the next reign and so beyond my tedder, I shall say little. But, considering that more especial counsellors and adjutants, with choice commissioners, messengers and spies, were instituted purposely to manage corporations, for compassing elections, and to humour the court and considering who they were, it is very strange that so much obloquy, as has been cast on the church and loyal party, should fall upon that account: for it is most certain and true that the Tories, as they were called, were more opposite to those proceedings than the author's celebrated party men were. For (under popery) at that time, the whole machine was fanatic; and the design was declared to compass a fanatic parliament. And we do not find that after the happy revolution, any of the persons, who had acted notoriously at the head of those mishapen counsels, fell under any question or punishment for example to others, and the very inventors and ringleaders were not so much as spoke to about it. Whilst the good sir John Moor, and sir D. North, &c. were scrutinated over and over again; and, if they had not been beyond all exceptions candid in all that they did, as regular magistrates in the city, they had been trounced for it: and even the ashes of the dead were not let rest in peace. So far hath gross partiality and animosity to do in popular factious times of clamour.

But one attempt, which failed, shews the design of those persons who had been in the factious list against king Charles 2. For, instead of calling to an account their own friends the regulators, who were hot and reeking being, by the revolution, but just driven from their work, they took an occasion to offer to the parliament, by way of rider, two clauses; the effect of whom was to disable all those persons, who had been concerned in the surrenders and renewals of charters, from voting in elections of members to serve in parliament. These carried a retrospection into that king's reign long before the abuses justly complained of; and when grand jury men and justices of the peace, and soon after, most of the intelligent loyal party had interested themselves for obtaining a reformation of some wretched and mercenary corporations; and the humour was so general, that the few of any account in the nation, who were desirous to be owned for royalists, whether for real opinion, or following the example of others, or out of a gaiety of behaviour on the government side, as it was a mode then (and the like hath been more than once since) but were all, one way or other, concerned in those affairs. I say all these, much the greater and more valuable part of the nation, were to be swept out of their right of voting at elections all at once; and that, without any summons, charge, or hearing, or any sentence of delict passed upon them. This must have procured rare elections for the church and monarchy. But, after diverse and great debates, these swinging clauses were thrown out of the house. Now let the indifferent judge who were the parliament packers. But I must not forget one thing, which is for the honour of some of the bishops, then newly deprived, who in the former reign, hazarded their persons and estates (then flourishing) for the defence of the Church of England against Popery: Now, although deprived of all exercise of authority and revenues, employed their endeavours to preserve it against the fanatics. For they directed their conversation all they could (and they had nothing else left them) to make gentlemen sensible of the design and large scope of this project, and one of them in particular procured the writer of these papers to publish a small pamphlet, while the matter was depending, to expose the wretchedness of these clauses, which many thought went a great way in creating a right understanding of them. For the promoters were very angry, and caused to be wrote an invective by way of answer, letting fly, at all adventures, against a noble peer (lately created of Guernsey) supposed to be the author of it, with as much justice as all the rest.

"So much of the business of charters at large. I might have made myself work

II. As to the having, electing, making, and constituting Sheriffs of London and Middlesex, they plead,

That they are, and time out of mind were, a body politic and corporate, as well by the name of Mayor and Commonalty, and Citizens, 'quam per nomen civium London.' And that king John, by his letters patents under the great seal of England, in court produced, dated 5th Julii, anno regni sui primo, granted to the citizens of London, that they should have the electing, making, and constituting sheriffs of London and Middlesex *imperpetuum*.

enough, if I had gone about to have gathered all the particular cases, with their circumstances, which would have made a just volume, to be wished for rather than expected. But the author, whom I am obliged to wait upon, hath thought fit to touch only the case of London upon the Quo Warranto prosecuted against that great city; and I shall join issue with him there, and consent that the justice of the proceeding, and the honesty of his account, shall be determined according to the state of that. This great city was among the earliest that were questioned at law for forfeiture; and I shall venture to say with more of reason than any other in England. For what, in the name of justice, had the government to do when Ignoramus was mounted in Cathedra, and there was a declared stop put to all state criminal law, to say nothing of the ordinary and civil course, and how factiously partial it was carried on in London and Middlesex? It was indeed a dangerous case to the public, and, in other times, had probably introduced precedents of authority and prerogative that would have lasted longer than that law-suit did. Ill actions give colour to mischievous precedents; and there are scurvy maxims, as 'omnia dat 'qui justa negat; quod remedio destituitur ipsa 're valet,' and the like. Some governments have resorted to force, and justified it upon the bare pretence of less than was true here. The city of London and county of Middlesex, respecting the safety of the government, as it should be guarded by law, is of the last consequence to the crown; because the government resides there, and all its enemies gather about it. It is an unparalleled error of politics in the people, when they think to deprive their government of the power of punishing capital offences by law, and no less when such course is taken to discourage it by popular misconstructions and calumnies, as it was scandalously done in this instance, and, by the author, reiterated; I hope there will never be known the like folly. I desire to ask the most dissatisfied person, when wrong is done, what is the course, going to law, compulsion, or fighting? And, presuming the answer, I ask farther, whether, after the sovereign and his authority were so outrageously insulted, was it not an instance of a just and gracious government to decline the use of power upon the reason of necessity, and resort to the law before judges sworn, and to pursue it in all the forms of process and special pleading? Government is in a very hard case if, having both right and power, it may not make use of either. It hath a ridiculous phiz, like the fable of the old man, his ass, and a boy, before the inconsistible vulgar. It is the part therefore of indifferent times to take things right, and defer nothing to the prejudices, that faction, to justify themselves, would cast upon their betters, especially in the way here before us, by setting up a tool of a writer to metamorphose the libels of the time into what he calls Complete History.

"As for the forms of the proceeding against the city of London, and the matters of law argued *pro* and *con*, with the judges final sentence that the corporation of the city be seized into the king's hands; the whole is at large in print in a folio volume, being a famous law-case which every one may study that is so disposed. Therefore I shall not make any formal report of it, but touch the principal matters in an historical way only. And first, as to the law, upon which the process was grounded; which was that all franchises whatever, derived from the crown, are forfeited by abuser; than which nothing is more trite in the law books, but more especially such as concern the conservation of the peace and justice. Then, that the corporation was a franchise derived from the crown, and, for every unlawful act done by the body, was seisable, for the abuser, as forfeited. So was the law taken to be: As for the fact, it appeared the corporation had done diverse unlawful facts; and, about the time, there was a paper handed to and fro, that contained ten or twelve mis-feasances, which were presumed would amount to a forfeiture: But not all with equal clearness: for some admitted of dispute. As, for instance, this, that they permitted and did not suppress the outrageous tumults in the city. For the corporation, being entrusted by their magistrates to preserve peace in the city, ought not to suffer tumults, but to suppress and punish them; which they did not so much as endeavour to do. But then the counsel for the city might have stood upon it, that that was the fault of the magistrates, and not of the body, and that they, in their persons, ought to be punished for their fault, and not the corporate-body. To prevent all colour of chicane upon such accounts, care was taken to select two facts, to be assigned for forfeiture, which were unquestionably unlawful, and indubitably the proper acts of the corporation.

"The first of these was a petition of the city, framed and ordered by the common council, to the king for sitting of the parliament. In which they accuse the king directly of misgovernment, and stopping the public justice of the nation, with other abominable reflecting expressions; all which in full form the common council ordered to be printed; and it was posted up in the carfours and public places of resort in the city; which was a publication with a

Then they plead this liberty and franch confirmed to them by all the aforementioned statutes and charters, *ac eo warranto* they claim to make and constitute sheriffs.

III. As to the Mayors and Aldermen being Justices of the Peace, and holding Sessions, they plead,

That the city is, and time out of mind was, an ancient city and county, and the citizens a body politic.

That king Charles the First, by his letters patents, dated 18th October, 14 Car. 1, granted to the mayor and commonalty, and citizens of the city of London, That the mayor and aldermen of London, such of them as had been mayors, should be justices of the peace, and should hold sessions, *et eo warranto* they claim to be justices, and hold sessions.

Respons.

To this Pl a the Attorney General replies. And as to the Mayor and Commonalty, and Citizens of London, being a Body Politic and Corporate,

witness. The other forfeiture was by like order raising money upon the king's subjects coming to the public markets, at rates as they were pleased to tax; which markets are free for all people, and may not be turned into a fund of revenue at the pleasure of the corporation. These forfeitures were no peccadillo trifles; but small or great alters not the case, for it is not value, but legality makes the question: For the least unlawful act is a forfeiture as truly as the greatest. It was enough if those facts, that were assigned, would not admit of any colourable dispute. The cause depended a long time upon the forms of special pleading, in order to come to proper issues, whether to the court by demurrer or to the county for trial; and of all the several pleas, bars, rejoinders, rebutters, surrebutters, &c. the public were made judges by the favour of the press that sent them forth in the very words, and an English translation annexed; which jargon was conned over by the common people with wonderful seriousness There was to be seen the whole fabric of Oates's plot, and the cases of the criminals, particularly the five lords in the Tower under impeachment, ready for trial when the parliament should meet, which was pleaded in justification of the libellous petition: What could resist that powerful charm? The learned counsel could plead in form a justification of a scandal upon the king posted in print, that knew by law no justification can be pleaded even in a case of *Scandalum Magnatum* against a peer. And when the law says expressly that the king can do no wrong, how comes it to be lawful or tolerable to accuse him for having done it? But where faction has to do, every thing must give way; and all, that is for them, is regular and just, and nothing else.

"In fine the counsel for the city did not think fit to deny the facts assigned for the forfeiture, whereby issue might have been joined, and a trial had to prove them. But, in the course of the especial pleading, the facts were confessed by insisting to the court that the same did not amount to a forfeiture; and in fine, the issue was joined to the court by way of demurrer, which admitting the facts to be true, forfeiture, or not, was the only question. This much shortened the cause; for nothing was to be done by the court but to hear arguments, and, after consideration, to give judgment. And, accordingly, time was given to the counsel, term after term, and solemn prolix arguments heard twice; and then after a considerable time past, the court gave judgment for the king; that the franchises should be seized into the king's hands. All which matters are punctually, as to times and circumstances, published in the print; therefore I refer to them, being not in my scope, which is chiefly to explain so much as may dissolve the author's sophistical libel. And that will require some material passages to be more particularly related.

"And first, as to the defence, I did not find that the city counsel insisted on any thing materially, that went to the whole case, but only this, viz. That a corporation was immortal, and dissolvable only by the act of God, as by the natural deaths of all the members. But, as to the particular facts, they said the common council were but the city's deputies, and a principal is not punishable for crimes of his deputy; so they might commit any misdemeanors, and the city be not the least affected by it. And, as to their markets, they had a custom to make by-laws, and the common council taxed the market folks by way of by-law. This was the marrow of their defence: but it is spread very thin, and, in the arguments, larded with a world of quotations, in which the other side were not wanting. For the counsel for the king at large insisted that a corporation is a franchise, and, in all the books and Quo Warranto cases, passeth under that title; and whatever it is, it is capable of no amendment but seizure. It must be lawless or seizable; and, for the notion of immortality, it is a chimera of invention, absolutely a stranger to the law and the law-books. That the common council was the representative body of the city *Corporaliter Congregati*, and the only means by which the city, as a corporation, can act extraordinarily to bind themselves and all the members. And, as for by-laws, grant all they say, they can extend no farther than to conclude their own members, but not to tax the people of England for coming amongst them on their lawful occasions. But as it happens in all great cases, where reason and justice is wanted, a face of assurance is the Succedaneum; so here, there could be no law so plain as to convince a party that the city was in the wrong in any thing, because they were

First takes issue, that they never were a body corporate, and for this puts himself upon the country. And then goes over and pleads.

That the mayor, commonalty, and citizens, assuming upon themselves to be a body politic and corporate, and by reason thereof to have power and authority to convocate and assemble, and make laws and ordinances, not contrary to the laws of the kingdom, for the better government of the city and citizens, and for

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resolved, right or wrong, it should not be so; and if they had credit with the vulgar, or members sufficient to sustain a clamour, it was the same thing, in their account, as if they were in the right. And they by their multifarious inventing, and lying, communicated, after the manner of their policy, to all people, and in all places where they had any access by party, they went a great way to possess all people that this proceeding against London was a tyrannous project of the court: And if the occasion, or rather necessity of it, had not been most evident before the eyes of all men, they had made very ill use of it as to consequences. But there was then enough of the church and loyal party in full credit at that time, especially citizens, to stem that orage of faction. But yet the impressions were not slight; for nothing is so deceitful as popular opinions of the vulgar in popular matters; and there is nothing so fond in them, which, more or less, is not found in some persons of quality and literature eminent in their time, of whom one would expect better.

"It is not to be imagined that the king intended the least harm to the city itself by this judgment; and most of the citizens of credit were thereof satisfied, and ready to have trusted the king; and they were in the right, for the king deceived them in nothing, as will apear. In the first place, care was had of the city that the judgment, pronounced upon the Quo Warranto, should not be entered upon the record of the plea, till his majesty's pleasure should be farther known. This was for caution, lest some customs or duties, that depended on the corporate capacity, might fall and not revive upon a regrant. And it also gave the city time to advise among themselves about renewing their charter, as might be done with confirmation of the old, and grant of some new privileges. But, as to the governing part, and the law, the king required some regulations should be made, for obviating the recrudescence, of those Ignoramus abuses, for the future, that had been so scandalous before. And people were generally satisfied it had been their wisest course to have done it out of hand, lest somewhat might have happened in the interim to their prejudice which they might not dream of. But matters of this nature, in their proper times, are so nice that they do not admit of a wise interposition of particular persons of the body; for if it be the interest of a party to oppose all reasonable settlement, nothing will be so liable to misconstruction, and to be defamed with ill language, as the most prudent propositions, tending that way, will be. It is no new nor strange thing, in great cities, for wisdom to be made unpopular and infamous; therefore the wisest citizens were passive, and let matters drive; they themselves going no whit faster than the common herd. But, after judgment pronounced, the common council thought fit to agree, that an humble petition should be presented to the king. It was conceived in general terms, begging his majesty's pardon and favour to the distressed city. The lord-mayor, with the aldermen, waited upon the king with the petition, and humbly presented it to him at Windsor. And thereupon the Lord Keeper North signified his majesty's pleasure to them in a solemn speech, which states the condition of the whole affair, with the reasons, better than I can pretend to do, and as shortly as it can well be expressed; therefore, although it is in print more than once, I shall subjoin it verbatim as it was spoke June 18, 1683. And this I am more inclined to do, because our author and I are to have some sharp words about it.

"'My Lord Mayor; I am, by the king's 'command, to tell you, that he hath considered 'the humble petition of the city of London, 'where so many of the present magistrates, and 'other eminent citizens, are of undoubted 'loyalty and affection to his service, that, for 'their sakes, his majesty will shew the city all 'the favour they can reasonably desire.—It was 'very long before his majesty took a resolution 'to question their charter; it was not the sedi'tious discourses in coffee-houses, the treason'able pamphlets and libels daily published and 'dispersed thence into all parts of the kingdom, 'the outrageous tumults in the streets, nor the 'affronts of his courts of justice could make 'him do it. His majesty had patience till dis'orders were grown to that height, that nothing 'less seemed to be designed than a ruin to the 'government both in church and state. For 'the factious party were not content with the 'practice of these insolences, but endeavoured 'to have them publicly countenanced by the 'magistrates, and, for that end, in all elections, 'they stickled to choose the most disaffected 'into offices, and carried themselves with that 'heat and violence, that it was a terror to all 'sober and discreet citizens; and the city was 'so unhappily divided into parties, that there 'was no likelihood it could return into order, so 'long as the factious retained any hopes of pro'curing the elections of magistrates of their own 'party, for their impunity.—It was high time 'to put a stop to this growing evil; this made 'it necessary for his majesty to enquire into 'their abuse of franchises, that it might be in 'his power to make a regulation sufficient to 'restore the city to its former good government. 'It was not for the punishment, but merely 'for the good of the city that the king took this 'course, and now he hath obtained judgment

preserving the king's peace—Under colour and pretext thereof, but respecting only their private gain and profit, and against the trust in a body corporate by the laws of this kingdom reposed, assumed an unlawful and unjust authority to levy money upon the king's subjects, to their own proper use, by colour of laws and ordinances by them *de facto* ordained

'in a Quo Warranto, it is not his intention to 'prejudice them either in their properties or 'customs. Nay, lest the entry of the judgment upon record might have fatal consequence to them, his majesty was so tender of 'them, that he caused Mr. Attorney to forbear 'the same at present, that the city might have 'time to consider their condition.

"'My lord; I must needs say the city hath 'not been so well advised to defer their application to his majesty so long, even till the court 'hath pronounced judgment; it had been done 'with a much better grace if it had been more 'early. His majesty's affection for the city is 'too great to reject their suit for that cause. 'But, for that reason, you will have less time, 'to deliberate upon the particulars the king 'doth require of you: And indeed there will 'be little need of deliberation; for his majesty 'hath resolved to make the alterations as few 'and as easy, as may be consistent with the 'good government of the city, and peace of 'the kingdom.

"'His majesty requires your submission to 'these regulations:

"'1. That no lord mayor, sheriff, recorder, 'common serjeant, town-clerk, or coroner of 'the city of London, or steward of the borough 'of Southwark, shall be capable of, or be admitted to the exercise of their respective 'offices, before his majesty shall have approved 'them under his sign manual.

"'2. That if his majesty shall disapprove the 'choice of any person to be lord mayor, and 'signify the same, under his sign manual to 'the lord mayor, or in default of a lord mayor, 'to the recorder or senior alderman, the city 'shall within one week proceed to a new choice; 'and if his majesty shall in like manner disapprove the second choice, his majesty may, 'if he so please, nominate a person to be lord 'mayor for the ensuing year.

"'3. If his majesty shall in like manner disapprove the persons chosen to be sheriffs, or 'either of them, his majesty may appoint persons to be sheriffs for the ensuing year by 'commission if he so please.

"'4. Nevertheless the election of these officers may be according to the ancient usages of 'the city with these restrictions.

"'5. The lord mayor and court of aldermen 'may, with leave of his majesty, displace any 'alderman, recorder, common serjeant, town-clerk, coroner of the said city, and steward of 'the said borough.

"'6. Upon any election of any alderman, if 'any of the persons, that shall be presented to 'the court of aldermen by the ward, shall be 'adjudged unfit: upon such declaration by 'the said court, the ward shall proceed to the 'choice of other persons in the room of such, 'or so many of them as are so disapproved, 'and if the court shall disapprove such second 'choice, they may appoint in their room.

"'7. The justices of the peace to be by the 'king's commission, which his majesty will 'grant according to the usual method, unless 'upon extraordinary occasions, when his majesty shall think it necessary for his service.

"'These matters are to be settled in such 'manner, as shall be approved by his majesty's 'attorney and solicitor general and counsel 'learned in the law.

"'My Lord Mayor; These regulations being 'made, his majesty will not only pardon the 'prosecution, but confirm the Charter in such 'manner as may be consistent with them.

"'The city ought to look upon this as a great 'condescension on his majesty's part, it being 'but in the nature of a reservation of a small 'part of what is already in his power by the 'judgment, and of those things which conduce 'as much to their own good and quiet as to his 'service. If the city should look upon it with 'another eye, and neglect a speedy compliance, 'yet his majesty hath done his part, and demonstrated his affection to the city by giving 'them this opportunity. And if there shall be 'any heavy consequence of this judgment, 'which it will behove you well to consider, the 'fault will lie at their door in whose power it 'now is to bring this matter to an happy conclusion.

"'My Lord Mayor; The term draws near 'an end, and Midsummer-day is at hand, when 'some of the officers use to be chosen, whereof 'his majesty will reserve the approbation; 'therefore it is his majesty's pleasure that you 'return to the city and consult the common 'council, that he may speedily know your resolution hereupon, and accordingly give his 'directions. That you may see the king is 'in earnest, and the matter is not capable of 'delay, I am commanded to let you know 'that he hath given order to his attorney general to enter up judgment on Saturday next, 'unless you prevent it by your compliance in 'all these particulars.'

"The whole speech thus lying open before us, I shall demonstrate that the author hath most disingenuously and shamefully, not only left out but perverted to libel his majesty's most gracious regards for the good and welfare of the city, by observing some matters; and first his note upon what was declared at pronouncing the judgment, that by the king's special order, the judgment was not to be entered till farther order. Now, says he, this was generally looked upon to make the citizens resign their own liberties, instead of being condemned to a deprivation of them. Here is poison gathered from a flower, that is construing a gracious tenderness, which I can affirm knowingly to be truly and really such, to be a trea-

or established; and in prosecution and execution of such illegal and unjust power and authority by them usurped, 17th of September, 26 Car. 2, in their common council assembled, made, constituted, and published a certain law, by them *de facto* enacted, for the levying of several sums of money of all the king's subjects, coming to the public markets within the

cherous wile; and without the least symptom of evidence to prove what he says. It is both foolish and false: For the condemnation was perfect by the judgment pronounced; but, the consequences of the judgment, recorded, concerned only the city, and not the king: Nay, the king, and also the people in general, might have gained by either a devolution or extinction of some payments, whereof the right discontinued, but an hour, were irrecoverably lost to the city. And the care of those and that it might be in his majesty's power entirely to redintegrate the city, whose diminution in any thing he did not desire, they behaving themselves dutifully, was the true reason of the suspension. And this piece of malice is screened under 'it was looked upon,' that is by such as saw with libellous spectacles, that tincted all objects according to their colour.

"Then he has left out all the introductory part of the speech, which shews the necessity, integrity, and good will of the king in his proceeding: But one must excuse him, for that was none of his business. But he finds another reason for the suspension. Thus he brokenly states it in words of the speech. 'That' though 'the king had obtained judgment,' —— 'it was not his intent to prejudice them in their 'properties or customs.' The malicious tendency of this sentence is not obvious; but it consists in this, that the king knew the judgment itself was a prejudice, that is a wrong, to the city in their properties and customs. We are, by his text, to understand the matter so, although nothing can be more alien in sense, than that is, to the purport of the speech. But the metamorphosis is dexterously made, by a petit alteration of the word 'though' put in the place of 'now.' Which ought to be well attended to; for the 'now,' as it is in the speech, looks forward, and casts the reference from the judgment upon the consequences: That is, the king is possessed, but is willing to quit all to them upon their compliance, and attends their answer. But 'though' refers back to the proceedings before the judgment, even to the first process, and rests upon the judgment itself as injurious, &c. if it took place; and so makes the king purge himself, as saying he did not mean them such an injury as the judgment was, or, which is the same thing in his sense as injury, that is prejudice. The speech means that the city was warned not to let such a prejudice run (since the king had his judgment) by preventing the entry; but the author means that the king owned, by his keeper, that, if he did enter judgment, it was a prejudice; which, being in properties and customs, that is rights, must mean wrong and injury, as I said before.

"Another case of the author's ingenuity is his carrying the conditions no farther than N° 3, whereas they go on to N° 7; and the very next, that is N° 4, shews that the elections were left to the common usages of the city. And the rest shews the disposition touching the lord mayor and aldermen's authority in the placing of officers of an inferior rank. In short, the king reserved only an approbation of those officers that are named N° 1, which he might, if he saw cause, reject, if the city, or a prevailing faction there, should, as formerly they had done, choose men who were the declared enemies of his person, authority and government. And if it be said, would not this be to impose officers upon the city arbitrarily? I answer, would it not be otherwise worse, for a faction in the city to impose officers upon the crown arbitrarily? But suppose it to be the city itself, and not only, as here it was, a faction; if it must be one or other, I desire to know whose trust is greatest? The king's or their's? And on which side the imposing ought to fall? On the governors or the cities, that, like the rest of England (whose county sheriffs are nominated by the king) are to be governed? Whatever trust is reposed in them, is for the sake of government, which is the trust of the crown so far delegated to them; and then, if one must have power to impose, the principle or delegate, which ought in common reason and decency to be? And it is to be noted that all the offices, subject to this approbation, are those that belong to vernment. Other offices, that belong to the city revenues and private œconomy, as the chamberlain, sword-bearer, &c. are all left free and untouched; but no notice is by our author taken of that part of the speech. And as to imposing, which the factious talkers so much exaggerated, there was nothing but a Republican cant in it, that carries all things to extremity; such as ages upon ages may not produce; whereas the evil to be cured is frequent, and now flagrant. It is to be considered that the crown, for reasons apparent enough, would never be apt to give the city offence; nor would the power of approbation be exercised by a refusal of any whom all the world would not say were necessary to be refused; and the city itself, well knowing of that power, would never be troubled with faction so much as to labour elections fit to be rejected. Therefore all those pretences against agreeing with the king, with which the faction blinded the eyes of, and dared, the honest citizens from appearing for it, were no better than Republican Fucus. And the author is yet himself, for there are two clauses in the speech, very material as to demonstrating his majesty's candor, which he hath wholly left out, and given no minute account of them or the matter. I do not reiterate them here; but that they may be obvious in the reading, and to shew in the main that the author hath sup-

city to sell their provisions, viz. Of every person for every horse-load of provisions into any public market within the said city, brought to sell, 2*d*. per day. For every dorser of provisions, 6*d*. per day. For every cart-load not drawn with more than three horses, 4*d*. per day. If drawn with more than three horses, 6*d*. per day. And that these sums of money

pressed every thing that looks fair upon the crown, and extracted all that, with the complement of his art, might look ill or tyrannical, as he thinks, I have put all his extracts of the speech in a distinct character, which, compared with the whole, shews how better and worse may be counterchanged if such liberties are allowed.

"But this author of our's is not content to cull and suppress to serve his libellous purpose, but directly falsifies. For example, the speech, taking notice of the better grace, if more early, says,———'That his majesty's affection for the city is too great to reject their suit for that cause,' that is for the tardy application. This I think is plain English. But how is it with him? 'However his majesty would not reject their suit if they agreed upon the particulars the king now required of them.' This is English too, but no part of the Lord Keeper's Speech. For the clause imported a declaration of the king's affection for the city so much, that, however he might justly have taken distaste at their not applying till judgment against them was pronounced, yet out of affection, he would excuse them so far; whereupon the matter, in his majesty's intentions, was the same as if they had applied at first, and not given any occasion of offence. But here the author sinks all that, and represents the king as higgling to make a bargain with them, or throwing out to invite them to purchase his pardon by accepting the terms; as if he were wheedling them, and the law had done nothing at all. Such a maulkin doth he make of majesty in this affair! But all is of a piece; none can say the author is *non compos*, for in this new work of his, he is never beside himself, that is in his design, which is perpetual libel. But, in his method of proceeding, he is a very Proteus; for he could on some occasions as to give a true state of the nation, bring in two hideous long speeches *verbatim* because they were all partial and sideling, crab-wise, to his side: but here a speech, that states the dealing of the sovereign with the great city of London upon a seisure of all their franchises, than which a greater crisis hath scarce happened in any reign, must be mangled, depraved, transposed, and altered in matter and form, to serve a false turn. An Historian would have esteemed it an original of greatest value in such an incident, to accomplish his relation, by giving it, so material as every period of it was, in the very words, or (affecting brevity) a full and true extract of the sense of it; but an historian and a libeller are as different as hawk and buzzard.

"Another scandalous concealment of the author, is the whole train of consequences upon this seisure. He says indeed that the common council determined by a majority of 18 voices to submit to the King's Order of Regulations. The proper wording should have been to the King's Offer of Regulations; but he thinks the other looks more tyrannous. And, as to what was done afterwards for the city, and the authority and honour of it, and how evenly and fairly matters were carried for conserving the rights and supporting the splendor of the city government, and how well generally the citizens were satisfied with it, no one syllable in all this Complete History. But only in a corner, in his annual list of court preferments, with their taggs, extracted from the Gazette, he has crowded in the commissions granted by the crown to the lord mayor and sheriffs, as if they had got good places; but nothing of the nature and frame of the city government established upon this seisure. And what of it is put here, looks as if it had been set out of the way on purpose that nobody should stumble upon it; and indeed, in the midst of such a catalogue of course, I had almost overlooked it. And no wonder if passages, in such masquerade, escape one's notice; and, if it had been slipt over, he must have blamed his own ataxy in the disposition; for I purpose to do him full right in every circumstance. It seems that the city had, by their common council, submitted, but the renewal of the charter was not prosecuted effectually; which might proceed partly from the good condition the city was maintained in by the crown, of which I am about to speak, and, partly, because it was a business that, for the misconstruction which the faction cast upon every thing tending that way, few cared to be forward in: and many thought it might stay for some more propitious time, no hurt coming in the interim to the city.

"Now some would, in such a case, expect to hear that the courtiers divided the city revenues amongst them; and that no order, property, or content, was left to the public in London; as if the town had been taken, or dealt with as princes use when they mulct their towns, that are contumacious, and, falling under their power, slight their favours and condescensions to them, in great sums of money or ransom. For who could have opposed the king's setting up of an exchequer for the revenues, formerly, of the city, or granting a commission, as upon an escheat to the crown? But so far from this, that no citizen, most acquainted with the public business and forms of the city, much less strangers, by any thing appearing, or done, after the seisure, could possibly (not knowing what had past) imagine that the order and model of the government there was any way changed from what it was before the seisure. For there was the lord mayor, court of aldermen, sword-bearer, town-clerk, chamberlain, and all infe-

should be paid to the use of the mayor, commonalty, and citizens: and if any refused to pay, then to be removed from his place in the

rior officers and attendance, just as before. And the revenues of the city were collected and paid into the chamber, and issued again to the proper uses, without the diversion of a farthing; only all this was done by virtue of a royal commission, as before by a royal charter, co-operating with the ancient customs of the city. As for instance: the chief magistrate, whether by the name of Portreve, Custos, or Mayor, was elder than the corporation. The sheriffs were appointed by commission, as in other counties: the aldermen of the wards were established by commission like that of the peace. And, by these means, all the authorities of the law and government, as well as for the disposition of the city revenues, subsisted as effectually as when the corporation itself subsisted; and the external appearance was in all respects the same; which was an unspeakable content to the good citizens, and created such a trust in the king, so far as his person and authority needed, they would have trusted any thing in his hands. They saw there was as much care taken of the city, as a father could take of a child, and all the counsel and skill of the court, not without consulting and conference with the most valuable citizens, was used sincerely for that end; and all this, as was declared, for the sakes of those worthy citizens, as had been eminently loyal. But it seems to me that all this lenity to the citizens was an impediment to the renewal of the charter, as might have been sued out in that reign; but, when all the revenues went in the old channel, and no prejudice like to accrue, the city procrastinated the doing of it, waiting, (as I suppose) for accident to save them that trouble, as did really happen.

"But what says our Complete Historian? 'Loss of their Liberties, evident violation of 'liberty and property,'—Good lack! When a man is sued at law for a trespass, and a judgment is had against him for damages, and the bailiffs come with an execution and take his kettle. 'Loss of his kettle.' And if a man forfeits his recognizance in the nature of a statute staple, and there comes a 'Capias si 'Laicus levare' and extent all together, 'Violation of Liberty and Property. Here is the author's politico-legal skill! But we have heard much, and are not to forget that, about this part of his book, he hath occasion to coin somewhat extraordinary to varnish over some parlous measures (as he words it, but the law terms high treason) which are drawing up against him in battle rangee to overturn all his endeavours, if he cannot get somewhat mobbish to make head against it; and, for that purpose, nothing like such ejaculations as those sentences are; no matter for sense, truth, or foundation; out with it, something will stick. I wonder which of his spirits taught him that going to law was a Violation

market. And that by colour of this law, the mayor, commonalty, and citizens, for their own private gain, had illegally, by the space

of Property. Some such familiar spirit might have disclosed to him what the grievances, if any, were in the proceedings; but the regularity of them was vindicated, to the satisfaction of all mankind, by the Press which laid every instance, from time to time, before them. And the same *diable* might have enabled him to tell us what secret corruption was in the business. If the judges were scandalous, ignorant, or any way unfit, the nation had rang of it. But all this is not full enough, the author must find somewhat else to say.

"He observes the Court had no way to get a power over the sheriffs, but by taking away the charter; which may be true if he had used the law term of seising instead of taking away; for the latter doth not imply a legal process, as the other doth, but rather a violent or tortious taking. As if a man, by judgment, levies a debt upon my goods, to say he executed his judgment is true, but that he took away my goods, without more, is false. But, as to this power over the sheriffs, 'which once 'effected would not only give the Court advan-'tage to make a common hall,' is nonsense; for the sheriffs, as officers, have nothing to do with the livery, common hall, or corporation, more than with a commission of assize and Nisi Prius, &c. They are ministers of the law, and bound to attend the chief magistrate; and had been the same if the city had no privilege of nominating them, but they had come in by the ordinary shrieval commission, as in other counties. Both ways, charter and commission, the office is exactly the same. And I marvel what put it in the author's head to set the sheriffs upon making a common hall! I make no doubt but, if the body of the city, duly for such purpose assembled, should order the poll to be taken by the common serjeant, and not by the sheriffs, it must be so; though it is confessed the latter are more fit, because it is a tumultuous business, and they are conservators armed to keep the king's peace 'But open a gap for making an House of 'Commons too.' Wonderful ignorance! For, if London be a gap, the great doors in all England are open to let in this supposititious House of Commons; for doth not the king arbitrarily appoint all the sheriffs of all counties, save one, and a few cities? And yet we have not found that the crown could ever make an House of Commons, nor ever will, by that means, although the sheriffs of London and Middlesex were appointed in the same manner. But 'If the city could not hold her own by law.' 'Petitio ejusdem rei cujus petitur dis-'solutio.' What determines own but the law? Put it thus; If a strong thief cannot hold his own (stolen goods) by law, then all lesser pilferers must truckle. So this worthy hypothesis concludes.

"The author touches the forfeitures *en re-*

of seven years next after the making this ordinance, received divers great sums of money, in all amounting to 5,000*l.* per ann. in oppression of the king's subjects.

And further, That whereas a session of parliament was holden by prorogation, and continued to the 10th of January, 32 Car. 2, and then prorogued to the 20th of Jan. then next:

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dicule, and sneeringly calls them—'two heinous crimes, no worse than these.' Admitting them to have been peccadillos, although, in truth, they were heinous crimes, what is that to the purpose? He is to learn some law, though, by fits, he sets up for a great deal; as that a good lawyer will choose a trifle, of a fact that is plain and clearly proved, to assign for a breach of a condition, though there are other matters of greater value that are not so punctually terminated: So the least offence forfeits a franchise equally with the greatest, as was said before. But I have a main suspicion we shall have foul play about these forfeiting facts, when we come at them. The first he says was they made an address to the king for the parliament to sit to redress grievances. A man is a strange falsary that writes matters of fact and hath a public record, and that printed over and over again, to confute him; and from such authority here I affirm this allegation of the forfeiture to be false. It was not the petition, but the libel and defamation of the king in public though shaped under the form of a petition, that was the crime. A bare petition ordered and presented, though in terms as here is expressed, had been no crime at all, and had never been alledged. But take here the very words of the libel extracted from the petition. "Your petitioners are extremely surprised at the late prorogation, whereby the prosecution of the public justice of the kingdom, and the making necessary provisions for the preservation of your majesty and your protestant subjects, hath received interruption." That is, the king had scandalously broke the trust of his government, which, by the party law of that time, forfeited his crown and dignity to his superiors, those that affected, for treasonable purposes, to be called the people. He could not for his life say true that it was not the petition, but the libellous part of it, that gave the offence, for then he had wanted the popular chime of 'petion,' 'parliament,' 'grievances,' which are to stand for sense, truth, wisdom, and every thing.

"What comes next? '2. The city had raised money towards repairing Cheapside conduit, ruined by the fire of London.' What signifies the use, for which the money was raised, if they had no power to raise it? And was it nothing for the common council of London to tax the people of England coming to their markets, which by law were free, as others are, paying the usual and reasonable toll? They might as well have taxed the people that came in and out at their gates, over the bridge, or that walked the streets. But observe how much the king's counsel were in the right in pitching upon these two facts for the forfeitures; for here a serpentine author would wind from under, but cannot plainly controvert them: And, for this last, he hath a rare subterfuge; for he throws out an empty bubble to detain you from fixing an eye upon the matter, that is the uses for which the money was illegally raised; a thing never appearing in the reasoning of the cause, and nothing at all to the purpose. Then he quarrels that there were no more than two solemn arguings; (he is a good friend to the lawyers) but pretends not but there were full time allowed them to be prepared; and then to say that two arguments was not enough, or all that any suitor can expect, or, at any time (unless the judges are in doubt and desire it) happens, is ignorant and ridiculous.

"But now comes a wise sentence. 'The judgment was observed to be strange and unwarrantable, for it was without any reasons given.' Where doth this profound lawyer find that a sentence declared, without reasons given, is not warrantable? Or whether reasons or no reasons make any difference in the behaviour of the judges, as if they did not do right in judging according to law without reasons given? Not long since, a great chief of the law gave a judgment in his court touching a case of nobility, and was urged, in an higher tribunal, to give his reasons why he gave that judgment; whereto he conformed, saying, that 'the reason, why he gave judgment for the defendant, was that he was satisfied in his conscience that the law was for him.' The form of the court is 'consideratum est per curiam quod, &c.' and saying that the plaintiff must have his judgment, is as warrantable as if it were done with six hour's talk. Now his *for* is a wise one. Every student knows that the arguing of the judges in giving judgment, is for the pure sake of learning, for the benefit of the bar and students of the law, and to appear candid to them to whose capacity it is directed, and not for any authority to the judgment. But the case here was that the party men attended, with their short-hand writers at their elbows, to take what might incautelously (if any thing should so) slip from the mouths of the judges, for matter of accusation; and they were, in great measure, frustrated of that. But I have often had cause to suspect the author's truth, when he reaches out so far for nothing, and do therefore guess that, after all, very good reasons were given by the judges; and whoever will look upon the print, may be satisfied. Mr. Justice Jones, the chief judge in the absence of the chief justice Saunders (who had been apoplectic) for the whole court pronounced the judgment with reasons and authorities cited, which were material but short; and that gave he offence, because they [illegible] of uption or crimination. I shall subjoin the ery words of that venerable judge, as, by the upervision of the party lawyers, they are printed. He said:

The mayor, commonalty, and citizens, 13th Jan. 32 Car. 2, in their common council assembled, unlawfully, maliciously, advisedly, and seditiously, and without any lawful authority, assumed upon themselves 'ad censendum et judicandum dictum dominum regem, 'et prorogationem parliamenti per dominum 'regem sic fact.' And then and there in com-

"'1. That a corporation aggregate might 'be seized, that the statute 28 Edw. 3, c. 10, is 'express that the franchises and liberties of the 'city, upon such defects, shall be taken into 'the king's hands. That a body politic may 'offend and be pardoned, appears by the 'general article of pardon, 12 Car. 2, whereby 'corporations are pardoned all crimes and offences: And the act for regulating corporations 13 Car. 2, which provides that no corporation shall be avoided for any thing by 'them misdone, or omitted to be done, shews 'also that their charters may be avoided for 'things by them misdone, or omitted to be done.

"'2. That the exaction and taking money 'by a pretended by-law, was extortion, and 'a forfeiture of the franchise of being a corpo'ration.

"'3. That the petition was scandalous and 'libellous, and the making and publishing it a 'forfeiture.

"'4. That the act of the common council was 'the act of the corporation.

"'5. That the matter, set forth in the record, 'did not excuse or avoid these forfeitures set 'forth in the replication.

"'6. That the information was well founded.

"'And thereupon judgment was given for 'the king, by the opinion of the whole court.' But shall an author have credit in any thing, that is bold to say, untruly, that it was without any reasons given?

"But now, says the author, it was 'by two judges only.' These are hedge objections. When nothing can be said against the matter they fall upon the manner, and in circumstances not material. It were a dainty government that could please those that are resolved not to be pleased, or obviate objections that are of nothing at all! But still I suspect our author is not true. Saunders was absent indeed, about which the author hath a tale, viz. 'That he 'said why do you trouble me that you know have lost my memory?" But it seems that in open court, two judges (as they declare) at his desire, reported his opinion to be for the judgment; and this the author thinks to enervate with a tale for which he hath no authority. Whether shall we believe, the judges upon their duty and oaths, or a chimeric inference from his story? But here it is usually so; when the fact cannot be proved or disproved, some enigmatic sentence is brought forth, from whence a reader of himself shall be inclined to suppose it. The author could not touch upon the calamity that fell upon the lord chief justice Hales before he gave judgment for Dunnardison against Soams; though his lordship was deplorably altered from what he was: for, from the most temperate judge that ever sat, he became the most impotently passionate that ever was seen, These things are scarce decent, or fit to be remembered, but the author's gross partiality forces it from me. Observe afterwards a reason the author gives for the reporting the opinion of the chief justice concurrent with theirs present; than which nothing is more usually done on like occasions in Westminster-hall. 'To confirm,' says he, 'their 'judgment by better authority than their own;' this is false, for the better authority was in court, though the chief was absent. As for the folly of the remark, I think no words need be spent upon it. But still we lose our labour, for the very fact, that leads to all this in our author, is false; that is two judges only, for there was Jones, Withins, and Raymond. See the force of libel, that can make three become but two. I shall here conclude these notes, about the Quo Warranto against the city of London, with recommending to the curious (in law matters at least) the reading of the long arguments of this case, as they are reported in print, for there will be diversion, as well as learning, in observing some points maintained; as that the common council were not the body, but deputies: that corporations are immortal, and divers other strange tenets for upholding the argument on the city's side. Which shew that importunate people will affirm any thing, to serve turns, though never so senseless; hoping some, that understand little, or are very willing, will give credit upon their authority: and, if justice must stay till such importunes are satisfied, there's a *ne plus ultra* of all law.

"It would make one grin to observe the author's come-off, from this and the rest of the charters in this time; which he hath most historically contrived to do by subjoining a piece of that foul libel that I gave a censure of before, and now stands bare-faced in his Complete History. It was penned with all the venom the wit of an enraged and exploded faction could invent, and in words utter. This method of historiography is without example among civilized nations; and, however barbarous ages may be valued for *precedents* of the like, the brass will not be found in them that shines here. Our ordinary anecdotarians make use of libels, but do not declaredly transcribe and ingraft them into their text, as our hypobolist hath done here, and in numerous other places of his book. But he seems to rejoice in this, which comes up to the height of his ambition in figurative scandal upon his late sovereign, and the ministry of that time, so much that, upon the strength of his own wit or courage, he did not dare to attempt half so high. I do not mean out of any fear of his person, for that is ensconsed, but of infamy, which he is forward to deserve, but loth to suffer; and therefore deals forth his *merda* by the hirelings of the times, that he might not stink in all compa-

mon council assembled, did give their votes and order, that a certain Petition under the name of the mayor, aldermen, and commons, of the city of London, in common council assembled, to the king should be exhibited; in which said Petition was contained,

That by the prorogation, the prosecution of the public justice of the kingdom, and the

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nies, and so be found out by those that otherwise do not know him. Else why doth he not speak for himself and stand to it? Then the abuse of religion and scripture, most atheistically held forth in this excerpt of a libel, had been all his own; and the scandal had been carried on by the strength of his own genius. So in the full joy of this fine piece of property libel I leave him, and pass on to other matters which he supplies so copiously, I think I shall never have done with him.

I cannot pass by a marginal index, which points to a list of hard and arbitrary judgments, as the author calls them; and why not a list also of good and righteous judgments? For sure the time afforded some; and it had been but equal to have shewed them as well as others. The reason of which partiality hath been given clearly enough already, viz. apology to be dressed up to palliate the intended rebellion, discovered at the Rye, which a reverend person (on an unhappy occasion) termed some stirs. But now I am concerned about the justice of his method of writing. He fills a few columns with concise accounts of divers cases of persons questioned, and some punished, for misdemeanors, being thereof legally convict. And here is his notion of hard and arbitrary; but it is only when the poor sufferers are of his party. It was not so in the time of Oates; then all the condemnations were the justice of the nation, against the least of which no man durst whisper. I looked over these cases, as any one else may do, and, by any thing he shews, could not discover the circumstances of them. It must be a nice report that verifies his index against the justice of a nation. No historian's words will be taken summarily to that purpose, without alledging how and in what. Shall the public administration of the laws be defamed as tyrannous and oppressive, against the unimpeached authority of the judges that act upon oath, on no better ground than this man's *dixit*? especially when it stinks of a faction? I shall instance but in one or two of these cases; the first is that of Holloway, for the treason of the Rye Plot. He confessed the whole crime at large, as, in the print before his trial, appears. This is a choak-pear to the author; and he can come off it no better than by saying that 'he 'seemed to confess,' and just so he seemed to be hanged."

The time-serving, despicable, worthless Sprat (see some account of him in his Case, A. D. 1692, in this Collection) says, concerning this matter:

"His majesty foreseeing how destructive, in time, the effects of so great and growing a mischief would be, resolved at length, after many intolerable provocations, to strike at that which he had now found to be the very root of the faction.

"This his majesty, and all wise and good men perceived, could be no other ways done, than first by reducing the elections of the Sheriffs of London to their ancient order and rules, that of late were become only a business of clamour and violence: And then to make inquiry into the validity of the city charter itself; which an ill party of men had abused to the danger, and would have done it to the destruction of the government, had they been suffered to go on never so little farther uncontrouled.

"In both these most just and necessary undertakings, the righteousness of his majesty's cause met with an answerable success. First notwithstanding all the tumultuous riots the factious party committed, to disturb the peaceable issue of that affair; yet the undoubted right of the lord mayor's nominating the eldest sheriff, was restored and established: And so the administration of justice once more put in a way of being cleared from partiality and corruption. And then a due judgment was obtained, by an equal process of law, against the charter itself, and its franchises declared forfeited to his majesty."

"His majesty cannot but esteem this to have been equalled by none but that; that, in so dangerous a junction of public affairs, he has met with so many unfeigned testimonies of love to his person and zeal to his government, from all degrees of men in the nation.

"And if some have swerved from their duty, yet his majesty's indignation and resentments against them are overwhelmed by the comfortable remembrance of the far greater and better number of those who stood by him in the severest trials.

"So his majesty has just reason to acknowledge, the main body of the nobility and gentry has done: So has the whole sound and honest part of the commonalty: So the great fountains of knowledge and civility, the two universities: So the wisest and most learned in the laws: So the whole clergy, and all the genuine sons of the church of England: A church whose glory it is, to have been never tainted with the least blemish of disloyalty.

"His majesty cannot here forbear to let the world know, what entire satisfaction he has taken in one special testimony of his subjects affections; whence through God's gracious providence the monarchy has gained a most considerable advantage, by means of this very conspiracy; And it is, that so great a number of the cities and corporations of this kingdom, have since so freely resigned their local immunities and charters into his majesty's hands; lest the abuse of any of them should again hereafter prove hazardous to the just prerogatives of the crown.

making necessary provision for the preservation of the king, and of his Protestant subjects, had received interruption. And that the mayor and commonalty, and citizens in the same common council assembled, did unlawfully, maliciously, advisedly, and seditiously, and with intention that the said Petition should be dispersed amongst the king's subjects, to induce an

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"This his majesty declares he esteems as the peculiar honour of his reign; being such, as none of the most popular of all his late royal predecessors could have promised to themselves or hoped for. Wherefore his majesty thinks himself more than ordinarily obliged to continue, as he has hitherto begun, to shew the greatest moderation and benignity, in the exercise of so great a trust: Resolving upon this occasion, to convince the highest pretenders to the commonweal; that as the crown was the first original, so it is still the surest guardian of all the people's lawful rights, and privileges." See the True Account and Declaration of the Horrid Conspiracy, etc. pp. 7 *et seq.* 161 *et seq.*

Mr. Fox says:

"The city of London seemed to hold out for a certain time, like a strong fortress in a conquered country; and, by means of this citadel, Shaftesbury and others were saved from the vengeance of the court. But this resistance, however honourable to the corporation who made it, could not be of long duration. The weapons of law and justice were found feeble when opposed to the power of a monarch, who was at the head of a numerous and bigotted part of the nation, and who, which was most material of all, had enabled himself to govern without a parliament. Civil resistance in this country, even to the most illegal attacks of royal tyranny, has never, I believe, been successful, unless when supported by parliament, or at least by a great party in one or other of the two houses. The court, having wrested from the Livery of London, partly by corruption and partly by violence, the free election of their mayor and sheriffs, did not wait the accomplishment of their plan for the destruction of the whole corporation, which, from their first success, they justly deemed certain; but immediately proceeded to put in execution their system of oppression." Fox's James 2, p. 48.

It appears that the seizure of the Charters of Corporations in England did not satisfy the stomach of the great revenge of Charles the Second and his brother:

"Le Roi d'Angleterre," writes Barillon to Louis 14, Dec. 7, 1684, (see Appendix to Mr. Fox's Historical Work): "a donné le gouvernement de la Nouvelle Angleterre au Colonel Kerque, qui étoit auparavant gouverneur de Tanger. Il y avoit eu devant une Compagnie établie par des lettres patentes du Roi Jacques, qui gouvernoit avec une autorité presque souveraine et indépendante les pays compris sous le gouvernement de la Nouvelle Angleterre. Les privilèges de cette Compagnie ont été cassés au Banc Royal, et sa Majesté Britannique est rentrée dans le pouvoir de donner une nouvelle forme au gouvernement, et d'etablir de nouvelles loix, sous lesquelles les habitans de ces pays doivent vivre à l'avenir; cela a donné lieu à une délibération dans le Conseil secret. La question a été traitée à fonds, si l'on y introduroit le même gouvernement qui est établi en Angleterre, ou si l'on assujettiroit ceux qui vivent dans ces pays-là aux ordres d'un gouverneur et d'un conseil, qui auroient en leurs mains toute l'autorité, sans être obligés à garder d'autres regles, que celles qui leur seroient prescrites d'ici. Milord Halifax a pris le party de soutenir avec vehémence qu'il n'y avoit point lieu de douter que les memes loix, sous lesquelles on vit en Angleterre ne dussent être établies en un pays composé d'Anglois. Il s'est fort étendu sur cela, et n'a omis aucune des raisons, par lesquelles on peut prouver, qu'un gouvernement absolu, n'est ni si heureux, ni si assuré que celui, qui est temperé par les loix, et qui donne des bornes à l'autorité du prince. Il a exagéré les inconvéniens du pouvoir souverain, et s'est declaré nettement qu'il ne pouvoit pas s'accommoder de vivre sous un roi qui auroit en son puvoir de prendre, quand il lui plairoit, l'argent qu'il a dans sa poche. Ce discours fut combattu fortement par tous les autres ministres, et sans entrer dans la question, si une forme de gouvernement en général est meilleure que l'autre, ils soutinrent, que sa Majesté Britannique pouvoit, et devoit, gouverner des pays si éloignés de l'Angleterre en la manière qui lui paroitroit la plus convenable pour maintenir le pays, en l'état auquel il est, et pour en augmenter encore les forces et la richesse. Pour cela il fut résolu, qu'on n'assujetteroit point le gouverneur et le conseil, à faire des assemblées de tout le pays, pour faire des impositions, et régler les autres matiéres importantes, mais que le gouverneur et le conseil feroit ce qu'ils jugeroient à-propos, sans en rendre compte qu'à sa Majesté Britannique. Cette affaire n'est peut-être pas en elle-même fort importante; mais M. le Duc d'York s'en est servi, pour faire connoître au Roi d'Angleterre combien il y a d'inconvéniens de laisser dans le secret de ses affaires un homme aussi opposé aux intérêts de la royauté qu'est Milord Halifax. Madame de Portsmouth a le même dessein, et Milord Sonderland pouvoit ne rien desirer avec plus d'ardeur. Ils croient l'un et l'autre y pouvoir réussir avec un peu de temps."

Governor Hutchinson in his History of the Colony of Massachusets Bay throws some light upon this business. He mentions, that "In 1680, (*a*) a letter had been received under the

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"(*a*) Lord Culpeper governor of Virginia came to Boston the 24th of August this year in his return to England.

"It appears by the records that the hon. Geo. Russell (I suppose a younger brother to the celebrated lord Russell) was in New-England in

opinion in them, that the said king by proroguing the parliament, had obstructed the public justice, and to incite the king's subjects to hatred of the king's person and government, and to disturb the peace of the kingdom, did order that the said Petition should be printed, and the same was printed accordingly to the intent and purpose aforesaid.

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king's sign manual, charging the colony with neglecting to send over other agents in the room of those who had obtained leave to return, and requiring that they be sent in three months after the receipt of the letter, and that they come prepared to answer the claim which Mason had made to the lands between Naumkeag and Merrimack. Immediately upon the receipt of this letter, the court chose two agents, Mr. Stoughton and Mr. Nowell, and instructions were drawn up, but both of them peremptorily refused to engage in the affair; Mr. Stoughton, notwithstanding the exceptions some had taken to his former conduct, being strongly urged to it. As for Mason's claim, it was looked upon as groundless and extravagant, and the court gave themselves but little concern about it further than to observe, that if he had any pretence to the lands, his

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1680 and presented with the freedom of the colony. Mr. Richard Salstonstall, son of sir Richard, returned this year after many years absence, and was again chosen first assistant, and so the two succeeding years. He went back to England before 1683, and died at Hulme, April 29th 1691. MS letter. He left an estate in Yorkshire. Mr. Saltonstall was related to Mr. Hamden, who like his ancestors was a true friend to New England. In a letter from Mr. Saltonstall's daughter, dated May 1694, I find this little piece of English history. "The court is altered as well as other places. Mr. H----n was to wait on master and all looked very smooth. He asked him concerning the report he heard (this was a second time not that mentioned in my other letter) he said no, no, there was nothing in it, he did not intend to remove him. He kissed hands, and that night a new commission was granted to a young person under 30 years of age, who they say must go before all the grave judges. His virtues may be wrote in a little room but not his vices. A few days after the archbishop was sent to tell him how well he was esteemed, but he growing into years might like his ease. If he would be lord or earl, he should be either, or have any pension. To the first he answered that he would die a country gentleman of an ancient family, as his was, and honour enough for him. For the second, he said, he should not take the king's money, and the king's servants want bread, he always spake against giving pensions to others, and at such a time as this it was a great oppression. While he had a roll and can of beer he would not take the king's money. It is wondered at by many, considering how useful he was in the year 88 and following—but enough of this."

"I hope the friendship shewn by the family of Hamden to New-England will excuse my inserting this anecdote, although it has no relation to the affairs of the colony.

title would be fairly tried upon the spot, where by law according to the opinion of the attorney and solicitor general in 1677, it ought to be tried. After this Randolph *(b)* brought to Boston the king's letter of October the 21st 1681, *(c)* complaining "that the collector had not been able to execute his office to any effect, that attachments had been brought against him and his officers for doing their duty, that he had been obliged to deposit money, before he could bring an action against offenders, that appeals, in matters relating to the revenue, had been refused, and that they had seized into their hands, the moiety of forfeitures belonging to his majesty by law." It was therefore required, "that fit persons be sent over, without delay, to answer these complaints, with powers to submit to such regulations of government as his majesty should think fit, that restitution be made of all monies, levied from the officers, that they be encouraged in putting the acts of trade in execution without charge, as in England, that an account be given of forfeitures received, and that appeals be allowed." The court denied the charge, and said in their answer, "that Mr. Randolph was acknowledged collector, and his commission enrolled, that no suits had been countenanced against any officers, except where the subject had been unjustly vexed, that they knew of no forfeitures, except a fine upon a master of a ship for abusing the government, that they would encourage his officers, and require no deposit for the future; but as to admitting appeals, they hoped it would be further considered." However, the sending over agents could be no longer delayed. At a court called in Feb. 1681, when his majesty's letter by Mr. Randolph was read, they determined to come to the choice of agents. Mr. Stoughton and Mr. Dudley were chosen, the Court

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"*(b)* In April 1681, Randolph set up a protest on the exchange in Boston, against the acts of the court.

"*(c)* As for the large and particular account you are pleased to give me of the concerns of the country in general, your's was sent either to me to my house here, by Mr. Randolph, where I have been for some weeks, and do intend to stay some weeks longer so that I doubt Mr. Randolph, by whom I send this, will be gone ever I come to London, but, when I shall be there, I shall endeavour to inform myself, the best I can, how matters do stand as to your colony, and shall do them the best service and friendly offices I can, and it will be very well and advisable, that, upon Mr. Randolph's arrival matters relating to trade be so settled, as that there be no further just complaints upon that account. Sir George Downing's letter to governor Bradstreet, East-Hadley, Sept. 28, 1681.

By which the mayor, commonalty, and citizens aforesaid, the privilege, liberty, and franchise of being a body politic and corporate did forfeit, and afterwards, by the time in the in-

neing much divided. Mr. Stoughton again bitterly refused, and Mr. Richards (*d*) was chosen in his stead. The design of taking away the charter became every day more and more evident. Agents impowered to submit to regulations of government, were, in other words, agents impowered to surrender their charter. However, the general court would have been glad to put a more favourable construction upon it, it being inconsistent with his majesty's repeated declarations, and therefore they directed their agents not to do, or consent to any thing that should violate or infringe the liberties and privileges granted by charter or the government established thereby. A new matter of charge had been brought against them in England, viz. the coining money. This they excused, "it having began in the time of the late confusions, to prevent frauds in the pieces of eight current among them, and if they had trespassed upon his majesty's prerogative, it was through ignorance, and they humbly begged his pardon." The other points of exception were answered as before mentioned. The agents sailed May 31st. A public fast was appointed to be observed June 22d, through the colony, to pray for the preservation of their charter and success to the agency. Randolph was in England not long after them, ready to disclose every thing the agents desired to conceal. The governor had desired him to do nothing to the prejudice of the colony. He promised, in his answer, that if they would make a full submission to his majesty, he would endeavour to procure his majesty's royal pardon, and the continuance of their privileges, so far as that they should have liberty of conscience and the free exercise of their religion, and that no money should be raised without the consent of the people; for other matters their agents were most proper to solicit. (*e*) The agents in their first letters to the general court, acquainted them, "that his majesty was greatly provoked by their so long neglecting to send agents, and they desired the court to consider whether it was best to hazard all, rather than satisfy his majesty as to the mode of submission to the laws for regulating trade, since they seriously intended to submit to the substance." They had not then been heard before the council, but soon after, upon present-ing the court's address, they were commanded to shew their powers and all their instructions, not publicly, but to sir Lionel Jenkins, secretary of state, and it appearing, upon perusal, that they did not contain such powers as had been required, they were informed by lord Radnor, that the council, nem. con. had agreed to report to his majesty, that unless the agents speedily obtained such powers as might make them capable to satisfy in all points, a Quo Warranto should proceed. The agents represented the case of the colony as desperate, and left it to the court to determine whether it was most advisable to submit to his majesty's pleasure, or to suffer a Quo Warranto to issue. Many cities had submitted. Bermudas (*f*) in the plantations, and the city of London had refused, and Quo Warranto's had gone out, the determination of which might enable the Massachusets to judge what would be prudent for them to do (*g*).

"(*d*) Mr. Richards was a wealthy merchant, of a fair character, and one of the assistants.

"(*e*) In Feb. 1671, Randolph exhibited to the lords of the council articles of high misdemeanor against a faction of the general court sitting in Boston, viz. Thomas Danforth, Daniel Gookin, Nathaniel Saltonstall, Samuel Nowell, Richards, Davy, Gedney, and Appleton, magistrates, and Fisher, Cooke, Brattle, Stoddard, Bathurst, Hathorn, Wait, Johnson, Hutchinson, Sprague, Oakes, Holbrook, Cushing, Hammond, and Pike, deputies.

"(*f*) Bermudas was the second colony, for many years scarce deserving the name, Virginia being the first. The charter bears date the "29th June in the 13th year of king James 1614, by the name of the governor and company of the city of London for the plantation of the Somer Islands." This charter never was removed to the colony as that of the Massachusets had been. The company continued to meet as a propriety in London. A governor deputed by the company, with a council and assembly, exercised some degree of legislative power in the islands, but the governor and company in London had the power of making laws not repugnant, &c. In 1663 a law was made by the company that every vessel above five tons built in the island without express leave of the company first had and obtained, should be forfeited and sold for the use of the company. The inhabitants made complaint of great oppression, and prayed for a dissolution of their charter, that a governor might be appointed by the crown, and the subjects governed as they were in Virginia and Barbados. "True relation of the illegal proceedings of the "Somer Islands Company, &c. 1678."

"(*g*) Randolph was incessant. June 14th 1682 he writes to the earl of Clarendon. His majesty's Quo Warranto against their charter and sending for Thomas Danforth and for Samuel Nowell, a late fanatic preacher and now a magistrate, and Daniel Fisher, Elisha Cooke, deputies, to attend and answer the articles of high misdemeanors, I have now exhibited against them in my papers sent Mr. Blaithwait, will make the whole faction tremble. If the party were considerable enough to revolt upon his majesty's resolution to settle the plantation, their first work would be to call me to account for endeavouring openly the alteration of their constitution, which by their law is death.

formation, that liberty and franchise of being a body politic did usurp upon the king. Et hoc, &c. And as to the other two pleas, viz. The making and having sheriffs and justices of the peace, the Attorney General imparles to Mich. Term.

"Upon receipt of these advices, it was made a question, not in the general court only, but amongst all the inhabitants, whether to surrender or not. The opinions of many of the ministers, and their arguments in support of them, were given in writing, and, in general, it was thought better to die by the hands of others, than by their own. (*h*) An address was agreed upon by the general court, another was prepared and sent through the colony to be signed by the several inhabitants, which the agents were to present or not, as they thought proper, and they were instructed to deliver up the deeds for the province of Main, if required, and it would tend to preserve their charter, otherwise not; and they were to make no concessions of any privileges conferred upon the colony by the charter.

"Cranfield, governor of New-Hampshire, being on a visit at Boston, advised to the agents waiting upon lord Hide, and tendering him an acknowledgment of 2,000 guineas for his majesty's private service, and, at the same time, promised to represent the colony in a favourable light. The court agreed to the proposal, and shewed him the letter they wrote to the agents thereupon, but he, infamously, represented the colony as rogues and rebels, and made his game of them for making such an offer, and the agents complained of their being ridiculed for the sham put upon the country. (*i*) Upon the agents receiving this final resolution of the court, their business was at an end. It was immediately determined a Quo Warranto should go against the charter, and that Randolph should be the messenger of death. The agents arrived at Boston the 23d of October 1683, and the same week Randolph arrived (*k*) with the Quo Warranto, and a declaration from the king, that if the colony, before prosecution, would make full submission and entire resignation to his pleasure he would regulate their charter for his service and their good, and with no further alterations than should be necessary for the support of his government there. Two hundred copies of the proceedings against the charter of London were sent at the same time, by advice of the privy council, to be dispersed through the province. The governor and major part of the assistants, despairing of any success from a defence, passed the following vote: "The magistrates have voted, That an humble address be sent to his majesty by this ship, declaring that, upon a serious consideration of his majesty's gracious intimations, in his former letters. and more particularly in his late declaration, that his pleasure and purpose is only to regulate our charter, in such a manner as shall be for his service and the good of this his colony, and without any other alteration than what is necessary for the support of his government here, we will not presume to contend with his majesty in a course of law, but humbly lay ourselves at his majesty's feet, in a submission to his pleasure so declared, and that we have resolved, by the next opportunity, to send our agents, impowered to receive his majesty's commands accordingly. And, for saving a default for non-appearance upon the return of the writ of Quo Warranto, that some meet person or persons be appointed and impowered, by letter of attorney, to appear and make defence, until our agents may make their appearance and submission, as above. The magistrates have passed this with reference to the consent of their brethren the deputies hereto.—EDWARD RAWSON, Secretary, 15th Nov. 1683.

"This lay in the house, under consideration, a fortnight, and was then passed upon as follows:

"Nov. 30, 1683. The deputies consent not, but adhere to their former bills. WM. TORREY, Clerk."

"Had this been made an act of the general court, it is doubtful whether the consequent administration of government would have been less arbitrary than it was, upon the judgment against the charter; but, upon the revolution, they might have reassumed their charter, as Rhode-island (*l*) and Connecticut did their re-

"(*h*) The clergy turned the scale for the last time. The balance which they had held from the beginning they were allowed to retain no longer.

"(*i*) 'Truly, sir, if you was here to see how we are ridiculed by our best friends at court for the sham Cranfield hath put upon you, it would grieve you. I will assure you, whatever letters he hath shewn you, his majesty last night told my friend that he had represented us as disloyal rogues.' Dudley to Bradstreet, Feb. 1682.

"(*k*) The next day after Randolph arrived, a terrible fire happened in Boston, in the richest part of the town. Some of the people in their rage and jealousy supposed the town to be set on fire by his procurement. I find this insinuated in an interleaved almanack, and other manuscripts.

"(*l*) Rhode island made a full surrender of their charter as appears by the following advertisement in the London gazette, Windsor, Sept. 13, 1684. "His majesty has graciously received the address of the colony of Rhode island and Providence plantations in New England, humbly representing, that upon the signification of a writ of Quo Warranto against their charter, they resolved in a general assembly not to stand suit with his majesty, but wholly to submit to his royal pleasure themselves and their charter, whereof his majesty has thought fit to accept the surrender." The order in council to the attorney general to bring writs of Quo Warranto against Connecticut and Rhode island was dated July 15, 1685.

Rejoinder.

The mayor, commonalty, and citizens, as to the Plea of the Attorney General, pleaded in assigning a forfeiture of their being a body politic and corporate,

Protestando, That those Pleas, by the Attorney pleaded, and the matter in the same contained, are insufficient in the law to forejudge or exclude the mayor and commonalty, and citizens from being a corporation.

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spective charters, there having been no judgment against them. *(m)*

" A letter of attorney was sent to Mr. Humphrys, to appear and answer for the province. Addresses were sent, one after another, but to no purpose. In September, a *scire facias* was received by Mr. Dudley and communicated to the governor, who called a special court. The time for their appearance at Westminster was past before it was received in Boston. *(n)* No

" Connecticut had the offer of being annexed to Massachusets or New-York. They prayed the continuance of their privileges, but if they must lose their charter they chose to be annexed to Massachusets. This was construed a surrender.

" *(m)* However agreeable to law this distinction might be, yet equity does not seem to favour it. The charter of London was adjudged forfeited upon a long argument of the greatest lawyers in the nation. The Massachusets was decreed forfeited upon default of appearance. Not only the charter of London but all the charters in the king's dominions I suppose (unless Bermudas is an exception) whether surrendered or whether there had been judgment against them, were re-assumed except that of the Massachusets.

" *(n)* The proceedings were in this form and order.

" The first *scire facias* directed to the sheriff of Middlesex bore test 16th Ap. 36 Car. 2d, whereon a nichil returned.

" Trin. 26 Car. 2d, an *al. scir. fac*, directed to the same sheriff, returned 2d June 1683, whereon another nichil returned.

" 12th June, 36 Car. 2d, the agent for the company moved by his council for time, to send to New-England for a letter of attorney under the corporation seal, to appear and plead to those *scire facias's*, until Michaelmas term then next, when the court ordered Mr. Attorney should be attended therein to shew cause the last day of that term why the defendants should not have time to appear.

" Mr. Attorney moved against that order and had it in some part set aside, but waved it, and on hearing counsel of both sides it was ordered,

" 18th June 1684, That judgment be entered up for his majesty as of this term, but if defendants appear first day of next term, and plead to issue so as to take notice of a trial to be had the same term, then the said judgment by Mr. Attorney's consent to be set aside, otherwise the same to stand recorded.

" On the first day of Michaelmas term following, the company's agent retained counsel to move, and brought several merchants to testify in the court of chancery, that in the time given it was impossible to have a letter of attorney

other answer, than another humble address, was attempted. The case was desperate, and judgment was entered up, copy of which was received by Mr. Rawson, July 2, 1685.

" Before any new government was settled, king Charles died. Mr. Blathwait wrote to the governor, *(o)* and recommended the proclaiming king James, without delay. This was done, with great ceremony, in the high street in Boston (April 20th.)

" There were all the symptoms, notwithstanding, of an expiring constitution. Several of the towns neglected to send their deputies in the year 1684. Little business was done at the court. The people, indeed, shewed some resentment against the magistrates, who had been forward for surrendering. Mr. Dudley, Richards and Brown were dropped, Cooke, Johnson and Hutchinson chose in their stead. Mr. Bradstreet, the governor, *(p)* Mr. Stoughton, Bulkley, Saltonstall and Gidney had fewer votes than usual. There seems to have been as much indifference in the legislature about public affairs in 1685, expecting every day to be superseded.

" The election for 1686 was the 12th of May. Mr. Dudley being left out, Mr Stoughton, from complaisance to him, refused to serve. *(q)*

" The 15th, the Rose frigate arrived from England, with a commission to *(r)* Mr. Dud-

returned from New-England, so, as they had not given time long enough to perform a matter, it was in effect giving no time at all, for a time not sufficient was equally fatal to no time given.

" To which the then lord keeper replied, that no time ought at all to have been given, in regard that all corporations ought to have attorneys in court at all times to appear for them upon all occasions. And to set aside the order for time to appear and plead, and judgment was entered as in the copy.

" *(o)* He said he did not write as to a government, the charter being vacated.

" *(p)* The governor had 690 votes, Danforth had 631 for governor. MS.

" *(q)* One Joseph Redknap died at Boston at the age of 110. He came over at 60, had been a wine cooper in London.

" *(r)* Mr. Dudley when he found he could do his country no service in his agency, that he might not wholly lose his labour, took measures to serve himself, and had recommended himself to the court when he was in London. After his return, he kept up a friendly correspondence with Randolph, who warmly espoused his interest, and writes, July 18th, 1684, to Col. Shrimpton—" No better news could have come to me, than to hear Mr. Dudley, principally was left out of the election, the fitter man to

Protestando etiam, That no act or deed, or by-law made by the mayor, aldermen, and common council is the act or deed of the body corporate.

Protestando etiam, That they, the mayor and commonalty, and citizens of London, never took upon them any unlawful or unjust authority to tax the king's subjects for their

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ley, as president, and divers others, gentlemen of the council, to take upon them the administration of government. A copy of the commission was presented, and the following answer resolved upon by the court, nemine contradicente,

"'Gentlemen; We have perused what you left with us, as a true copy of his majesty's commission, shewed to us the 17th instant, impowering you for the governing of his majesty's subjects inhabiting this colony, and other places therein mentioned. You then applied to us, not as a governor and company, but (as you were pleased to term us) some of the principal gentlemen and chief inhabitants of the several towns of the Massachusets, amongst other discourse saying, it concerned us to consider what therein might be thought hard and uneasy; upon perusal whereof, we find, as we conceive, First, That there is no certain determinate rule for your administration of justice, and that which is, seems to be too arbitrary. Secondly, That the subjects are abridged of their liberty, as Englishmen, both in the matters of legislation and in laying of taxes, and indeed the whole unquestioned privilege of the subject, transferred upon yourselves, there not being the least mention of an assembly in the commission, and therefore we think it highly concerns you to consider whether such a commission be safe for you or us; but if you are so satisfied therein, as that you hold yourselves obliged thereby, and do take upon you the government of this people, although we cannot give our assent thereto, yet we hope we shall demean ourselves as true and loyal subjects to his majesty, and humbly make our addresses unto God, and in due time to our gracious prince, for our relief. May 20th 1686. By order, EDW. RAWSON, Secretary.'

"'These for Joseph Dudley, Esq. and the rest of the gentlemen named in his majesty's commission.'

"The court appointed a committee to take into their custody such papers as referred to the charter, and titles of land, by purchase from the Indians or otherwise, and ordered the Secretary to deliver the same, and adjourned till the second Wednesday in October.

"The 25th of May the president and council met, and his majesty's commission was published.

"New Plymouth, Connecticut, and Rhode-Island, who were less obnoxious, and had been more pliant than the Massachusets, were all to be in like degree sufferers, although not included in Mr. Dudley's commission, *(s)* the execution was only respited a few months.

"We have taken no notice of the affairs of New Plymouth since the year 1676. Having conquered Philip's country of Mount-Hope, now Bristol, it was confirmed to that colony by king Charles. The Massachusets had applied for it. Mr. Winslow, the governor of Plymouth, died in 1680, Dec. 18th, and was succeeded by Thomas Hinkley, who continued until that colony was included in the same commission with the Massachusets, &c. It was agreed, that the grand council of Plymouth could confer no powers of government. They had nothing therefore to support them at New Plymouth, but the king's approbation, from time to time, of their proceedings. It might then well be expected that they should act with great caution, to avoid giving offence. They had been amused, from year to year, with assurances that the king would grant them a charter. Such an one as Connecticut had received they prayed for. The name of the Massachusets was odious. The governor kept upon good terms with Randolph, who engaged to do every thing in his power to obtain

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serve his king and country in an honourable station, for they have declared him so,"—and again the 26th. "I am extremely solicitous that Mr. Dudley might have the sole government of New England, for no man better understands the constitution of your country, and hath more loyalty and respect to your majesty's affairs, but I dare not openly appear in it, lest it be thought there is some private design in it, but I am, upon all occasions, hinting his merit to his friends."—But, however obnoxious Mr. Dudley had rendered himself, yet he was, with less reluctance, received as their chief ruler, at this time, from a general expectation, which had obtained, of Kirk's being sent over to take the government. Their agent (Humphries) had advised them of the danger of it, and they expected something of the same tragedy he had been acting in the West of England. Mr. Rawson, in a letter to Hinkley, July 1685, writes, that "Colonel Kirk, whom his late majesty appointed and designed to be our governor, is confirmed by his present majesty, and is preparing to sail with two frigates, and may be expected in four or five weeks." This was before his and Jefferies campaign, as king James called it, in the west; but after the news of the tragedies there, Rawson writes—"Our condition is awful."

"*(s)* I find the following passage in a letter from Ireland, March 26th 1684. "Our last packet from England brings us news of two very loyal addresses to his majesty, one from New Plymouth and the other from Connecticut, which were both very graciously received, by which I suspect you, of the Massachusets, are more whiggish, and your neighbours more toryish, to express it in the language of late in use."

own private gain, or did ever levy or exact from the king's subjects, coming to markets, such yearly sums as in the replication are alledged—For Plea say,

That London is the metropolis of England, and very populous, 'et celeberrimum emporium totius Europæ.'

That there are, and time out of mind, have been, divers public markets for provision and merchandise within the said city to be sold.

That the mayor and commonalty, and citizens have been, time out of mind, and yet are, seized of these markets in fee, and by all the said time at their own costs and expences have

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the charter. *(t)* They had orders to send over a copy of their patent, in order to form a new one, in which the Naraganset country was to be included; but, upon the Quo Warranto coming over to the Massachusets, Mr. Blaithwait wrote to the governor, Sept. 27, 1683.—"I must deal plainly with you. It is not probable any thing will be determined, in that behalf, until his majesty do see an issue of proceedings in relation to the Massachusets colony, and that, upon regulating their charter, that colony be brought under such an actual dependence upon the crown as becomes his majesty's subjects. From hence it will be, that your patent will receive its model; and although you may be assured of all you desire, yet it will be expected that, in acknowledgment of so great favours, such provisions may be inserted as are necessary for the maintenance of his majesty's authority." After this, they could have no great reason to hope for success. However, they continued their pursuit, and in Nov. 1683, they forwarded another address, wherein they congratulated his majesty upon his deliverance, in answer to their prayers they hoped, from the late horrid conspiracy, *(u)* and they had appointed the 15th instant for a day of solemn thanksgiving, for the salvation of his majesty's royal person from that and other hellish conspiracies. They go on to pray his majesty's favour, in granting them a charter, having sent over a true copy of their patent from the council of Plymouth. Randolph writes to the governor of Plymouth, the 4th of March following, that he had presented the address, with the necessary amendments, to his majesty in council, that it would be printed, was graciously received, and that they would find the benefit of it, in dispatch, and settlement of their colony. Upon the death of king Charles, they were distinguished by king James from the other colonies, by a letter under his sign manual, *(v)* acquainting them with his accession to the throne, the great things the parliament had done, the defeat of Argyle, and the landing of Monmouth, and the care taken to prevent his success, all to prevent any false and malicious rumors that might be spread among his majesty's subjects at that distance. An Address was sent to the king, upon his accession, taking notice of the assurances they had received from his royal brother, and praying that his majesty would fulfil them. This was the last effort. *(x)* Connecticut kept more silent, inactive and reserved, submitting when compelled to it, and reassuming their rights as soon as they had opportunity for it. *(y)*"

"*(t)* They sent over Mr. James Cudworth, as their agent, in 1681, to solicit their patent, but he died soon after his arrival.

"*(u)* This must be the Protestant Plot.

"*(v)* June 26th, 1685.

"*(x)* King Charles's grant, under his sign manual, of Philip's country, is in these words, "We have taken into our royal consideration, how that, by your loyalty and good conduct in that war, you have been the happy instruments to enlarge our dominions, and to bring that new territory of Mount-Hope into a more immediate dependance upon us, we are therefore graciously pleased to give and grant, and do hereby give and grant unto you, the full and entire property of the said territory, or scope of land, commonly called Mount-Hope, containing by common estimation, 7,000 acres, be the same more or less, for the sole and proper use and behoof of yourselves and the rest of our said colony of New Plymouth, to be holden of us, our heirs and successors, as of our castle of Windsor in the county of Berks, yielding and paying, &c. seven beaver skins each and every year, &c."

"This country of Mount-Hope, with several townships and parts of townships, always reputed part of the colony of New-Plymouth, by a new line, never, until then, conceived by any person whatsoever, was, in the year 1741, by commissioners from New-York, &c. determined to be within the bounds of Rhode-Island charter, and this determination, perhaps, for want of proper evidence, which might have been produced on the part of the Massachusets, was afterwards confirmed by his late majesty in council.

"In this and other controversies about boundaries, it has been the misfortune of the Massachusets province to have been represented as too great and powerful a province, that his majesty's small province of New-Hampshire, the small colony of Rhode-Island, were oppressed and borne down, &c.

"*(y)* The condition of the dissenters in England, in the latter part of the reign of king Charles the 2nd, had caused many of them to turn their thoughts again towards New-England. "Divers persons in England and Ireland, gentlemen, citizens and others, being inclined to remove themselves into foreign parts, where they may enjoy, without interruption, the public exercise of the christian religion, according to what they apprehend of divine institution, have prevailed with Mr. Blackwell to make your country a visit, and enquire whether they may be there welcome, and whether they may reasonably expect that liberty they promise them-

provided and have accustomed, and ought to provide at their own costs places for the holding the said markets and stalls, and standings, and other accommodations for persons bringing provisions and merchandizes to the said markets, and supervisors and other officers for the better preserving and ordering the said markets; and of the great concourse of persons coming to the same; and for the sustaining and supporting of the said costs and expences, by all the time aforesaid have had, and ought to have reasonable tolls, rates, or sums of money, of persons coming to the said markets for their stalls, standings and other accommodations by

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Hutchinson in a preceding part of his history mentions some interesting particulars, of an attack which had been made in the reign of king Charles the 1st upon the charters of the New England Provinces. In the conduct of this attack Abp. Laud was by no means remiss.

The proceedings against the city of London were freely animadverted upon in pamphlets published at the time. See "A Modest Enquiry concerning the Election of the Sheriffs of London, and the right of chusing demonstrated to belong unto, and to have been always adjudged to reside in the Lord Mayor, the Court of Aldermen, and the Common Hall London. Printed for Henry Mead, 1682." "The Lord Mayor of London's Vindication, &c. printed for E. Smith, 1682." "The Privileges of the Citizens of London contained in the Charters granted to them by the several kings of this realm, and confirmed by sundry parliaments. Comprehending the whole Charter only words of form left out. Now seasonably published for general information upon the occasion of the Quo Warranto brought against the said City. London printed for the Translator of it, and published by Langley Curtiss, at the sign of Sir Edmundbury Godfrey, near Fleet Bridge, 1682." See also, as connected with the privileges of the city of London, "The Liberties, Usages, and Customs of the city of London confirmed by especial acts of parliament, with the time of their confirmation; also divers ample and most beneficial charters, &c. 1674." "London's Liberty in chains, discovered and published by lieutenant colonel John Lilburne, a prisoner in the Tower of London, October, 1646, with a postscript." "London's Account, or a calculation of the arbitrary and tyrannical exactions, taxations, impositions, excises, contributions, subsidies, twentieth parts, and other assessments within the lines of communication, during the four years of this unnatural war, &c. imprinted in the year. 1647."

"The city," says Roger Coke, "upon the dissolution of the four last parliaments, were aware of the designs of the Court, and chose sheriffs accordingly. When Colledge's bill was preferred, Mr. Cornish and Mr. Bethel were sheriffs, and now another such was preferred against my lord of Shaftesbury, sir Thomas Pilkington, and Mr. Shute were sheriffs; who, though at other times sheriffs would rather fine than serve, yet at this time none refused to serve; so that unless sheriffs of another stamp were chosen, all would be to no purpose. It is scarce credible what a noise the not finding my lord Shaftesbury's bill made; all justice, now the Tory party cried, was stopped, if these Ignoramus Juries were not set aside. R. L. S. proclaimed 41 would inevitably return; and this countenanced by the Court, flew out of the city, all the country over; so that scarce any other thing was to be heard but of Ignoramus Juries, and what would follow from them.

"It was the latter end of Michaelmas Term, the great Inquest returned an Ignoramus upon the bill of high treason preferred against my lord Shaftesbury, and in the vacation, all wits were set on work how to take the election of the sheriffs of London out of the power of the city, and no other expedient could be found out, but by taking away their charter; which, if it could be done, would not only entitle the Court to making of sheriffs, but open a gap to their making a House of Commons, for near 5-6th of the Commons are Burgesses and Barons of the Cinque-ports, who would not dare contest their Charter, if the city of London could not hold theirs. So that in Hilary Term following, a Quo Warranto was brought against the city, for two heinous crimes, viz. That they had made an address to the king for the parliament to sit for redress of grievances, and to settle the nation; and that the city had raised money towards repairing Cheapside conduit, ruined by the fire of London.

"The city pleaded their right, and the king replied; upon which there was a demurrer, but judgment was not given upon it till Trinity term 1683. However, the novelty of the thing caused an amusement upon the generality of the city and nation too, whereto this tended. In the mean time the Duke having done his work in Scotland was returned to London, and his zeal for promoting the

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selves, and others, who will attend their motion." Letter from Daniel Coxe to governor Bradstreet, London October 10, 1684. The alteration which happened presently after, in the public affairs of the colony, was alone sufficient to discourage this emigration. At the same time, some of the protestants in France, after a relation of their miserable state in France, concluded a letter from Rochel, 1st October 1684—'New-England, the country where you live, is in great esteem, I, and a great many other protestants, intend to go there. Tell us, if you please, what advantage we can have, and particularly the peasants, who are used to the plough. If somebody at your country would send a ship here to fetch over French protestants, he would make great gain.'"

them for the better exposing their commodities had and enjoyed.

They further say, that the citizens and freemen of London are very numerous, (viz.) 50,000 and more.

That within the said city there hath been, time out of mind, a common council assembled as often as necessary, consisting of the mayor, aldermen, and of certain of the citizens, not exceeding 250 persons thereto annually elected, called the Commons of the said city.

That there is a custom within the said city for the mayor, aldermen, and common council, to make by-laws and ordinances for the regulation and government of the public markets within the city.

That these liberties and customs of the city were confirmed by Magna Charta, and the other statutes in the plea above-mentioned.

"That by reason of the burning of the city in Sept. 1666, and the alterations in the market-houses and places thereby occasioned, for the establishing and resettling the markets within the city, 17 Sept. 26 Car. II. the then mayor, aldermen, and commons, in common council, assembled, according to the said custom, for the better regulation of the market did make and publish an ordinance, entitled, 'An Act for the 'settlement and well ordering the public mar-'kets within the city of London,' by which said ordinance reciting that for the accommodation of the market people with stalls, shelters, and other necessaries for their standing in the market-places, and for the support and defraying the incident charges thereof, there have been always certain reasonable rates and duties paid for the same. And to the intent that the said rates may be ascertained and made public to all market-people, and the collectors restrained from exacting, It was enacted and ordained by the said common council, that the rates and sums in the replication should be paid to the use of the mayor and commonalty and citizens; or upon refusal, to be removed out of the market. And they aver, that these are all the rates or duties paid, and were reasonable sums to be paid; and these they have demanded and received for the use and purpose aforesaid, as was lawful for them to do.

As to the other matter alledged by the Attorney general in assigning the forfeiture, they say,

That within this kingdom (viz.) at the parish of St. Michael Bassishaw, London, there was an execrable Plot and Conspiracy prosecuted by papists to destroy the king, and to subvert the ancient government, and suppress the true religion in this kingdom established.

That sir Edmundbury Godfrey took examinations of witnesses, and informations of the same; and also of the burning of London by the Papists.

That divers of these conspirators had laid in wait for him, and murdered him, to the intent to suppress his examinations, and to deter other magistrates from acting in the discovery.

That Green and others were tried, and hanged for this murder.

That Coleman, and others were also tried, and executed for the same conspiracy.

That William lord Powis, lord Arundel of Warder, lord Petre, lord Bellasis, were impeached by the Commons in parliament of high treason for the same conspiracies, and sent to the Tower.

That the king in his speech to that parliament had recommended to them the further pursuit and examination of that conspiracy, declaring he thought not himself nor them safe, till that matter were gone through with; and therefore that it was necessary that the said lords in the Tower should be brought to their trials, that justice might be done; and

Catholic cause, outwent his patience for the Court's judgment upon the demurrer to the Quo Warranto; so that courtiers of the first magnitude appeared barefaced for the next election of sheriffs, and sir Dudley North, and sir Peter Rich were returned, one by a shameless trick, the other by open force. Though the Court had gained this point, they thought not fit to push it further till the demurrer to the City Charter were determined; in which such haste was made, that only two arguments were permitted on either side, one in Hilary Term 1682-3, and the other in Easter Term following, and so judgment was given in Trinity Term next after, against the city.

"The judgment against the city was as strange as the election of the sheriffs, for it was without any reason, and by two judges only; one was sir Francis Withens (who heard but one argument, and I believe understood but little of that) and who after, in the absence of sir Edward Herbert, delivered that for his opinion which sir Edward when present, disowned; and sir Thomas Jones. However they said justice Raimond was of their opinion, and so was Saunders, the chief justice, though he was past his senses, and only had sense enough to expostulate with them for then troubling him, when he had lost his memory." 2 Roger Coke's Detection, p. 313.

In the library of All-Soul's College, Oxford (Owen Wynn's MSS. No. 75) is a large collection of extracts, relating to the city of London, from the Quo Warranto Rolls during the reigns of Edward the First and Edward the Second. In the same library there is also a very good report of the Arguments in this case, in a MS. which belonged to Mr. Narcissus Luttrell.

In the "Life of King James the Second written by himself," as Macpherson calls it (See the Introduction to lord Clarendon's Case, vol. 6, p. 291, of this Collection) is the following passage:

"Quo Warranto brought against the city-charter, which pleases all good men there. The common council, on the 21st, were better than last year."

the parliament having made an address to the king, wherein both Lords and Commons declared their being deeply sensible of the sad condition of the realm, occasioned chiefly by the conspiracies of a popish party, who had plotted and intended the destruction of the king, and subversion of the government and religion of the kingdom; and thereupon a solemn fast kept pursuant to the king's proclamation, grounded upon the said address, and divers bills prepared to be passed into laws for preservation of his Protestant subjects.

These Impeachments and Bills being thus depending, and the lords in the Tower not tried, the parliament was upon the 10th of January prorogued, as the Attorney General above in his replication hath alledged, by reason whereof the citizens and inhabitants of the said city, being faithful subjects to the king, were much disquieted with the sense and apprehensions of the danger threatening the person of the king, his government and realm, by reason of the conspiracies aforesaid, as is by both king and parliament affirmed and declared; and conceiving no better means to prevent, than by the sitting of the parliament; and having received a petition from divers faithful subjects, citizens of London, to the same effect: and it being lawful to petition, the mayor, sir Patience Ward, and the aldermen and commons, in common council assembled, for the preservation of the king and his government, did cause to be written the Petition in the replication mentioned, which is set forth *in hæc verba;* and did order, that after the same was presented to the king, it should be printed for the satisfaction of the troubled minds of the said citizens; and traverse the writing or making any other Petition, or making this to any other end or intent than they have pleaded.

Surrejoinder.

The Attorney General, as to the Plea of the mayor, and commonalty, and citizens pleaded to the making and publishing the ordinance about the markets,

Protestando, That the mayor, and commonalty, and citizens were not seized of the markets, nor at their charges provided stalls and necessaries, or market-places.

Protestando etiam, That the said rates and sums were not reasonable.

For Plea saith, That by a statute made 22 Car. 2, it was enacted, that places for markets should be set out, and 2*d.* per chaldron upon coals for the charge of that, and many other things, was given; and that they received a great sum out of that duty for the purpose aforesaid; and yet for their own private lucre took the money by the ordinance.

And traverseth, That the mayor, and commonalty and citizens, time out of mind, 'habuerunt et habere consueverunt Tolneta, 'Ratas, sive denariorum summas per ipsos 'Majorem, Communitatem, et Cives superius 'supposit. per præfatam Legem, sive Ordina-'tionem prædict' Assess. et in certitudinem re-'duct. prout per placitum suum superius re-'jungendo placitat' supponitur.'

And to the Plea of the mayor, and commonalty, and citizens, pleaded to the residue of the Attorney's matter assigned for a forfeiture, as aforesaid.

The Attorney *protestando,* That the aforesaid prorogation of the parliament was for urgent causes concerning the good of the kingdom, and thereby the prosecution of public justice not interrupted.

And demurs to the said Plea of the mayor, and commonalty, and citizens by them pleaded as to the Petition.

Rebutter.

The mayor, and commonalty, and citizens, as to the making and publishing the ordinance for the payment of monies by those that come to the said markets, say as before,

That the mayor and commonalty, and citizens have, time out of mind, had, and accustomed to have, reasonable tolls, rates, or sums of money of all persons coming to these markets with victuals and provisions there to be sold, for stalls, standings, and other accommodations, by them had for exposing their victuals and provisions to sale. And of this they put themselves upon the country, &c. To this Mr. Attorney demurs.

And as to the Plea by the mayor, and commonalty, and citizens pleaded to the residue of the matter by the Attorney General, assigned for forfeiture, they join in demurrer.*

* When the Demurrer in this Case was joined (viz. Mich. Term, 34 Car. 2,) Mr. Serjeant Pemberton was Chief Justice of the King's-Bench. But before Hilary Term when it came to be argued, he was removed, and made Chief Justice of the Common-Bench; and sir Edmund Saunders, who had been counsel for the king, in drawing and advising the Pleadings, was made Chief Justice of the King's-Bench.

This Great Case was only twice argued at the Bar: First, by Mr. Finch, the King's Solicitor, for the King; and Sir George Treby, Recorder of London, for the City. And next by Sir Robert Sawyer, the King's Attorney General, for the King; and Henry Pollexfen, for the City.

The first Argument was in Hilary Term on Wednesday, February 7, 1682.

ARGUMENT

OF MR. SOLICITOR FINCH.

The questions in this case, as I think, will be,

I. Whether any corporation can be forfeited?

II. Whether the city of London differ from other corporations as to point of forfeiture?

III. Whether any act of the mayor, alderman, and common council, in common council assembled, be so much the act of the corporation, as can make a forfeiture?

IV. Whether the acts by them done in making the by-law, and receiving money by it; or in making the Petition, and causing it to be printed and published, be such acts, as if done by the corporation, will make a forfeiture of the corporation?

I. The first of these questions truly I should not make any question at all, but that this case has been a case of so great expectation, every man hath discoursed about it, and the prejudice that some have entertained concerning it, have drawn them to assert the negative proposition. Therefore, my lord, because this strikes to the whole, though I think it hath no foundation in law, I will beg leave to remove this objection out of the case.

1. First of all, No corporation hath any other creation than any other franchises have, and subsist upon the same terms that other franchises do.

2. There is a trust or a condition in law, that is annexed to, and grows upon all franchises, that they be not abused, and the breach of them is a forfeiture of the very being of the franchise.

3. And as there is no foundation of that opinion in law, so the mischiefs would be great, if the law were otherwise. For,

1. First, That no corporation hath any other creation than other franchises have; it is undoubtedly true that the king is the original and commencement of all franchises; they have their beginning from him, the books are clear and full in it: I need not quote them, though there are many, Kelway 138. 17 Ed. 2. 530. in the Reports of those times set forth by Mr. Serjeant Maynard. Now, my lord, there can be no corporation, but by the king's letters patents; for even the prescription doth suppose there was the king's patent to create it at first. And therefore the proper inquiry will be about the second thing.

2. How far the breach of trust that is annexed to a franchise, is a forfeiture of that franchise.

First of all, There is no rule in law more certain than that the misuser of a franchise, is a forfeiture of that franchise. This the statute of 18 Ed. 2. does very well prove, which was an act of grace to restore franchises to those that had lost and forfeited them. There it was restrained 'Ita quod libertat' non sint abusæ.' And my lord Coke 2 Inst. in his observations upon the statute of Westm. 1. that chapter of it that concerns towns that exacted more murage than was granted, fol. 223. says, 'They 'lose that grant for ever;' says the Mirror of Just. which my lord Coke there quotes, that is no more than the common law; for the law wills that every man should lose his franchise that does misuse it: so the Abbot of St. Alban's case, 8 Hen. 4. 18. The king seized the franchise into his hand, because the abbot, who had the gaol, would not give pledges to make deliverance, and for detaining his prisoners a long time without making a lawful deliverance. And so 20 Ed. 4. 6. The Abbot of Crowland's case for detaining prisoners acquitted after fees paid, the king seized the gaol for ever. These two are cited by my lord Coke 2 Inst. 43. And in sir George Reynal's case, 9 Report, Fitzherbert's Abridgement, Titl' Coron' Placit' 233. a layman was taken in a robbery, the ordinary challenges him as a clerk, whereas he was a layman: it was ruled, that for his false challenge the ordinary should lose his temporalities to the king, and lose his franchise to challenge clerks for him and his successors for ever. Thus far is plain, That franchises, if misused, are forfeited; and that though enjoyed by persons in a corporate capacity, as appears by the cases put. And then as a corporation may forfeit any franchise they are seized of in right of the corporation, so may a corporation forfeit the franchise, of the corporation itself, upon the same ground and reason in law: unless any one will say the franchise of being a corporation cannot be misused; and that would be very strange matter to assert.

Every corporation is entrusted with a franchise to make laws for governing the subject within it's jurisdiction. If that power be exercised to the subjects prejudice, as it may be, it were an hard matter if there were no law to redress that grievance. Suppose a corporation under their common seal should authorise a rebellion, would any man say that were no for-

feiture? It is said indeed by Pigot, 21 Ed. 4. f. 13. Arguendo upon a case (where the question is, Whether a corporation should avoid a bond entered into by the mayor by duress,) That a corporation can neither commit treason or felony; but upon the same reason that he urges, That a corporation cannot act at all, that is, abstractedly from all the members of it; for so this notion is, that a corporation is a body in consideration of law only, and not reality; and therefore the particular act even of the head of that body shall affect him personally only. But this is only a notion of his arguing; but it is the best opinion of that book, that duress to the members did so affect the corporation, that it should avoid the bond.

Now my lord, a corporation may be surrendered; and surely that that may be surrendered, may be forfeited; and I shall offer you some authorities in this case, 12 E. 3. rot. claus. memb. 36. a writ is directed to the constable of Dover, reciting, That the Cinque-ports had seized divers goods of several merchant strangers, Portugueses, and others; and the writ commands that right should be done, or else the franchise should be seised into the king's hands, 6 Ed. 2, rot. claus. No. 5. The liberties of the city of Bristol were seised, and the custody of it granted to ——— for divers contempts and injuries done 'per majorem, ba- 'livos, et communitat.' to the king; and so the Close Rolls of R. 2 m. 6.

There is another case that comes further, Pasc. 9 Edw. 1. Majus rot. 25. I find it likewise among my lord chief justice Hale's collections, that he has given to Lincoln's-inn library; I took it out of that book: It is in the Collection of the Adjudicata in time of Edw. 1, fol. 28, a. Thus it was: There was the abbot of St. Austin in Canterbury had made an agreement with the men of Sandwich, about paying ten hogsheads of wine yearly to the abbot; and there was due to the abbot some thirty marks, and he had judgment, and execution went out; and thus it is in the book, 'Vic de ——— mandatur, quod levari fac' 30 'Marcas de bonis ipsius, ad opus Abbatis, pro 'pretio 10 Doleorum Vini annuatim solvend'.' And they made rescue when the sheriff came to execute the writ, and they were sued for that; and the judgment of the king and his council, which was by parliament, for it was adjourned into parliament, was, 'Quod libertas de Sandwich forisfact' sit.' And there is this observation, though it be written with the same hand, which is not his, but the clerk's that transcribed it, 'Judicium illud extendit contra 'Barones 5 Portuum, et eorum libertates, ut 'mihi videtur.' These are the words of that book: And this will go a great way with the city of London, as to their confirmation of Magna Charta; for the Cinque Ports are confirmed by act of parliament, as well as they.

But, my lord, there are many cases of like nature, and that even in the case of the city of London too, as I shall shew you by and by. Now though these are not judgments in Quo Warranto's, to out a corporation of a franchise of being a corporation, yet it shews, that these things were forfeitures of all the franchises of a corporation; for a seisure is never but where there is matter for forfeiture found upon record, as in sir George Reynel's case; or to ground a forfeiture, upon which to bring a Quo Warranto, as in our case. But in the case of 9 Edw. 1, there it does appear judgment was given by the parliament, that the liberty should be forfeited, not that it should be seised into the king's hands only.

Now, my lord, where all the franchises of a corporation are forfeited, what is the corporation? Truly, it is nothing, it is but a name; a corporation without a power to act, is nothing at all. Indeed, I do not find any judgment in a Quo Warranto of a corporation being forfeited; yet, my lord, it doth not follow from thence that this cannot be by law; for many Quo Warrantos have been brought against London, and other places too, to out corporations of their franchises, but it hath always ended in submission to the king, and so they have been at quiet. All the Quo Warrantos in Mr. Attorney Palmer's time, after the king's restoration, against the several corporations, they all submitted; and yet that was to question the very being of their corporations.

Now, my lord, pray consider a little upon the rule of law. It should seem very strange, if a corporation should neglect to come into eyre, or into the King's-bench, the same term that a Quo Warranto is brought against them, they must be outed of their franchise for ever, as it is said 15 Edw. 1, 6 and 7. And yet, when all the contempts and oppositions imaginable are found upon record, that this should not be a forfeiture, that seems absurd that a neglect in eyre should do it, but all the oppressions and offences in the world, when found upon record, should not do it.

3. But, my lord, the mischiefs that would follow from hence are very great. How many oppressions and offences would be daily committed, if every corporation were a franchise and jurisdiction independent upon the crown? and the punishment truly of some particular men for those offences would not be adequate, where the power of offending and misgoverning should still remain; sure that were no adequate redress of such an inconvenience. And to this purpose, my lord, I shall humbly offer a case, and it is that great case between the earls of Gloucester and Hereford, Hil' 20 Edw. 1, in B. R. rot. Wallie 11. It is likewise in Riley's Placita Parliamenti, 83, 86. The case is this in short: They both claimed the liberty of *Returna Brevium*, and they had incurred great contempts in refusing to obey the king's writs; and judgment was given against them, that the liberty should be seised for this reason, which, I think, will go a great way in this case, and for which I offer it, 'Quia puniendus est Dominus libertatis in eo 'quo deliquit.' I think, my lord, as I said,

that will go a great way in this case to shew the reason of the law.

My lord, if the granting of too many and too large franchises were a mischief, as certainly it was by the law, and as appears by the Commons petitions 21 Edw. 3, rot. parl. No. 17, where they pray, That new and large franchises may not be granted, because it tended to the overthrowing the common law, and great oppression of the people. And the king's answer was, That care should be taken for the time to come. I say then, if this were such a mischief, that there ought not to be granted new and large franchises, much more would it be a mischief, if these franchises should not be under the controul of the law, when they exercise such oppression. And so, my lord, I shall leave that point; for I think it will be pretty clear, that a corporation may forfeit their being of a corporation

II. I shall next consider, 'Whether the 'city of London be in any other plight than any 'other corporations.' I think, truly, there is no difference at all. Now this question doth depend upon what they have set forth by their plea; and that is, the confirmation of Magna Charta, cap. 9, 'Civitas London' habeat omnes 'libertates suas antiquas, et consuetudines 'suas.' And then the act of 1 Edw. 3, upon which my lord Coke, in his 2 Inst. 253, says, that the franchise of this city shall not for any cause be seised into the king's hands. And then that of 7 R. 2, which says, that the city shall enjoy its whole liberties, 'licet non usi 'vel abusi.' This is their foundation, upon which they would distinguish this city from all other corporations. Now as to these things, I give these answers.

First for Magna Charta, That plainly is no more a confirmation to them, than it is to other cities and corporations. For not only the city of London is named to have its ancient liberties and customs preserved, but it is likewise 'omnes aliæ Civitat' &c.' And all cities, boroughs, and towns, and the barons of Cinque-ports, and all other ports, should have all their liberties and free customs. So my lord Coke agrees it in his comment. And in what he cites out of the Mirror of Justice, and other ancient authors of our law, they should enjoy their franchises which they had right to by lawful title of the gift and confirmation of the king, and which they had not forfeited by any abuse. So that the act which confirmed them, did not purge former forfeitures, much less did it license other abuses.

Then for their acts of 1 Edw. 3, and 7 R. 2, I shall humbly offer this, That as they are in truth no acts of parliament at all, so they will not concern this question, whatsoever my lord Coke says concerning them. But I shall give some instances before these acts, to shew that they never had such an unquestionable power as they now dream of, and then some instances in aftertimes, that there either were no such acts, or no such sense at least is to be put upon them, as they have strained to make.

First, it appears 15 Edw. 1, that the franchise of the city of London was seised into the king's hand, and Johannes de Britton was made Custos Civitatis London, who was no freeman; and this implies, that the franchise was seised into the king's hands, for they had a power to choose *de seipsis* by charter from king John, a citizen to be mayor or chief governor; but here was another governor appointed them.

Then Rot' Pat' 26 Edw. 1, 'Rex pro bono servicio civit' London' reddit eis civit' suam 'London' habend' dict' civibus ad volunt' 'Regis. Teste Rege.' So that both the city and all its franchises, were seised at that time; for he restored the very city of London to the citizens 'habend' during his will and pleasure. Thus, my lord, it stood in the time of Edw. 1, then in the time of Edw. 2, seised again; 14 Edw. 2, memb. 21, of the Pat. Rolls, in 21, 'Rex dimisit civibus London' officium Major' 'civitat' London.' 15 Edw. 2, 'Rex dedit 'licentiam eligendi Major' London'.' And in the second part of Pat' Rolls 15 Edw. 2, m. 5, the king recites, That whereas in the 14th year of his reign he had replevied to them the office of mayor, 'usque quindenam Sancta 'Martini,' and also recites, which office was seised into the king's hands by the justice of eyre in the Tower of London, and he was willing to continue it longer to them, 'ex gratia 'speciali' he did grant them the said office, *quamdiu*, &c.

Then the second part of Pat' Rolls in 20 Edw. 2, it is recited, that the king had seised the office of the mayoralty, and had replevied it from time to time; and that one Hammond de Chigwell was made mayor, the king had accepted of him for mayor, 'Et Rex volens eis 'gratiam uberiorem facere,' grants him the office of mayor.

Now, my lord, these seizures shew plainly, that the franchises of the city were forfeitable; for either they were seised upon matter of record found for a forfeiture, or else upon some matter which was to be a ground of a forfeiture. So then they were absolutely gone, and I do not find that these were ever taken out of the king's hands by process of law, but were restored by grace and favour; for till the 20 E. 2. it appears, that they so long continued in the king's hands, and he absolutely disposed of them.

Here is now a favour to them, and a plenary restitution. Thus it stood in the reigns of E. 1. and E. 2.

Now the next thing will be for their act of 1 E. 3, which they back with my lord Coke's observation upon it, that it was *authoritate parliamenti*. Now, truly my lord, there is no such act of parliament, that is any where extant. For it is not in print, neither are there any parliament rolls of E. 3's time till 4 E. 3. And he that cites it, my lord Coke himself, cites no roll at all for it; so that where we shall find this act of parliament, truly I do not know. But this act at best amounts to no more, than that for

any personal trespass of officers the liberties of the city should not be seised: but that signifies nothing, for that is not our case. There are acts of the corporations, not of particular officers; though I cannot but observe how the law was taken to be at that time, before this their pretended act, even for the offence of private officers: and that appears to be the law too in the case of 9 E. 1, which I cited before, which was only the offence of the mayor of Sandwich, who refused to answer for a trespass, and a rescue was committed, and the whole liberty seised.

Now this act of 1 E. 3, be it what it will, though they would take it in that sense, that no forfeiture should be incurred for the trespass of an officer, yet I find quite the contrary thereunto, and that it hath not prevailed even in that sense. For 5 E. 3, rot. claus. 14. there the king did discharge one from the office of mayor, and commands the aldermen and commonalty to choose another. Now this, my lord, I take to be not so much a punishment of the officer, as a breaking in upon the franchise itself. But I shall shew more fully in the reign of R. 2, that this was done.

Yet I will first take notice of the statute of R. 2, which is the next thing that they rely upon; and this, with submission, is no act of parliament neither; for though my lord Coke, in his 5th Inst. 205. says, this is the statute mentioned in our books, which supports the customs in London to devise in Mortmain, and other customs against acts of parliament and cites authorities in the margin; yet my lord, I have looked, and can find none of them to speak to the purpose for which they are cited, but the book of 7 H. 6. fol. 1. where the custom of London to devise in Mortmain is in question; and there it was ruled a good custom, because of the statute that confirms it after the statute of Mortmain, but says the book, quere the statute; so that they were not well apprized of the statute in those days, though this were the foundation of all these resolutions of that kind.

It appears by the roll, that it is no act of parliament in the nature of it, for it is 7 R. 2. No. 37. it is a prayer of the Commons, that there might be a patent granted to the city confirming their liberties, 'licet non usi vel abusi 'fuerint.' And the answer was, 'Le Roy le veult;' but this is no act of parliament, it is no more than a confirmation of the letters patents, which had been 1 R. 2. Besides further, there never was any patent granted in pursuance of this act: And yet it is plain, that if it had been so, it would only have extended to forfeitures, that were past, but could never amount to a dispensation or licence for the future. And my lord, this appears by these authorities and records that I shall now cite. The first part of Pat' Rolls 16 R. 2, membr. 36, 37. whereby it fully appears, that notwithstanding these pretended statutes, there was no such privilege in the city, but that for the offences of their officers, or themselves, the franchise should be seised.

But, my lord, I must a little observe, that truly the city have attempted to raise themselves above the fear of any judgment in any of the king's courts; for in 1 R. 2. Parl. Roll 126. there they petition for a confirmation of their character, with a clause of 'licet non usi vel abusi,' which was that they then would have to be done in parliament for them. But they do likewise desire in their petition, that notwithstanding any statute, privilege, charters, judgment made, or to be made to the contrary, their liberties might be confirmed; of this, it is said, the king will advise. There is in 1 R. 2. Parliament Rolls 121. as pleasant a petition as the other; they there do desire, that the interpretation of their charter may be left to themselves; and where it is doubting, such meaning as they should put upon it should be allowable. But to that the king's answer was, That he would make the interpretation of his own charters. according as his council should advise. So that I observe, they would fain have been absolute, but they could never do it; it hath always been denied them. So that from what was done at this time, and after 7 R. 2, it does appear plainly, that there was no difference between the city of London and any other corporation, only this is really the greatest. But as all greatness is the king's favour; so when men forget their duty, in abusing the king's favour, this great court is the place to put them in mind of it. I come then to the third question:

3. 'Whether the act of the mayor, aldermen 'and commonalty, in common council as-'sembled, be an act of the corporation, so as 'to make a forfeiture of the whole?' And with submission, my lord, that will be pretty clear too upon these reasons:

1. First of all, the whole corporation is fully represented by them, notwithstanding the disparity of number set forth in their rejoinder.

2. Again, all by-laws and ordinances made for the good government and order of the city, are certainly the acts of the corporation; but the sole power of making those laws is in the mayor, aldermen and common council; and therefore sure the whole power of the corpotion is in the common council.

3. They have the sole power of the corporation-seal. They can bind all the whole corporation by any alienation to, or charge upon their inheritance; and by consequence they may surrender all or any of their franchises, and then as I said, they may forfeit them.

1. They have pleaded that there hath been time out of mind a common council, consisting of the mayor, aldermen and 250 citizens, who are called the Commons of the city. So that it shall be intended now, that as they have prescribed for it as incident to their corporation, it was part of their original constitution to be thus represented by them, and ruled and governed by their laws: but there is another reason for it, and that is, that it is an inseparable incident to a corporation, implied in law without grant, that they have a power to make by-laws to

bind the corporation, without wh ch there were no government in a corporation, and therefore a misusure of that power must be a forfeiture of their corporation, because it is a breach of their original trust: 22 Assis. pl. 34. there is this rule given, and a true one it is, where there are many franchises granted, which do not depend one upon another, there the misusure of one is a forfeiture of that one which was misused; but where there are several parts of a franchise depending all upon the said franchise, if any part be misused, the entire franchise shall be forfeited. As for instance, if a man have a fair, a court of Pypowders is incident to it, the misusure of that court of Pypowders is a forfeiture of the whole fair itself; for wh any part is abused that is incident to an entire franchise, that abuse forfeits the whole.

And this is the opinion of Palmer's Reports in the case of the corporation of Maidenhead, where it is doubted whether the market was forfeited for taking too much toll, because the toll was not inseparably incident to the market, and so was not dependent upon the entire franchise, and there the rule is taken, as I have said before, that the misusure of a part of an entire franchise; or a power that is incident to it, is a forfeiture of the franchise.

Then, my lord, if they cannot forfeit here, the whole power of the trust of the corporation is reposed in them, and may be misused by them, to the oppression of the king's subjects, and there is no remedy, if they shall not be punished at all. For it is much harder to say, that several acts of all the particular persons should forfeit the corporation, than that their joint acts should do it. But this, my lord, is an act contrary to the trust upon creating the corporation, and may be a misusure to the prejudice and oppression of all people; and if this should not forfeit the corporation, there is no remedy at all, but the power remains of oppressing as it did before.

Now, my lord, I think, with submission, I have made it pretty plain; and as they are not distinguished from other corporations in point of privilege as to forfeitures, so this is their act, and shall bind them, being done by their representatives.

IV. Then the fourth point will be, 'Whether these offences set forth in the Replication 'are forfeitures?'

1. The first is the making of that law in the common council for the levying of sums of money upon the king's subjects, and the actual levying of those sums accordingly; and this they justify under their prescription to have reasonable tolls, as they set forth in their pleadings, from all persons that come to their markets to sell provision there, and power to reduce their tolls to a certainty by an act of common council. This is their justification; so that my lord, the first thing to be considered is,

(1.) What right they have to these tolls or sums of money assessed by the by-law? and then,

(2.) Whether if they have no right, their taking upon them to make a law be a forfeiture?

(1.) For their right, that depends upon a prescription to have reasonable toll, as they set it forth, and this, as they have pleaded it, appears to be no right at all; for a prescription to have toll and tollage not shewing how much in certain, is void; for reasonable toll is not incident to a market, but the party has it by the king's grant, and so it was adjudged in this court, Mich. 39 and 40 Eliz. cited by my lord Coke in the second Inst. 220. So if the king grant a toll, if he do not in his grant ascertain how much shall be taken for toll, that grant is void, and so is the prescription too, as you may see in the corporation of Maidenhead in Palmer's Reports, fol. 79. grounded upon 9, H. 6, 45. and 11 H. 6, 19. and so he cites the opinion of Popham in the case of Heedy and Weeldhouse, for no subject can prescribe to have toll, by the grant of the king.

But my lord, this is not properly a toll neither, nor in the nature of a toll; for that is always paid by the buyer, and never paid before a sale; but here all that comes to the market, whether they buy or not buy, sell or not sell, they must pay by this law. My lord, I confess there may be a custom for persons to pay for standings in a fair or market, as that case was 9 H. 6. 45, but yet that must be prescribed for in a certain sum, which is not done here. And this customary payment is in the same nature as a toll traverse, or a toll through, which cannot be in an uncertain sum; for they are all by prescription, and a grant of them now uncertain would not be good.

But, my lord, however, judgment upon these pleadings must be given against the city; for either the prescription, as they have set it forth is good, or it is not good: if it be good, then the traverse that is taken is well taken, to wit that they have no such custom, and they ought to have taken issue upon that which they have not done; for, my lord, they have taken issue thus, that, time out of mind, they have had reasonable toll of all persons coming to the market to sell their provision, without tying of it to the reasonable toll assessed and reduced to certainty by the law; and this is naught: for though they had a reasonable toll in general, taking the prescription to be good, yet if either that reasonable toll in the use of it were not taken in that manner, or to that value that they assess by their by-law, then have they done wrong; and therefore our traverse is proper to their reasonable toll, that they had not, time out of mind, such a toll as they set forth; for it must be such a reasonable toll as may answer to that which is assessed in the by-law; and that they have not put in issue. For the king, when once he hath granted a market, cannot after grant toll to that market, because it is a free market, and the people have right to come to it as a free market; neither can they, when once by custom they have exercised their power of assessing reasonable toll, alter that at their

pleasure; for it being once set, all people have right to come upon such terms: and if they increase the toll, under pretence to reduce it to certainty, it will be void; for they may lower their price if they will, but they can never come to increase the penalty. If, therefore, they have done ill in not taking issue upon the traverse, which does take in the full substance of their rejoinder; if it be good, then judgment must be given against them upon that reason; so then, my lord, the question will be,

(2) 'Whether the making of a law to raise 'money at large upon the subject be a forfeiture of the charter?' And truly, my lord, that it is. For,

First, It is the usurping of a power that they neither can have, nor have by law.

Secondly, It is a breach of the trust annexed to the corporation; for 'tis a misusure of the franchise, to the oppression of the king's subjects; and therefore the charter must be forfeited, and not the other franchise; not the franchise of a toll, for they have none; not the franchise of the market, for that would be nothing. If the market be forfeited, it must either be extinguished or kept, if it be extinguished, 'tis a punishment to others that did not offend; and if it be kept, though it be forfeited, 'tis no punishment to them that do offend: And 'tis a question whether a market may be forfeited for taking unreasonable toll; and that appears in the case of Maidenhead. And, as my lord Coke says upon the statute about taking outrageous toll, the franchise should be seised only till it be redeemed by them.

But, my lord, however, without going far into that matter, this offence lies not only in taking the money, but in taking upon them, and usurping a power to make laws to raise money. They have taken upon them a legislative power to oppress their fellow subjects, that is their offence, and that is a misusure of their franchise. My lord, in the Case of Ship-Money it was not the quantum of money that was raised, that was complained or quarrelled at, but it was the manner of levying of it without an act of parliament. The logic and consequence of that was it, which was so much debated and stood upon. So here, the abuse and the offence is the making the law, and the consequence of that; for by the same reason that they have a prescription to lay so much, they may have a prescription to lay ten times as much. So that upon what I offer upon this point, I conceive it ought to amount to a forfeiture of their charter, and the loss of their corporation.

Then the next thing will be that which is the last matter, that is the Petition, and that is of a strange nature; where the offence is not only in presenting, but in printing and dispersing of it; it charges the king with interrupting the public justice of the nation, and the making the necessary provisions for the security of his Protestant subjects; for, my lord, to say, that the prorogation of the parliament, which is the king's act, who surely has alone, and none but he, the undoubted prerogative of calling, proroguing, and dissolving parliaments; to say that act of his was an interruption of justice, is all one as to say, the king did interrupt: And 'tis done by them as a corporation, 'tis the act of the city in their common council in the name of the corporation; and, as we have pleaded it, the mayor, citizens, and commonalty, in common council did do it, which sure is the corporation, as they would have it. And that I rely upon for the reasons I offered before upon that point.

Then the matter of this Petition is the taking upon them to censure the king and his government by this Petition. The printing and dispersing it is now publicly scandalizing and libelling the king; for 'tis in the nature of an appeal to the people: 'tis unlawful to print any man's private case, while it is depending in any court of judicature, before it comes to judgment, because 'tis an appeal to the people. And that was my Lord Chief Justice Hales's opinion in colonel King's case. And the ill consequences of such proceedings are so many, and the danger so evident in these licentious days, that I do not know indeed whither it may tend.

The fact is confessed by them in their rejoinder; but they say they did it to alleviate men's fears, and quiet their minds *absq. hoc*, that they did it 'aliter vel alio modo.' Surely, my lord, this is no sort of excuse in the world, nor is it capable of any. They have owned the thing, but they have excused it in the manner of doing thereof. And I may venture to say the traverse is impertinent: Suppose a man be indicted for publishing a libel, and he owns the fact, but doth traverse *absq hoc*, that he did it *malitiose*, or with an intent to defame, that surely would be an idle thing; for those are constructions that the law puts upon it, and are not matters traversable, or to be put in issue. But if the fact be done, the law says, 'tis maliciously done, and with such an intention. Therefore a confession of the fact is a confession of all the consequences that the law puts upon the fact.

My lord, this can amount to no less than the forfeiture of their charter, not only for the greatness of the offence, but because otherwise the law would be unequal; for if this were the case of a private common person, he must be fined and imprisoned during the king's pleasure, as was the case of Harrison in 1. Cr. 503, for words spoken of justice Hutton. Now, my lord, a corporation is not capable of suffering this imprisonment; and therefore 'tis a much greater offence in them, as the body is greater than any particular member: And then, that which is a greater offence would have a less punishment, if the charter itself were not forfeited, than it would if a particular person were punished. And give me leave to apply here the reason of the earl of Gloucester's case, that I cited before, 'quia dominus libertatis 'puniretur in eo quo deliquit.' So they shall lose their charter for the abuse of that power that was intrusted with them by their charter.

Therefore, upon the whole matter, I do humbly pray your judgment for the king, That they may be outed of their franchise of being a corporation.

ARGUMENT

OF SIR GEORGE TREBY, RECORDER OF LONDON.

May it please your Lordship;

I am of counsel in this case for the mayor, commonalty, and citizens of London.

The record hath been truly opened by Mr. Solicitor in all particulars, except an omission of one or two, which I shall mention.

The information sets forth and charges, That the mayor, commonalty, and citizens of London, had, by the space of a month before the information, used, or claimed to use, without any warrant or royal grant, the liberties therein set forth: that is to say; to be of themselves a body politic and corporate with such a name, and by that name to plead and be impleaded, to answer and be answered; and likewise to make sheriffs and justices of the peace: But as to these there are only imparlances, and I suppose continuances. But as to the first article, the defendants plead and prescribe, That they are a body politic time out of mind; and then they set forth, indeed, several acts of par-

this Mr. Attorney General doth reply two things:

First, He takes issue upon the prescription, That they are not time out of mind a body politic with such a name; and then he assigns a forfeiture, which Mr. Solicitor, indeed, does call two causes; but they rather seem to be but one joint cause; but yet take them to be two.

The first is, That the city did assume upon themselves a power to meet and make laws for the government of the city, and thereupon did make the law which is now in question; and thereby did levy, and order to be levied, for one horse load of provision so much, &c. and that this should be paid to the use of the city, and for default of paying, the persons denying to pay this rate, should be removed from their standings in the market.

The second branch is, The Petition, and therein are those words which Mr. Solicitor hath repeated about the prorogation of the parliament.

And to all this the defendants do rejoin, That the city of London has, time out of mind, been seised of these markets; and they say, That the city of London is the metropolis of the kingdom, and consists of above 50,000 citizens and inhabitants; and that (at their proper costs and charges) they are to provide, and always have provided a market-place to sell provision in, and also officers for the preservation of good order, and regulation of that great concourse of people that comes thither, and that they have always amended and cleansed the markets; and for these charges of the market-places, and officers, and cleansing of the markets, they have always received, and ought to receive reasonable tolls. They say that time out of mind there has been a common council in the city, and that, for the like time there has been a custom, that they should make by-laws for the better regulation of the markets, for the ordering where such and such markets should be held, and for the assessing and reducing to certainty the tolls and rates that are to be paid by persons coming to the markets, so as such laws be profitable to the king and his people, and agreeable to the laws of the kingdom; and then again they set forth the several confirmations of their customs and privileges by act of parliaments and charters.

And then, as to the second branch of their forfeiture, they set forth, That there was such a plot, and such proceedings in the courts of justice against the conspirators, and that there were several judgments and executions upon it; and they set forth several of the king's gracious speeches to his people in parliament: amongst other things, that he did there, in his speech therein mentioned, recommend to the Lords and Commons in parliament assembled, to pursue the further examination of the plot; adding, That he thought not himself nor them safe, till that matter was gone through with, and that the lords in the Tower might be brought to their speedy trial, that justice might be done. They set forth likewise an Address of both Houses for a fast, wherein they desire that the king would issue forth his proclamation, which proclamation is accordingly issued; and in that it is expressed (I cannot repeat the words, but to this purpose), 'That the dangers impending could not be prevented, but by the blessing of God upon the councils of his majesty and the parliament.' Then they set forth, That the parliament was preparing several bills for the preservation of his majesty's person and the Protestant religion, and the peace of the kingdom; and those bills could not be enacted elsewhere, and that they were then depending: And they set forth further, that the parliament was prorogued before these bills were enacted: And they set forth also, that the lords impeached could not be tried, but in parliament; and that by the law of the land it is lawful for the king's subjects in their distresses, and for redress of grievances, humbly to petition the king for remedy in that behalf; and that for satisfaction of the citizens, who had made their applications to the common council, and for the alleviating of their fears; and out of their zeal for the preservation of the king's person, and the Protestant religion, they did give their votes to this Petition, as is charged; and they give their reasons for it; that is, it was ordered to be printed, to the intent that false rumours (concerning the citizens petitioning of the king) might be prevented, and the enemies of our lord the king from proceeding in their conspiracy be deterred, and the fears and per-

turbations in the minds of the king's subjects might be allayed, and that the citizens and inhabitants of the said city might better know what was done upon their application to the common council.

My lord, I have taken some notes of what Mr. Solicitor has said; but I beg your lordship's leave, that I may first deliver what I have prepared upon the Argument; and afterwards I will talk upon my notes, and give particular answers to the particular things he has insisted upon, for so much of them as I shall not answer in my discourse, which I must beg your lordship's patience in; for I fear I shall be pretty long.

I shall go on upon the same points Mr. Solicitor has done, and endeavour to meet him, and give an answer in all particulars, and shall add a point or two which he has not mentioned; as particularly, that this information (as it is here laid upon this Quo Warranto) is not brought against right persons; for it is brought against the mayor, commonalty, and citizens of the city of London. Whereas it ought to be brought against particular persons for usurping such a corporation, if it can be brought at all.

The first thing that I shall go upon, is, 'That a corporation cannot be forfeited;' for now we must begin as it were from the replication; for there is disclosed all the matter, upon which the stress of this point lies.

And that a corporation cannot be forfeited, I think will appear by opening the notion and nature of a corporation, which you may find in my lord Coke's 1st Inst. fol. 202, 250, he says, It is a body to take in succession, framed as to that capacity by the policy of man, and called a corporation, because the persons are made into a body, and so are of capacity to take or grant, &c. And he says, 'That persons capable of purchasing are of two sorts; 'persons natural created of God, such as private men, as J. S. and J. N. and persons 'created by the policy of man, as persons 'incorporated into bodies politic.' So then if this be the true notion of a corporation, then all the question is, Whether there shall remain such a person in the world as this corporation of the mayor, commonalty, and citizens of London?

And that this is a mere personality and capacity will further appear even by this Quo Warranto itself, which says, 'That we did 'claim and usurp to be a corporation under 'such a name, and thereby to plead and be impleaded, to answer and to be answered.' So that there is no more now can be considered in this record, but whether we have or can have the capacity of being plaintiff and defendant.

My lord, in Brook's Abridg. tit. Corporation (I cite not what is said there as an authority, but only as an opinion), he joins the titles Corporations and Capacities together: I say, it is only the judgment and notion of the man, who your lordship knows never uses to join any words as titles, but what are synonymous; and there he joins Corporations and Capacities, to shew the nature of a corporation is a capacity. And suitable to this is what justice Windham says in Dr. Patrick's case; 'A corporation is 'a mere capacity, a civil capacity,' says he, 'I 'do call it an *Ens rationis*;' whether he did affect that word because it was in the case of a man in the university, I cannot tell; but the meaning was, that this was the notion of a corporation, that it was an invisible person and capacity only.*

* "A Corporation," says Kyd, (on Corporations, Introd. p. 13.) "has been called 'a mere capacity to sue and to be sued, and to take and to grant;' which is as ridiculous as it would be to say 'that a man is a mere capacity to walk with two feet.' It is not a capacity, but a political person, in which many capacities reside.

"A Corporation has also been called a franchise: the propriety of this appellation depends on the more or less extensive meaning in which the word 'franchise' is used; in its most extensive sense it expresses every political right which can be enjoyed or exercised by a freeman: in this sense, the right of being tried by a jury, the right a man may have to an office, the right of voting at elections, may, with propriety, be called franchises; and in this sense, the right of acting, as a corporation, may be called a franchise, existing collectively in all the individuals of whom the corporation is composed; in this sense, and in this sense alone, 'the franchise of being a corporation,' can have any precise meaning.

"In a less general and more appropriate sense, the word 'franchise' means a royal privilege in the hands of a subject, by which he either receives some profit, or has the exclusive exercise of some right; of the first kind are the goods of felons, waifs, estrays, wrecks, or the like; of the second are courts, gaols, return of writs, fairs, markets, and many others. They are estates and inheritances, which may be granted and conveyed from one to another, as other estates, which is not the case with a corporation; in this sense a corporation cannot be called a franchise; the latter is a privilege, or liberty, which can have no existence without reference to some person to whom it may belong; the former is a political person, capable, like a natural person, of enjoying a variety of franchises; it is to a franchise, as the substance to its attribute; it is something to which many attributes belong; but is itself something distinct from those attributes.

"Several other epithets have been given to a corporation, which, unless particularly explained, are apt to bewilder and mislead the understanding: thus it has been said, that 'a corporation aggregate of many, is invisible, immortal, and rests only in intendment and consideration of the law;' that it is 'a mere metaphysical being, a mere *Ens rationis*.'

"That a body framed by the policy of man, a body whose parts and members are mortal,

Now, my lord, I do not love to litigate about words; I must confess that Mr. Solicitor does not speak without some authority, when he calls a corporation a franchise; but I say it is not properly a franchise to have a power to be impleaded and to plead; for as to that they are consequents, which belong to the person rather than a liberty or franchise that is superadded to it. Therefore in Hobart 210. Norris and Stap's case, the case of the wardens and fellowship of the weavers of Newbury; I think it unnecessary to cite the whole case, but there my lord Hobart says, 'Though license or power 'to make laws is given to a corporation by a 'special clause,' yet it is needless, for I hold it to be included by law in the very act of incorporating; and so it is also the power to sue and to be sued: Such body is a person that must answer the law as a defendant, and sue as a plaintiff.

But I do agree, I say, that there is one case, and yet but one in all the world, wherein a corporation is called a franchise; and it is in Coke's Entries, tit. Quo Warranto, Placito 1; a Quo Warranto is brought against several persons, to shew by what warrant they claim divers liberties, privileges, and franchises, as to be of themselves a body politic and corporate, by the name of the burgesses of Helmesley in the county of York. So that under that general word I confess it may be called a franchise; and the rather, because Mr. Noy (a man of great learning) * in his great Argument of Fulcher and Haywood's case in Mr. Justice Jones Reports, says it is a franchise, for it was called so in such a plea.

But now, my lord, that it is not in it's own nature forfeitable, is made plain by all those qualifications that have been attributed to it, and expressions in our law books about it: As that a mayor and commonalty, or body corporate, can never die, 1st Inst. fol. 9. b. 3 Coke, 60. a. 2 Bulstr. 233. 21 Edw. 6. fol. 13. a mayor and all the officers; but the commonalty have succession *in perpetuum*, and can never be said to die: And this notion, my lord, has gone further than England: I beg your lordship's pardon if I take the liberty to cite a very learned author, Grotius, in his book De jure Belli et Pacis, lib. 2. cap. 9. he says, 'Cities are immortal;' and a city does not therefore cease to be a city, though all the citizens of it should die. †

But the dissolving of a corporation by a

should in its own nature be immortal, or that a body composed of many bulky, visible bodies, should be invisible, in the common acceptation of the words, seems beyond the reach of common understandings. A corporation is as visible a body as an army; for though the commission or authority be not seen by every one, yet the body, united by that authority, is seen by all but the blind: When, therefore, a corporation is said to be invisible, that expression must be understood, of the right in many persons, collectively, to act as a corporation, and then it is as visible in the eye of the law, as any other right whatever, of which natural persons are capable; it is a right of such a nature, that every member, separately considered, has a freehold in it, and all, jointly considered, have an inheritance, which may go in succession. Natural persons, as such, are capable of taking and holding this right, which is not taken or held in their politic, but in their natural capacity; for many men, as men, are capable of union, which, if it requires proof or illustration, is evident from the charters of creation, and the pleadings in all such cases, in which it is said, that the 'men and burgesses,' or 'the men and citizens,' are constituted one body corporate or politic. And as the natural persons essentially constitute the body politic, so all the operations and exercise of this right, are performed only by the natural persons."

See the arguments of the Attorney-General in this case on Ass. 27 and 21 Edw. 4, fol. 14, as there cited, *infra*. See, too, on the nature of Corporations, Blackst. Comm. B. 1, c. 18; Wooddeson, Lecture 18.

* See concerning him the Note to the case of the King and Hampden, vol. 3, p. 828, of this Collection

† "When it is said that a corporation is immortal, we are to understand nothing more than that it is capable of an indefinite duration, and the authorities cited to prove its immortality, do not warrant the conclusion drawn from them. If a man give lands, says sir Edward Coke, to a mayor and commonalty, or other body aggregate, consisting of many persons capable, without naming successors, the law construes it to be a fee simple, because, in judgment of law, they never die: where the sense is plain that these natural persons, though capable to take in their natural capacities jointly, which the law would adjudge an estate for lives; yet the grant being made to them in their corporate name, they take in that capacity, and the grant is not determinable on the death of any of the individuals, but continues as long as the corporation continues.

"In support of this idea of the immortality of corporations, a passage is also cited from Grotius; which, however, when fairly considered, is so far from justifying the conclusion drawn from it, that it proceeds on the supposition that they may cease to exist.

"Si qua persona, nullâ editâ voluntatis significatione, nullo consanguineo relicto, moriatur, omne jus quod habet, interit——Idem si populus. Dixit Isocrates, et, post eum, Julianus imperator, civitates esse immortales, id est esse posse, quia scilicet populus est ex eo corporum genere, quod ex distantibus constat, unique nomini subjectum est; quod habet—spiritum unum—Is autem spiritus, in populo est vitæ civilis consociatio plena atque perfecta, cujus prima productio est summum imperium, vinculum per quod respublica cohæret, spiritus vitalis quem tot millia trahunt." Kyd, on Corporations, p. 17.

judgment in law, as is here sought, I believe is a thing that never came within the compass of any man's imagination till now, no, not so much as in the putting of a case. For in all my search (and upon this occasion I have bestowed a great deal of time in searching) I cannot find that it ever so much as entered into the conception of any man before; and I am the more confirmed in it, because so learned a gentleman as Mr. Solicitor, has not cited any one such case, wherein it has been (I do not say adjudged, but) even so much as questioned or attempted; and therefore I may very boldly call this a case *primæ impressionis*.

1 Inst. fol. 13. b. there it is said, if lands holden of J. S. be given to an abbot and his successors; in this case, if the abbot and all the convent die, so that the body politic is dissolved, the donor shall have again his land, and not the lord, by escheat. So that he does allow a body politic may be dissolved indeed; but it is not properly a dissolving, nor a dying of that body, but a taking away of the subjects in which it did subsist, or to which it did adhere. And therefore unless it be by such an accident, as all of them dying, or by violence, as in the case of the monks of Bangor, I never heard before that a corporation was dissolved; to be sure not by a judgment in law. My lord Rolls, in his Abridgment, part 1. fol. 514. tit. Corporation, at the letter I, makes it a head of one of his titles, how a corporation can be dissolved; and therefore was led very properly to enquire into all things that might dissolve a corporation; for that book is in the nature of a common place book. Now under that head he cites not only the common case, if all the members die, then it is a dissolution; but he says further, and he cites an authority for it, if a corporation consists of so many Confratres, and so many sisters, and all the sisters die, this corporation is dissolved; for both the brothers and sisters are integral parts of the corporation, and it cannot subsist by halves. But he does not go further, he does not say, if they shall levy too much money upon the market, nay, he does not say if they should commit treason (if it were possible they could do so) which had been more proper to have instanced in, he being naturally led to it under that title; for that is a thing that happens a thousand times oftener than the death of all the members. And, under favour, if the law be so as they would have it, every penalty levied upon a by law does endanger the corporation every whit as much as this of the rates upon the markets.

Littleton, my lord, in his Sect. 108. (it is a general rule, but commonly taken notice of, and may be in this case) says there, upon the statute of Merton, an action will not lie against a guardian for the disparagement of his ward, because it was never heard of from the time of the making of that statute, that such an action was brought; and yet he adds, that the words of the statute might very properly ground such an action. Now, my lord, that was a matter of two hundred years before Littleton wrote, that that statute was made; and it is possible such an action might have been brought, but not remembered, and that is an action brought by an inferior against a superior, the ward against his guardian; but here this suit, if it can be brought, is brought by the king, who is supreme, and therefore there can be no reason to think, but he would have brought many of these suits to have dissolved corporations, if by law it might have been done.

Besides, my lord, acts of parliament can never be antiquated, because a statute is a law in writing; but the common law is not a law unless it be repeated and practised. And so is Davis's opinion in the preface to his book, and in the body of his Reports too: He says, that when people have tried and used such an act, and found it useful and profitable to the public, and fit to be practised, that act of repeating begets a custom, and so becomes in its name and nature the common law of the land. But now, my lord, if I can challenge all the times, and all the precedents that ever were in this kingdom, to shew me wherever there was a forfeiture of a corporation, or a judgment given against a corporation to forfeit it; no, nor ever thought of till this last year, I think I may assert it is not law: And if it extend to this corporation of London, it must have extended to all corporations formerly, and it must do so to all still.

In the case of ecclesiastical leases, in the fifth Report, and in several other places, there is a large discourse of what bishops and other spiritual corporations might do at common law; it is said, they might grant for years, for life, in tail, or in fee. But what might they grant? their lands and tenements, their possessions and revenues; but never one word, that they could grant away themselves, or politic capacity; still that which was their very being, was not in their own power to grant away; and, if it were not to grant, much less were it in their own power to forfeit: for if it should be so, there is never an hospital in England, but if it have taken too much toll, were to be destroyed; and never a bishopric, deanry, and chapter (nay, almost particular parsonages, for they are spiritual corporations too, and all the corporations of England are under the same rule of law) if they have transgressed in any of the kinds assigned here for a forfeiture, but were to lose their very being.

That these were in the power of these spiritual corporations at the common law, no man doubts; and if any man does tell me, that the restraining statutes do extend to the corporation, truly I must deny it; for it is lands, tenements, and such things, that are mentioned, and there is provision made only against grants, and not against forfeitures. A forfeiture, Mr. Solicitor says, must be a great breach of trust; and so it must indeed! and how then should they answer for it? If a bishop, or a dean and chapter, have lands in fee upon condition, and they break the condition, their lands are gone: but if that breach of condition should amount

to a forfeiture of their being a corporation, that were very strange; this would dissolve and destroy all the colleges in the universities, and all the charity in the kingdom; for every breach of such condition would be a breach of trust.

My lord, there was a very proper time when this might have been thought of, if it could have been maintained for law, and that was in the time of H. 8. He sent out Dr. London and others with a commission of inquiry, to examine into all the misdemeanors of the monasteries, convents, and colleges. To what purpose was all this done? Could he not have brought Quo Warrantos against them? He needed not have hunted much for misdemeanors and offences; if they had but raised 5*l*. nay, for ought I know, if they had but raised 5*d*. upon a market, or the like, they had all been dissolved; and it was so much the worse in this case then, for this reason: in those regular, religious houses and corporations, the body of them was dead, and the abbot or head was only to appear for them, and plead and defend for them. Therefore it is said in the 1 Inst. 103, a. that in a Quo Warranto against an abbot, or bishop, or a prior, for franchises and liberties, if the abbot or prior disclaim alone, this shall bind their successors; and if it were possible that there might have been a forfeiture, yet without so much as troubling himself to assign that forfeiture, he might have gone that way by Quo Warranto to get a disclaimer.

And it is very well known, there were men put in those houses to be heads of them, on purpose to try if they could surrender them: and that they needed not to have done, nor have asked the consent of the members to have surrendered; for they needed only to have brought a Quo Warranto; for after the renunciation of the pope's power and supremacy, king H. 8, did grant his Conged'eslire to choose the heads of those corporations; and when they were once there, and a Quo Warranto issued, the abbot or prior might say, this corporation is but a liberty or a franchise, and I am the king's creature, I will disclaim the liberties, and there is an end of the franchise: but this was not thought of *in diebus illis*.

I think, my lord, that in case of a town the law is clear; though I shall not at *present* much contend with Mr. Solicitor upon that point, that London stands upon greater and better circumstances than other corporations and towns. It is all one as to the main points, whether it do, or not; though I shall say enough as to the particular reason, to answer what he says to the contrary, by and by. But yet this I will say, a corporation in a town is more protected in law, than others are: for, says my lord Coke, if a town or borough does decay, yet it shall remain a town or borough; as is plain in the instance of the burgesses of Old Sarum, and the like. So that it seems, that though the death of the abbot and his convent does destroy that corporation, yet the dilapidations and decays of a town does not destroy it, but it remains a town still; nor is the liberty of sending burgesses to parliament destroyed, or forfeited.

I confess, my lord, I do not see but that at this rate a Quo Warranto may be brought against a particular man, to know by what authority he claims to have the liberty of a subject, to sue and be sued, to plead and be impleaded: it is a capacity that is born with him, and belongs to him as he is born in England, or as he is by act of parliament naturalized, and made a subject; especially in the case of denization it comes home to the point. Why should not a Quo Warranto be brought against a man, to know by what warrant he claims to be a denizen, and in that respect to plead and be impleaded, to sue and be sued? These are relative capacities, that stick and adhere to the person; and if you once constitute the person, you shall never say he shall not have the incidents to such a person.

This case indeed, my lord, that I put last, is so gross a thing, that it was never drawn in question, though some others have, as dignities, lordships, and the like; and yet no Quo Warranto was ever brought, or can lie in these cases. And that is the opinion upon that great and solemn argument of the case of the earl of Oxford, in Mr. Justice Jones's Reports; where it was held, that an earldom, or the like, is a personal dignity, and such a one is in the nature of a public person and by no means can part with or surrender that capacity. And so your lordship knows it was adjudged lately in House of Lords in parliament, upon the petition of the lord Purbeck, they all voted there, that peerage could not be determined, nor surrendered; no, although there was a fine levied, and all the instruments of law that could be contrived to annul it; and I cannot see, but that if this capacity of a corporation be liable to a forfeiture, all others must be so too.

There is one capacity indeed, and a small one, that a feme covert has by the custom of London, that she shall trade without her husband, as sole merchant, and be sued so, and shall sue: the husband indeed is named, but only for conformity; the action is against her, and the judgment against her severally, and the debt must be levied of her estate; can it be thought that a Quo Warranto lies for such a mere capacity? No more than it can lie to know, by what warrant such an one claims to be an executor, or administrator, or an overseer of a will; and yet there an action is brought against them in such a capacity, and as such they sue and are sued, though perhaps they would be glad to be rid of that capacity too.

My lord, it is true what my lord Coke says in his 2 Inst. 664, there was a custom to take tithes of marriage goods within the dominion of Wales, which is taken away by a statute; and there he says, if a custom, that was once reasonable and tolerable, become grievous, and not answerable to the reason whereon it was

grounded, yet it cannot be taken away but by act of parliament; for an inheritance once fixed cannot be taken away but by parliament. If this be so of a little custom in Wales, how much more is it so of this great corporation of London, and, which is more yet, of all the corporations in England?

My lord, Mr. Solicitor was pleased to say that a corporation might be surrendered. I must confess, I should not willingly have meddled with that point at this time; but since it has been mentioned, I will only endeavour to say so much as may answer him in what he intended it for, as a ground for the better proving the point of forfeitures. I believe Mr. Solicitor (because he cited no authority for it) might rest very much upon the supposed surrenders in the time of Hen. 8. the surrenders that were made of the monasteries then; and I do believe he does presume, as others have thought, that those were surrenders of their corporations: truly, my lord, I believe they were not; and to prove that they were not, I shall rely upon the dean and chapter of Norwich's Case, 3 Coke 73, which [illegible] reported in 2 Anderson 120, and I shall at the same time mention another case, and that is [illegible] and Hay[illegible] and [illegible] Palmer 491, where [illegible] question came to be debated, Whe[illegible] deanery and chapter of Norwich wa[illegible] [illegible]en up and destroyed by their surrender?

My lord, in the report of that case in Palmer, I will first remi[illegible] your lordship of what is said by Whitlock in his argument of that case; it is fol. 501, of that book; there Whitlock sitting in this very Court, says, That although the king can create and grant a corporation, yet he cannot dissolve a corporation; and a dean and chapter, being a settled corporate [illegible] by their own act cannot dissolve themselves; being once a [illegible] corporation cannot be *felo de se*. But [illegible] further, those acts of parliament made in H. 8's time (they are all in your lordship's memory) that of 27 H. 8. gave all the monasteries under 200*l.* a year to the king; that of the 30 H. 8, cap. 13. recites, that several other monasteries had been granted, surrendered, and forfeited to the king; and it says, that the king shall have them, &c. I do allow there are the words surrendered and forfeited, and I men[illegible] them on purpose to answer them; and [illegible] is the answer I give them.

First, For the word Surrender. When the monasteries were surrendered, that was only a grant [illegible] lands, and nothing else [illegible] the word Monastery can carry nothing else in it. And [illegible] is Worty and Adam's case in Plowden's Com. 194. where there is a great discourse of the surrenders of the monasteries, and the acts of parliament about them, and what ensued upon them; but in all that book it was not by any means admitted, that the corporation, or any of that, was by these surrenders dissolved. And, my lord, as to the word Surrender, it is fully satisfied by the words 'lands and tenements.'

Secondly, as to the word 'forfeited,' my answer is this: the corporation is not named in the surrender, and therefore cannot be presumed to be intended to be surrendered; and then there are other things, as leets, liberties, and franchises, which are named, and are capable of being forfeited, and so the word forfeited may be applied to them, and very properly; for they are liable to a forfeiture, but the word corporation is not at all mentioned.

But for another understanding of the word forfeited, I desire your lordship would give me leave to cite a case in the 2d Part of Roll's Reports, fol. 101. (which is called the Continuation of his Reports) and it agreeth exactly with the history of those times: there were some Abbots, as the abbot of Glastenbury, the abbot of Reading, and the abbot of Colchester, that were stiff men, and would not surrender; thereupon the king gets them indicted of treason (the story is well known how he handled those men) and thereupon they did graft a kind of opinion, that their land was forfeited by this means; [illegible] small pretence would serve then to put people into an act of parliament of attainder; and he tells you, that was the reason why they put the word forfeited into the act of parliament; and then disbosom themselves upon the statute 26 H. 8, cap. 13, that statute that gives to the king any estate of inheritance, whereof any one is seized that commits treason. Though I do not by any means allow it to be law, that those clergymen by their own acts could forfeit so much as the lands of their corporation; but it was taken for a pretence, and so they [illegible]ut in the word forfeited.

Be[illegible]s another thing is this, the same statute says, The king shall have and enjoy the things there given him, in the same manner as they the abbots, prior, &c. should have enjoyed them. Now if the king shall enjoy all as they did, and in the same manner, what then must be extend? it may well extend to lands, to leets, and to markets, and particular franchises; all those things the king may have: but shall the king have their very corporate capacity? Shall the king have and enjoy the liberty of suing, and being sued, by the name of the abbot and prior, or the like? That office, sure, he cannot execute; it is inconsistent with sense or reason to say, that he shall have it, or can have it. And in these statutes they did doubtless accumulate words to make them look bigger, because they were to make a great present to H. 8, by these means.

Then comes 32 H. 8, cap. 24, that relates to the corporation of the knights of St. John at Jerusalem; and it seems by the penning of that statute, that this very question had been taken notice of since the time of the making of the last statute in 30; for there it is declared, That that corporation of St. John at Jerusalem shall be dissolved, and that the king shall have their lands. So that their taking notice, and providing directly to dissolve it, shews, that they had by that time considered, that neither the surrender of their lands, nor the vesting of

them in the king, had done any thing to the corporation, save only they had deserted their house, and fancied themselves dissolved, because they were turned out of their possessions.

My lord, in the great case of Haywood and Fulcher, it is again and again said there, that the surrender of the dean and chapter, (where they surrendered all their church, and all their franchises and hereditaments) was no surrender of the corporation, no, though the king did take it to be a surrender, for he accepted it as a surrender and granted them a new incorporation of the same name, only adding, 'Ex 'fundatione regis Edwardi Sexti.' So that he did take it to be a good surrender, but it was adjudged that it was not a good one; and so it is held in 3 Coke 73. And so says the dean of Wells's case in Dyer 273. the surrender is, 'Diaconatus Ecclesiæ Cathedralis de Wells:' one would think it impossible to have surrendered any thing by a stronger word; but yet there they say, it is not good without an act of parliament.

And whereas it hath been sometimes said, as it is there, they were dissolved, and they have been dissolved by the surrenders, and the like; there is a very good answer given to all that discourse in Palmer 495, where it is said, when they speak of a dissolution by surrender, it is a relation of fact only, and not of law; that is, they were dissolved in fact, so as they did desert their house, and did demean themselves as if they were discorporated, but they were not so in law; for they fancied a corporation could not be without lands, and so, when their lands and church were given up, they thought all was gone and dissolved: for (said they) a dean and chapter must be a dean and a chapter of some place, and when the land is gone, how can they be said to be of such a place? No, said the judges there, that is no reason at all; for the corporation was before they had any lands; and if those lands were all evicted, or they all disseised of them, yet they are a corporation still. And in Roll's Abr. 2. part 185. it is said, the abbies came to the king by the statutes of dissolution; so that they had no opinion that the surrender did carry even their lands, though I do admit they did carry their lands; but I may say they could carry no more, they could not carry their being of the corporation.

There is a case in Dyer 282, and it is the only case that seems against us in this point; there were two deans and chapters of St. Patrick and Christ Church in Dublin, in Ireland; and these both, and not one of them, were together one chapter of the archbishop of Dublin, time out of mind, and one of these surrendered and then their house was used for a place for the courts of justice, and continued so; and then a lease is made by the bishop, and that confirmed by the only remaining dean and chapter, which was that of Christ Church: and whether that lease was good or no was the question, and truly that was the only question that is made there in that book; and so it is of little authority as to any thing else; but it is true, that that book does say in the end of the case, that the lease was held good, 'quia corporatio et 'capitulum sancti Patricii prædicti ferut per do- 'num et sursum redditionem decani et capituli 'prædicti legitime dissolutum et determinatum.' My lord, to that I answer:

First, There was no occasion for this reason, because it did digress from the main point in the case, as it is truly observed in Palmer, fol. 502, next.

Secondly, It was a private extrajudicial opinion; it was the opinion of but five judges, and for ought appears seven might be of another opinion, and yet the case was sent for the opinion of all the judges here, because the lawyers in Ireland, it seems, did make a great doubt of it. And it was also an opinion and judgment of the favourable side, for it was to confirm a predecessor's lease. But,

Thirdly, Certainly, my lord, the case is mistaken, for the surrender could not be good without the consent of the bishop, which is also added in the end of the case there: he is the patron, and must necessarily confirm their acts to make them valid, especially they being instituted, and given to him for his advice in the government of the church, and the disposal of it's lands.

Fourthly, my lord, I have this further answer to give it, that my lord Coke says in 1 Leon. 231. (and it is not denied) that this surrender was by act of parliament, or else it had not been good. And beyond that,

Fifthly, I have by me a manuscript of my lord Dyer's Reports, the most authentic one, which was my lord Coke's, and has his own hand to it in sundry places; and by that he does often correct the prints of Dyer, and so also he might have done in this case; for there also these Latin words are left out, there is not one of them, nor any space left to put them in, nor any blot for their being rased out, it is an addition of the publisher, and printed in another letter than the rest of the case is; it is not in that book, which I take to be the truest original of Dyer: Besides, my lord Coke's answer, that it was by act of parliament, makes an end of all. And truly, my lord, that the determination of such things should be by act of parliament I shall cite you one authority, and I borrow it from Mr. Solicitor, who has mentioned it before; it is Rot. Par. 8 R. 2, num. 11, and it is taken notice of by my lord Coke, who cites it in his 4 Inst. 228. To which I add also, that the liberties were seised, and the case determined in parliament: There the case was this, the mayor, bailiffs, and commonalty of Cambridge, had committed a notorious uproar and tumult; they had assaulted the colleges of the university, they had imprisoned the vice-chancellor, and some of the scholars they had extorted from them two releases, and a bond of 3,000*l.*; and after all this great uproar and tumult a writ went out, but whence? From the parliament, and there they are summoned

to appear, and there they are to shew cause why the liberties should not be seized, as forfeited; and there upon full hearing it was adjudged by the king, with the full consent of the Lords and Commons in parliament, that the liberties should be seised as forfeited: All this is taken notice of by my lord Coke. But yet, as if he thought it not enough to have said all this in the body of the book, he puts down in the margin of that book these words, Nota, It was done by act of parliament. And that it was taken, that a corporation cannot be dissolved but by parliament, I shall cite your lordship Davis's Reports, fol. 1, b. where he says, that neither by the surrenders, nor by the acts of parliament that gave their possessions to the crown, were those corporations dissolved; the surrenders did not do it, and the acts of parliament did not intend it.

But, my lord, I shall dismiss this point, for indeed it will not conduce to the question, which is not, Whether a corporation be surrenderable, or no? but, Whether it be forfeitable?

Now there are many things that are renounceable, that yet are not forfeitable; an annuity 'pro consilio impenso et impendendo' may be surrendered, and so is Empson's case in Dyer, fol. 2, but it cannot be forfeited for treason, it is a thing that adheres to the person, and there is a privity in it that makes it not forfeitable; so a guardianship in soccage, a man may renounce it as well as he may executorship, they are neither of them forfeitable; and so is the trust of a freehold, and several other like things.

My lord, as to what Mr. Solicitor has said, That a corporation may be seized, and therefore it may be forfeited; I think certainly that is no good conclusion at all. Those words of seizures and liberties, and seizing into the king's hands, he has with great learning collected a great many records about them, and they make a great sound at first, but when they are narrowly looked into, they make nothing of argument at all; they have slept a long time, and are but imperfectly remembered; they may serve to amuse people, but when they are considered they will signify very little. Vet. Nat. Br. fol. 161. He distinguishes there, and every body must, between the causes of the seizure of a franchise into the king's hands, and the causes of a forfeiture; and there he sets down several things, and then adds 'stude differentiam istorum:' so that there is a difference, and that difference ought well to be advised upon. In 2 Edw. 3, 28 and 29, Scrope gives the rule, says he, in some cases a franchise ought to be taken into the king's hands, and in some cases it ought to be seized till a fine be made to the king; and in some cases it ought to be fore-judged; and so he makes three distinctions. Now, my lord, this will answer (as I shall observe by and by) all that Mr. Solicitor has produced about seizures, either by act of parliament, or for a fine, or for a distress for want of an appearance. If a real action, there goes out a Grand Cape, and there the lands shall be seised into the king's hands, and that look big upon record; but if you come to know the meaning of it, it is only that the sheriffs should return issues upon it, and that is a very little thing; the king has no pretence to the title of the land, nor is the suit his suit, but the party's: So the seizing of a bishop's temporalities, and the lands of priors, aliens, and the like. But words must have a reasonable and legal construction; as when a statute is made, that if a man does so and so his body shall be at the king's will, and he shall do with him at his pleasure, as in the statute of maintenance, and the statute against the transporting of money, that is nothing but that he shall forfeit the use of his body, and shall be imprisoned for the offences.

All this I shew, to distinguish about this word seisure, and by that distinction to answer the weight of all the records that Mr. Solicitor has cited. Those seisures that were of any towns, I say, they were only till they had made a fine to the king; and when the king had so seised them, what did he do? He put in a Custos upon them, which was to keep them in good order; he put them into a safe hand, but it was never intended to suspend or destroy the corporation: For the corporation went on as it did before, it might sue as it did before, and was as liable to be sued as before; it was to put a guard upon them, not for their destruction, but for their preservation; to quell insurrection, to keep peace and good order among them: the seisure of the liberties was not a seising of the corporation, because a corporation is not a liberty, it cannot be seised; for the king cannot exercise the liberty of a corporation; the king may seise the mayoralty, and the king may put in such a deputy, that may be a Custos, he may seise the sheriffalty, he may seise a leet, or a market, or he may receive the profits of them, and execute by deputy the purport of them: but what can he do when he has seised the corporation? Can he himself be the mayor, commonalty, and citizens of the city of London? or can he put in any one to be such corporation? It is not a thing manurable, it is not a thing seisable, nor ever was seised; for the king can seise nothing, but what he can have and use when he has seised it. And therefore all those Custodes that were put into London, upon the seising of the liberties, were only in the nature of the lord lieutenants, that were to keep order in the city, and prevent breaches of the peace; but still the customs, the courts and the usages of the city went on as they did before; I cite not any record indeed for it, because there is no need, it is so well known; but if there be any doubt of it, we will make it appear, that during all those times Mr. Solicitor speaks of, who has cited a great many records, and if he can find as many more, yet still all along the city was *in statu quo*, as to their being a corporation; they did sue and were sued, and they did all manner of acts as a corporation, which shews that it was not so much as

suspended, much less forfeited. This is without contradiction very plain, during all the time of those seisures. If it had been forfeited at all, it must have been extinct; and if there could have been a judgment given against it, it could not have been taken into the king's hands, but it must have been an ouster of the liberties.

In Yelverton there is a case of the king against Staverton, a Quo Warranto is brought against Staverton for keeping a court leet, and a court baron, within the hundred and manor of Wrafield: the defendant disclaims the court leet; as to the court baron, the great doubt is whether a Quo Warranto can be brought for it, it appearing that he had a manor; for that is inseparable to a manor. For he that has the demesnes and copyholds, must call his tenants together to do suit and service; and it is agreed indeed a Quo Warranto will lie. But Fleming, chief justice, and Fenner doubted of it. And in that case judgment must be, that he shall be ousted of the liberty, and not that it shall be seised; for the king cannot use it, and therefore it is impossible, that it should be taken into his hands: and so it is, as I said, of a bishop's temporalities, and the lands of priors, aliens, and the like; it is a mere personalty, and cannot be seised.

But Mr. Solicitor says a corporation can commit a crime: truly I do very much question that, nay, I shall deny it by and by: but if they do commit a crime, the punishment must be by other means than a forfeiture; and I will cite your lordship a parallel case: For as I said before, a corporation is an ability or capacity like that of a denizen, and so can no more be forfeited than a denizenship can. There is Verseline Manning's Case in Lane's Reports, 58, and the same Case is in Rolls, 1. Abr: 195, in an office of intrusion, it is there found, that Verseline Manning was a denizen by letters patents, and in the letters patents there was a clause, as is usual in patents of denization proviso, that Verseline Manning the denizen should do liege homage, and that he should be obedient and observe the laws of this realm. The office finds that he never did homage, nor was obedient to all the laws of the realm; and it was urged that consequently he had lost his denization, for breach of the condition. No, says the court there, by no means, this must have a reasonable construction, not to take away his capacity of being used as a subject and so suing and being sued; but the proviso is to be interpreted thus, for his non-obedience of the law he shall forfeit the penalties appointed by the law: So, I say, a corporation, if they do offend the laws, shall forfeit and undergo the penalties appointed by the law, but not be discorporated, any more than a denizen undenizened.

My lord, the next point that I go upon is, what I at first mentioned, and that is this, that this Quo Warranto is not well brought, and there can be no judgment given against us upon it, if we should admit (which I do not) that a corporation is forfeitable; or if I should grant (which I do not neither, but shall come to that afterwards) that the particulars assigned are causes of a forfeiture.

Now this Quo Warranto is brought against the mayor, commonalty, and citizens, of the city of London, that is to say, against the corporation (for that is the corporate name, and no man sure is so vain as to think that can be the christian name or surname of any natural person) therefore I say it is brought against us as a corporation, and charges us, that we have usurped the liberty of being a corporation, under such a name, for a month before the information brought. Now, my lord, I say this is impossible, and this is repugnant; for the question is here, whether we are a corporation, and that is a liberty to be plaintiff and defendant? And then comes Mr. Attorney, and admits us to be defendants; for he sues by that name, and yet the very question that he does bring us to dispute on is, whether we are capable of being defendants, or no: That is just as if he should have said, I have brought you into court, and you must be defendants, or else I have brought you here for nothing; for there is no cause depending without parties, plaintiff and defendant; and then I will assign for the cause of my suit, that you are no defendants; nor is it possible for you to be defendants.

My lord, this is plain reason; but I shall strengthen it with great authority, and that is the case upon a writ of error, out of Ireland, to reverse a judgment given in a Quo Warranto against the corporation of Dublin: It is in Palmer the first case, and 2 Rolls, fol. 113 and 125. A Quo Warranto is brought against Cusack, and other aldermen of Dublin, who pretended to have privileges, and a guild, and to be a corporation, and this I presume is for their being a corporation; for there is a 'Curia advisare vult' as to the corporation, and so it is not put in the case, but it is also brought for several liberties that they did pretend to claim; as that they only, and none others, should sell and buy all merchandizes, and nobody should buy of another, or sell to another, but to them; that all merchandizes should be brought to their common-hall, &c. Now, as to these liberties, they are forejudged, that the liberties should be seised, and they ousted; as to their being a corporation, 'Curia advisare 'vult;' so the case is in Palmer: but in the other book in 2 Rolls, 115, it is agreed, if a Quo Warranto be brought to dissolve the being of a corporation, it ought to be brought against particular persons; for the writ supposes, that they are not a corporation; and it is to falsify the supposal of the writ to name them as a corporation. Now here this writ, it supposes them to be a corporation, or else they could not be defendants; and then it comes and falsifies that supposal, by assigning that they are no corporation, nor ever were, or if they had been, they had forfeited it; and so all the foundation that this writ stands upon is destroyed.

In this case of Cusack I am assisted further

with a report of it in my Lord Chief Justice Hales's Book; a report of very great authority with all men of our profession: And there he says expressly, If a Quo Warranto be brought for the usurping a corporation, it must be brought against particular persons, because it goes in disaffirmance of the corporation; and judgment shall be given, that they be ousted of the corporation; but if it be for liberties claimed by a corporation, then it must be brought against them as a corporation.

Lord Chief Justice. What folio is it in my lord Hales's book, Mr. Recorder.

Mr. *Recorder.* It is my lord Hales's Common-place Book, which is in Lincoln's-Inn library, fol. 168. placito 7, and this is our case directly. If you go about to say, our corporation is forfeited, or must be dissolved, nay more, (as you say here) we never have been a corporation; or by forfeiture our corporation is lost long ago, then there is nothing can come before the court properly, but that J. S. and J. N. particular persons, have usurped to be a corporation, when they are none. This information is brought in disaffirmance of their being a corporation; and therefore there must be set up somebody capable of being a defendant in such a suit; and who can that be but particular persons, which ought to have been named, as they are in that case of Cusack? For as judgment of ouster of particular liberties given against particular persons, will not bind the body of the corporation; so the judgment, that they are not a corporation, will not be good, unless it be given against those particular persons that usurp the corporation. And I do say further, that individual freemen of London cannot possibly be bound by this judgment: For they are not here before you, nor were they ever so; for it is the corporation here that is made the defendant. And I do not now consider the number that make up that body (London's being so populous doth not alter the case;) for the case is the same, if it were the corporation of Queenborough, or any other petty corporation. Suppose twenty men be a corporation, or pretended to be a corporation, and you come to enquire by what particular means these twenty men pretended to be a corporation, or, as the words of this Quo Warranto are, usurped to be a corporation; you must not say that they are one, and then say, that they usurped it; for 'tis not the corporation that usurps to be a corporation, that is impossible; but it is the particular persons that usurp to be a corporation, when indeed they are not one. A corporation may usurp a market, they may usurp a leet, but they cannot usurp themselves. In Townsend's book of printed Precedents (which is a laborious thing, and wherein he has collected all the precedents he could meet with of Quo Warrantos) there is but one in all the collection, that was brought against any persons upon the score of being a corporation: And what is that? How was it brought? Not against a corporation that was, but against a corporation that never was, that is to say, a parcel of people, that took upon themselves to be a corporation, when they were not; and that is the same single precedent in Coke's Entries 527, tit. Quo Warranto. The king against Helden, and other burgesses of Helmsley, for usurping to be a corporation by the name of the burgesses of Helmsley. And how does the Attorney General there bring the writ? He brings it against particular persons. My lord Hobart, who was then Attorney General, never thought he could have maintained his Quo Warranto, or expected judgment against them, if he had brought it against the burgesses of Helmsley generally, and then have said, that there were no corporation: but he brings it against these particular persons, and thereupon they come in and disclaim their being such a corporation, and the having the other liberties; and the judgment is, That of those liberties those particular people should be ousted, and should not intermeddle with them.

Now, my lord, what judgment can be given in this case, that the mayor, commonalty, and citizens, shall not intermeddle with the being of mayor, commonalty, and citizens? 'Tis a very reasonable judgment, that Helden and those particular persons should not intermeddle with such a liberty, or be in such a corporation; but if such a judgment be given against the city here, that would be as much as to say, That you have never been what you are, or you shall never be what you are, that is the English of it.

And, my lord, I am sure, as there never was but one Quo Warranto, that we can find any printed precedent of against the being of a corporation, so that very precedent is not against those that really were so, but particular persons that usurped to be so. And if you search all the records of this kingdom, and all the books in all the offices, you will never find any that is brought against a corporation, for being a corporation, upon pretence that they might be made none by a forfeiture; and no prerogative of the king shall extend to excuse this, but his action shall abate, if it be not right brought, as well as the subjects, and so is Plowd' Com. fol. 85.

Further, my lord, I have another authority in this point; and that is in the case of the corporation of Maidenhead, which hath been so often cited by Mr. Solicitor, and it is in Palmer 80, 81, where it is said, When the Attorney General hath supposed them to be a corporation, it is not usual to plead them to be a corporation; otherwise, if he had questioned them as inhabitants of such a town, then they ought to enable themselves: Those are the words of that book; and what can be more plain? Here the Attorney General supposes us to be a corporation, his replication flies in his own face; and he having supposed it at first, he is bound not to question us for our being a corporation at any time after. As to the business of *forisfecerunt*, it is a strange and a new word, that never came into any Quo Warranto before, that I know of; but we will accept the new

word, but not the thing, and that they have forfeited by such and such acts: This sure will be very hard upon us; for if it be a forfeiture, it must relate to the time of the thing done, to the time of the making the act of the common council, to the time of the toll levied, or to the time of the petition; and if it do so, it must relate like a forfeiture for treason; it must reach all mean acts, all the leases that we have made since, are gone; all the judgments that we have given in any cause, are 'coram non Judice, and void; all the acts of the corporation are overturned by this forfeiture; and we have been under a vast mistake all this while. We have had no mayors nor sheriffs, no kind of officers, no manner of regular and legal proceedings; but we have been under a great mistake ever since this money was ordained or levied. We have forfeited all; and that it is so, is plain, because in all Quo Warranto's, wherein persons are convicted for usurping of liberties, there is a fine set upon them for continuing that usurpation, and reason good; then if it be an offence for continuing the liberty, we must be fined for doing it ever since the forfeiture, when, if Mr. Attorney General's rule be right, there has been no such corporation; but we ought to have discontinued all our acting as a corporation and laid it down; and so every step that we have taken since hath been irregular, and every act void.

If so be an action be brought against Baron and Feme, and the plaintiff should in his replication say, they were divorced several years before, has he not undone all his pleading? Here then is our case: Mr. Attorney-General admits us to be suable, and yet charges us to have no capacity to be sued: I do implead you, but you have no right to be impleaded; here he brings us into court, and when he has brought us here, he quarrels with us for being here. He makes us defendants, and then questions whether we ought to be so; and so his great charge against us is, that we are what he would have us to be, and what he hath made us to be; for if a month before the information, the corporation was not, but the very being of the corporation was usurped, how come we at the month's end to be defendants? Here comes a new creation interposed in that time, and makes parties sueable in the court, when by the charge in the information we were not so a month before.

And then, my lord, the information is not quite so bad, but the replication is worse: First, he takes issue, that we never were a corporation, at all; and the next thing is, if ever you were a corporation, you have ceased so to be, because you have forfeited it so, and so several years ago. This is just then to put a common case, (and I confess a very familiar one it is) if I should bring an action against a man, and when he hath pleaded, I should by way of replication set forth, there never was any such man as the defendant, and take issue upon it; or, if there were, that he was dead ten years ago: And yet this is the substance of Mr. Attorney's issue, and his replication.

My lord, the authorities before cited in Palmer, Coke's Entries, Rolls, and my lord Hales's Common-place book, are not all; for I have some other that never saw the light in print yet; and that is the case of the king against Bradwell and others, Trin. 18 of this king. A Quo Warranto was brought against them for usurping to be a corporation or company of musicians; It had been a strange thing, if the Quo Warranto had been brought against that corporation, and then the Attorney-General had said they were no corporation, nor ever were; there they did think best and fittest to go against Bradwell, and the rest, and that by name, and only so, not against the body corporate. So in that case of the corporation of Worcester, which was lately tried before your lordship in this court; when the Quo Warranto was brought against such men for usurping to be all aldermen and common-council-men; if the Attorney-General had once called them common council-men, it had been a great repugnancy for him afterwards to say, that they were none: or if they were, that that privilege of their's was lost so long ago. So in the case of the Quo Warranto against the Bermudas company; it was against a corporation, and against particular persons by name both. These things have been considered, and doubtless they have gone on in an ordinary way. I must confess, I was not privy to that particular case; but by the report of that case, which I have seen, I have been informed, that the corporation never appeared; for they said, it is not sense for us to appear; for it being a question by what warrant we are a corporation, it is not we, supposing us a corporation, that do usurp, but the particular persons that do usurp, if it be at all usurped. Now, my lord, if that had been a regular suit, no doubt but there would have been judgment against the corporation, which there was not; and certainly the replication of forfeitures was not good against the corporation, but against particular persons only.

All Mr. Solicitor's authorities for seising hold true, if the corporation would never appear: And what is the reason it should be brought against J. S. and J. N. but because corporations do never appear in such a case, in regard it were not congruous they should appear? for the Quo Warranto must intend it so, that they were not a corporation in being, by implying a forfeiture. Then say I, no judgment at all can be given upon this score; 'Non 'admittitur exceptio ejusdem rei, cujus petitur 'dissolutio;' a man shall never be admitted to controvert that to be in being, which he himself desires should be destroyed, and so he has allowed it to be. Shall Mr. Attorney be admitted to deny the supposal of his own writ? And truly I think I might very well leave this part of the case, and this point, to Mr. Attorney-General himself; for if he will have any thing to be answered by us, he must maintain us to

be a corporation capable of answering; and so I have reason to expect, that against his own replication he will be pleased to support the being of our corporation, and so dismiss us hence.

My lord, I have done with this point, and now I come to the replication, which indeed is a kind of a new Quo Warranto; for it brings in new matter, and therein they do charge two forfeitures; the one is, by reason of the abuse of the market, the other is, by reason of the petition. My lord, I shall answer both of them. That we were seised of the market, that is pleaded, and that is agreed: That we were seized of tolls, that is agreed too: That there is a custom in London to have common councils, and that this was by common council, is agreed; all this is agreed by the demurrer: That this toll (though by the way I must confess, and will agree with Mr. Solicitor, that it is not properly to be called a toll, for a toll is only for goods sold; and when they are sold, in recompence for the officer's attendance for the testification of contracts, and the entering them in their books; but I agree, this is not such a duty for goods bought and sold, but it) is for the accommodation of persons repairing thereunto for their stalls; and, if I would call it by any particular word, I had rather call it stallage than any thing else; it is for those accommodations, which we have been at vast charge in preparing and providing, and for the maintenance of requisite officers, and for the cleansing of the markets. Now Mr. Solicitor objects, That we cannot prescribe for a toll uncertain, and he cites the case of Murage, and the like; and so I must confess, where Murage is granted, it is commonly a thing uncertain; so is Pontage, and the like; but I believe (if I had thought, that it would have been a point insisted upon) I could have brought you instances where Murage, and such like things, have been granted in general, and they would have been ancient ones indeed: And there is a necessity for it in some cases; for when a town will repair its walls, the charge may be greater or less, as the particular accidents may be, and so perhaps a certain duty would not do it. When a wall is to be built, there the duty may be certain; but when it is built, to keep it in repair, the duty of Murage may be uncertain, according to the charge; and if the case be not so, it will come little to our purpose, which is a duty upon a great and a continuing charge. I will name him some things that he must agree, and I know he will grant, are uncertain, as pickage and stallage, which are duties for picking in my earth to dig holes for the posts of stalls to be fixed in: Now there can never be, nor ever was, any circumscribing in those matters; for circumstances in every of those cases must govern it. If I have occasion for my stall to use a foot of ground, one sort of sum is necessary; if ten feet, another sum; it ought to be equal indeed, but it could never be good, if it were limited to a sum certain; and in all grants that ever were of pickage and stallage, they were never reduced to a certainty; and those are things too that relate to a market.

And so I take it to be for keyage, anchorage, and the like, for when there are posts or places for ships, to which they may be fixed, the owner of the port may have a compensation for that; but that must needs be uncertain, according to the circumstances; if a ship be bigger or lesser, if a ship stay a month or a day, it is not fit the same rate should be paid; nor is it usually granted by particular words, Co. Entr. 535 and 526, Placit' 4, the king against the city of London for the water-bailage, and other things. They pleaded only a right in general, and do not say what the particulars were; and yet one of the things demanded in the Quo Warranto, was, as I said, the water-bailage; which, sure, if any thing ought to be certain, that ought. In that case it was good pleading; though I think I could say more against it than this thing, that is in the nature of stallage; so that all that Mr. Solicitor hath built upon that must, I think, needs vanish.

My lord, I do not think but London ought to be, and is as much under the obedience and correction of the king, as any city; but yet I believe, in these cases of their customs, you will give that allowance and indulgence to it, that all your predecessors have done, which is greater than they have given to any other corporations in the kingdom, and that because it was London. That there should be such a thing as a foreign attachment, I think, is hardly allowed in other places; I am sure, I have known it denied in some, that a contract in writing should be equal to a book-debt; that a feme merchant should sue or be sued without her husband; or if he be named, he should only be named for conformity. You take notice, that London is a port town, and that men that trade there, sometimes go beyond seas, and in their absence their wives trade by themselves, and perhaps carry on distinct trades while they are here; and so they may do in other places, may be; but only for the sake of London do you take notice of these things there, and not elsewhere. Their penalties, that are sued for in their courts, a great many of them are such as would not be well maintained in other Courts, or in any other place; and yet they are maintained there, as namely, that their penalties should be sued for before the mayor and aldermen, when the benefit of them goes to their use; and yet that is allowed in the eighth Report, notwithstanding the grand objection, that they are in some sort judges and parties, Rolls 2 p. Abr. Tit. Prescription, letter H. fol. 266, N°. 2, and 3. The city of London may prescribe to have a Court of Chancery in London, of matters tried in the Sheriffs Court, though such a Court cannot be granted by the king's letters patents; but the mayor and citizens of York cannot prescribe for such a Court, because it were very dangerous, that

such petty corporations should have such Courts. And, whatsoever is said by my lord *Hobart in his Reports*, 63. I do affirm, there is no act of parliament that erects a Court of Chancery in London or the Cinque-Ports. If Mr. Solicitor had struggled with me about the being, or not being of that act of parliament, I would have agreed with him, that there was no such, sooner than some that he says are none.

The customs of London have been upheld, and, I must confess, I think that is very strange, even against the general words of an act of parliament, 2 Inst. 20. A gaoler in London may permit his prisoner, that is in execution, to go at large with a batoon in any place within their jurisdiction, and it is no escape. And so is Plowden's Com. 36. A citizen of London may set up one retale trade, though he was bred to another, notwithstanding of the statute 5 of the queen. And for a general rule take that that is said in Palmer 542. Those of London may prescribe against a statute; and the reason is, because their liberties are confirmed by statute, and other towns are not. In Rolls Rep. 1, p. 105. Sprike against Tenant, my lord Coke being then chief justice, says, we take notice of the customs in our Courts, and other Courts in Westminster-Hall, and in London. Fleetwood, Recorder of London, says a very strange thing in 1 Leon' 284. Hollingshead's and King's Case, and in 4 Leon' 182, that the King's Courts ought to take notice, that those of London have a Court of Record; for if a Quo Warranto issues to the justices in Eyre, it does not belong to them of London to claim their liberties for all the king's Courts have notice of them. And truly I have been informed, I mean by copies of records, that when the justices in Eyre came to the Tower, this was a privilege allowed to them, they were not bound to set forth their liberties, as others were.

My lord, I think this, as it is pleaded, is a duty very justifiable, and very well payable, by virtue of this custom. I do agree, as I said, a toll is properly for goods sold, and this is a custom for the accommodation of those that brought goods to be sold; and it is like that 1 Leonard 218, my lord Cobham's case, a duty paid for the standing in the cellar; and there that is held to be good. In Rolls 2 p. of the Abridgment, 123. Letter B. Hickman's case, the lord of a manor may prescribe to have the eighth part of a bushel of corn in four bushels that are brought to the market within the manor, in the name of the toll, and that is for stallage only; for it is said there, whether it be sold or not. And in the same book, fol. 265, the city of Dublin set forth, that they are owners of the port of Dublin, and that they maintained perches in the said river, to direct the ships in the deep Channel, and that they kept the Key and the Crane; and therefore, in consideration of that, they prescribed and demanded 3*d*. in the pound for all merchandizes in the said Port, and it was held good. Now I agree toll-through, that cannot be prescribed for simply and generally; but by toll-through I mean, as you know, for passing and repassing through only, and not for staying. But yet even that may be prescribed for too, in consideration of repairing a great highway, or a very foul way, or maintaining a bridge, and the like. And therefore, if our considerations here be as good, then we maintaining those great places may prescribe for this duty, as for passing through the streets, though it were no market.

There is a famous case reported in Rolls 1, p. fol. 1, and 44, and it is in 2 Bulstrode, and also in Moor; it was the case of the bell-man of Litchfield: a prescription is made, that the corporation of Litchfield hath a market, and they ought to repair the way to it, and to appoint a bell-man that should sweep the market-place; and that for this the said bell-man, time out of mind, had taken of those that brought corn to the said market, and opened their sacks to sell, a pint of corn, if but a bushel or under; if more, a quart. So that if it were opened and not sold, yet he was to have that duty, and that prescription was adjudged to them by all the judges; and yet it does not appear there, whether the repairing that way cost them 5*s*. or 5,000*l*. and yet by intendment they would not account it unreasonable, though it might have been urged it was very unequal; if they could take a pint for that which was under a bushel, perhaps they would take, by that means, half of what the party bought; but if there were 15 bushels, they had but a quart, and this was objected as to the inequality of it; and yet they all passed over that by a reasonable intendment, and would not deny the prescription to be good. And the case of cranage in Dyer, and the case of 21 H. 7, 16, are admitted to be good law, where the town of Gloucester prescribed for a toll of boats passing by the river near the town.

Now, my lord, for ours, there was very great reason to induce it, the great alterations that were made in London by the fire; and it was not the first time that London was burnt: and if there should be war, and so great alterations and confusions, there were great cause, that the city, that lays out great sums, and must be at such a public charge, should not be losers by it.

And we do set forth more than they do in the case of Litchfield, that we provided the market-places at our own charge; and if they will use them, they must expect to pay some compensation for it; that we do keep officers, and pay them for cleansing and keeping order in the markets: and above all that, we provide standings and stalls, and such accommodations, and that I am sure is a provision no lord of a market is bound to make, unless he will; and therefore the market-people, that are accommodated by it, have great reason to pay for it; and we pay all the taxes for the market-places, for the ground is ours; and

that is not alledged in the pleading indeed, but it must be implied, because we pay the taxes, and they that have the standings are not liable to pay the taxes: and so is the judgment in Rolls, 2 p. 238, and the second Abr. 289. And in the case of Cusack justice Dodderidge says, that the redeeming of one fair from the abbot of Westminster cost the city of London 8,000*l.* for he had a fair at Westminster, and a market for 40 days, and that during that time no sale should be in London, or the places adjacent; and a great rate it was, if it were so. The measure of a toll is according to my lord Coke 2 Inst. 58, when the thing demanded for wares or merchandises does so burden the commodity, that the merchant cannot have a convenient gain by trading therewith; and thereby trade is lost or hindered, then it is an evil toll. But here indeed the market-people are better accommodated than ever they were; and trade is so far from being discouraged, as that it is increased, as is implied in the replication; for it is said we receive 5,000*l.* a year, which if it were so unequal, would not certainly be paid, nor could be, if there were not great trade there. So that the increase of trade is the thing complained of in this Quo Warranto. And the truth of it is, I have examined and looked into the fact of these things, and there is nothing in this by-law, but what was really anciently paid, except only in one instance, whether it were 6*d.* or no, that was paid when a cart was drawn by two horses, which now is but 4*d.* and if we have increased the toll, which I doubt whether it be so or no, it is only in a very trifle.

Now, my lord, this case, I think, is a stronger case than that in 5 Rep. the chamberlain of London's case; there is no consideration of stalls, or cleansing the place, but only they had an officer to search and view, and that was a new appointment of their own; they could not prescribe for it, but it was thought a penny was a reasonable recompence, and the subject had a benefit by it; and if he would bring his cloth to London to be sold, he should come thither to have it viewed, and give a recompence for it.

Now London is all market indeed, every shop is a market; and it hath been well said of the judges several times in Westminster-hall, that London is the market of all England; and there is never an acre in England, but is the better for that.

As to the imposition upon coals, that is but an inducement; and an inducement is never to be relied upon; it is not to be stood upon; and Mr. Solicitor did very honourably decline it, and did not make any thing of it, nor trouble the case with it.

When the city did make this act of common council, they did consult with their counsel for matter of law, and with their officers and fellow citizens for matter of fact, and did adjust these rates, and enacted them to be paid, they being reasonable ones, and according to the ancient usage; but if they were mistaken, it will be no cause for you to give judgment against them, for many other reasons: as first, you cannot judge this to be unreasonable. I have not heard one word said, that this is an unreasonable oppressive toll. Here is money levied; what then? if it be a reasonable sum, if it is not so great; it does not deserve the name of oppression. I say, it is not so great an oppression, if they should have been mistaken in the form of instituting the levying of it; if they might have done it under their common seal, and now they have done it without that by act of common council. Nay it does not deserve that you should judge it unreasonable; you cannot do it here, for the considerations are meritorious, and equivalent to it the great charge they were at in building, and they still daily are at in cleansing and repairing, and providing stalls. But however, the case is not so disclosed here, that you can judicially determine this to be an unreasonable toll; according to the rule in Coke's Magna Charta 222. the toll of a market need not be certain, only it must be reasonable; and what shall be deemed reasonable the judges must determine, if it come judicially before them. So shall reasonable customs, and reasonable fines, and reasonable services, and reasonable time to remove goods, and the like, they must be judged by the discretion of the justices upon the true state of the case before them. Now this case must have all its circumstances stated and agreed by demurrer, or found by verdict. And so is 4 Rep. 27. b. and Hobart 135 and 174. as in the case of copyholders fines, the quality and yearly value of the land must appear, or else there cannot be judgment whether it be reasonable or no. In the 13th Report, fol. 3. and Croke Car. 196. Where the question was, whether the lord of a manor might assess two years and an half value of copyhold lands, according to the rack rents for a fine upon surrender and admittance, and upon nonpayment to enter for the forfeiture; as suppose land, it be rented at 20*l.* a year, here is 50*l.* demanded for admittance; there it appeared judicially that it was unreasonable; and so it was adjudged, because the value was certain. But who can here say, whether the providing of markets costs 5*s.* or 500*l.*? It is not estimable. Perhaps we have over bought all these tolls that they call unreasonable; we aver it to be reasonable, the demurrer agrees it to be so, and you must intend it to be so, unless the contrary be set forth clearly in its circumstances; for he that will have a forfeiture, must shew the circumstances to make it out.

My lord, another thing is this, to answer Mr. Solicitor in that point: I say, an unreasonable by-law is no unreasonable cause or colour for forfeiting a corporation, admitting it to be unreasonable, though I grant it not. My lord Hobart in Norris and Stap's case, Hob. 211. says, that though power to make laws is given by special clauses in all incorporations, yet it is needless; for that is included by law in the very act of incorporating. For as reason is given

for the natural body for the governing of it, so bodies corporate must have laws as a politic reason to govern them. Reason is a faculty in them as it is in a man, and may err; and therefore, says he, if the king do grant letters patents of incorporation to persons, and he doth thereby make ordinances and by-laws himself, they are subject to the same construction and rule of law as if they were made afterwards by the corporation. For the king can no more make an unreasonable by-law than a corporation: but if the king do, shall that affect the corporation, and make the corporation void by way of repugnancy, or an instantaneous breach of condition? No, it shall not. And therefore as they may receive unreasonable rules from the king, without defeating of the corporation, or having their being thereby vacated; so they may make unreasonable by laws without the same danger of destroying the corporation. The cases are very many, wherein by-laws have been judged unreasonable; the truth of it is, there is a great misfortune in the penning and making of those by-laws; by some means or other there is something discerned that still proves an exception to it, as we see in the Case of the Carmen and Woodmongers: their by-law was made and re-made, and corrected again and again, before it could be made to hold water in this court. So in the Taylors of Ipswich's case, the Bradnox's case, which was here lately. All these have been adjudged void; but what then? In all these cases it was never said, hereby your corporation is destroyed, you have erred in making a by-law, and therefore you have lost your being of a corporation. Besides if there were but a colour for it, and it were any thing tolerable, surely that were enough to make us excusable in such a matter. If it has been received, as we agree it has, the officers are trespassers, every individual of them are sueable, and any man may bring his action against them. But they that come to the market, think not fit to complain; if they did not like the market, they would not come at all; and if they did not like the payment, they would not come neither; and there is no levying of any thing unless they do come.

Now, my lord, I will admit the levying and the receiving, and yet I say this is no forfeiture; for here is a mistake of law, or a mistake of fact, by colour whereof money is received: this by no means will work a forfeiture of a corporation; for at that rate, every penalty that has been levied by a by-law will be adjudged a levying of money without law, and so forfeit the corporation; which has not been done in other cases of by-laws, and those much worse than this; because most of those by-laws were made for levying money upon men for exercising a trade; and it is much more to say that you should levy such sums of money upon every stroke of honest industry, whereby a man gets his livelihood, than that you shall pay so much for your accommodation in my ground for the better vending your goods. This hath been held good in some cases, but in others it hath been held naught; and this hath been all received and levied to the use of the city too, and so it is a levying of money, whereby they have a great advantage; nay, it is worse still, because it is imposed by force, and recovered by force: but here it is a voluntary penalty, no force, no compulsion, only their being removed from their standings, no other penalty, no imprisonment, or the like; but if you do not like the conditions, you may be gone: I desire you to walk out of this market, if you don't like the price of the provisions; and to be gone from the stall, if you don't like the price of the standing. We were not bound to provide these stalls for you, but having provided them, if you don't like them, you may leave them; in other cases, the man is imprisoned, and sued by action for the penalty; here at any time, if you do not like, you may be gone.

My lord, I am very confident, if this be so, that all monies levied by a corporation without law are forfeitures, or where the law is mistaken; then I dare boldly affirm, that we never were a corporation two months since London was London; but by virtue of some old sleeping by-law or other, that has been set on foot, monies have been levied, which perhaps will not be in strictness allowed good: and if all these had been forfeitures, we had been in a strange condition, not one month or two should pass over us, but we had forfeited it; and never can there be perhaps a month to the end of the world, but we should still be forfeiting. And what is said of us, may be said of any other corporation that happens to make by-laws. And I am sure in former times there were monies levied with a witness, I mean not the late times of rebellion only, but an hundred years ago, strange exorbitances of that nature were committed by London and other corporations; then they went by way of information, but never was it thought that it could affect the being of a corporation: if it should do so, I do not know whether it will go at last. The greater or the lesser sum is not that that will difference the law. Is it a forfeiture to receive 5,000*l.*? Why it is not a forfeiture to receive 500*l.*? Why not to receive 5*s.*? Why not to receive 5*d.*? No bounds can be set for that, if it be a transgression of the law; here is a tort and a wrong done by your by-law, that you have levied 5*d.* and therefore all this great inheritance of London, this, that is the greatest inheritance of this kingdom, is forfeited for a trifle, upon three halfpence, or a basket of eggs.

Nay, my lord, to go further, I say, if this be a forfeiture, I say it is only a forfeiture of the market; nay, not so much neither, it is only a forfeiture of the toll: my lord, I cannot but once more mention that excellent notion of my lord Hobart, that the power of making by-laws is included in the act of the corporation; for as reason, says he, is given to a natural body to govern it, so a politic body must have laws, as its reason to govern it. Now then the making

of these laws is but the exercise of that reason declaring the mind of the corporation, for the direction of the officers of it, what to do, and what to take; and it is but like the mind of a man that directs his hand what to do. For this is not like the duty of stallage, that relates to the public, and relates also to something that before they had no interest in; but only relates to the administration of a private property, and directs the manner of that administration. They are lords of the market, and that is casual to them, it is not necessary for them so to be. If any corporation bid their officers levy so much money; suppose they bid them take more toll than is due, or levy more money for rent than is due for the land, why this might be looked upon as a great breach of trust and encroachment: they should have had but 6*d.* and they took 7*d.* and this done by act of common council, which is their way of expressing their mind; yet surely it would be no forfeiture, because the land is their own, and the administration of it belongs to them only in point of interest and property. Suppose a gentleman has a market, and his reason, which is his by-law as my lord Hobart says, puts him upon taking of toll; but he does a little mistake the law or the custom, he bids his servant take so much, which perhaps may be too much for toll; does this destroy his capacity of suing and being sued? You may as well say such a particular person shall not plead, or be impleaded if he do so and so. Nay, this if he were a denizen, does not forfeit his denization, and yet a denizen is as perfectly a creature of the king's as a corporation is. It is Basilicon Doron, it is the bounty and kindness of the king to one born out of his dominions, to give him the capacity of a subject, to sue and be sued, and the like, which cannot be forfeited, even for breach of conditions in the letters patents of denization For this is within Vesellin Manning's case; if he does not observe the laws of the land, it is true, he must be punished for it, but he shall not be undenizened.

My lord, there is a statute, which I think is a most plain declaration of the law in this case, and it is the stat. of West. 1. cap. 31. Some call it the 30th, because they differ in the numerating and heading of the chapters. It is the statute concerning those that take outrageous tolls in market towns. The statute says, 'Le Roy prendra la franchise del' March in sa Maine.' The king shall seize the franchise into his own hands. My lord Coke in his comment upon that statute says, he shall seize the franchise of the far market, till it be redeemed by the owner, that is all. But this is intended, says he, upon an office to be found; for in statutes all incidents shall be supplied by intendment.

Now in the Quo Warranto that was brought against the corporation of Maidenhead in Palmer's Reports, there is this very case. That corporation took an outrageous toll, too much toll, or that that was not justifiable, for going over their bridge. Yet it was so far from being imagined, that this should be a forfeiture, (and yet the case is the same, let any man distinguish it that can) that it was a question whether the market was forfeited, or no, as you may see in that book, fol. 82. And there it is said by Dodderidge, and at last it was agreed by all the court, that it should be a forfeiture only of the toll, and not of the market. And I desire that that folio may be noted by your lordship, and that you will please to look into what is said in that case; for it is debated before, and it seemed as if they would have forfeited the market by it, but not the corporation: and yet that was not forfeited neither. And to this I will apply that rule that Mr. Solicitor himself did mention, 'Puniatur in eo quo peccat.' You have offended in the toll, therefore you shall suffer in the toll, not in the market, to be sure not in the corporation. For if it were that, it should affect the market, it would be because it hath some relation to a market as a toll hath; but how can this possibly affect or touch the corporation? The statute indeed goes thus far, and says, whosoever shall take outrageous toll, shall forfeit the market; but then shall we come and add, whoever shall take outrageous toll, shall forfeit his capacity of holding a market, or any thing else? Do they complain of us for taking the legislative power upon us, and therefore we shall forfeit our corporation, when the statute itself has appointed the punishment, and says only, the market shall be forfeited, and so make a new law themselves? Statutes are supposed to be penal enough of themselves, and all penal statutes are to be taken equitably as to the penalty, and not stretched beyond the letter. And wherever a statute inflicts a penalty, and says you shall forfeit so much, as my lord Hobart says, the common law shuts up the negative, that you shall forfeit no more.' How then is it possible we should forfeit that, which if it were forfeitable at all, is not within the provision of this law?

It is true, as Mr. Solicitor hath said in the book of assises that he cited in Vet. Nat. Brev' 161. it is said you shall forfeit in the case of a misuser (where the liberties are not depending one upon another) only the liberty that is abused; but how that can be applied for him I understand not, for nothing can be more flat and plain against him: If so be we should forfeit our toll or our market, be it so; nay, if we should forfeit our liberty of having a common council, what then? How is it possible to bring it up to a forfeiture of the corporation? You shall forfeit a court of pypowders, if you forfeit your market, because it is incident to it, and dependant upon it, and subject to what dangers the market itself is subject to: but the being of a corporation, nothing can transcend that. To be sure what is incident to it, cannot transcend it; it is but a subject to that which is superior.

For example sake, my lord, I will cite you a case, which is the case of the city of London too about the measurage of coals. It is sir

Julius Cesar's case, 1 Leon' 106. And I chuse to cite that book; for though it did not come out with your lordship's authority, yet my late lord chancellor gave this just account of it, that it was one of the best of our later reports. Sir Julius Cesar libelled in the admiralty against the officer of the city for measuring coals upon the Thames. Fleetwood came to the bar, and prayed a prohibition, and Edgerton the solicitor on the other side complained, that the mayor of London did take a fine for this measurage, and made an office of it; and this he conceived was extortion (which is the thing complained of here in so many words;) and being upon the Thames, should be punished in the admiralty. As to that the judges replied, by no means, and Wrey and Gawdey said, if it be extortion in the mayor, there is no remedy for it in the court of Admiralty, but in the king's courts: And it shall be redressed here in a Quo Warranto, says Gawdey. It is true, a Quo Warranto might well have been brought for redressing that extortion; but it could not mean thereby, that the corporation should be dissolved: And that it was so understood, is most plain; for accordingly a Quo Warranto is brought. You have it in Coke's Entries fol. 535 and 536. placit' 4. And the city of London appeared and pleaded, and prescribed to it; and thereupon the attorney general that then was, my lord Coke himself, was satisfied, and confessed their title, and judgment was given for them; and since it hath been held good and they have enjoyed it in peace; and this I hope is a good example for Mr. Attorney to follow in this case.

My lord, I come now to that part which I come least willingly to, I mean that of the Petition: and that which I have to say in it, is this, my lord; First I say, that this Petition is justified in the pleading, and I hope it is very justifiable; if it were but excusable, it is enough. That it is justifiable to petition the king in our necessities and extremities is plain from what my lord Hobart says, fol. 220. He says it was resolved by the court in Renham's case, that it was lawful for any subject to petition to the king for a redress, in an humble and modest manner: For, as it is there said, access to the sovereign must not be shut up in case of the subjects distresses. Now the common council are not less privileged than any other sure, but rather more in this kind of addressing and petitioning; I cannot tell what crime to make of this, there is so much alledged against us.

I did very well observe truly, and would always observe and remember in all such cases what my lord keeper here said to your lordship, 'That counsel should not so much speak, as if they would abet the guilt of their client, rather than advocate for their innocency.'

My lord, if the words themselves that are alledged are not words that are unlawful to be delivered or spoken, then all this that they are dressed up with the intention to censure the king, and to bring him into dislike with his people, all that must go for nothing, and are not to weigh in the case. Now the words are these: 'That there was a prorogation, and by means 'of this, there being depending so many im'peachments of Lords and others, and bills in 'the parliament in both houses, which could 'not be perfected any where but there, the 'prosecution of the public justice, and the 'making provisions necessary for the preserva'tion of his majesty and his protestant subjects, 'received an interruption.' Now, my lord, I conceive these words are not words that in themselves are unlawful, and for that your lordship will be pleased to consider our plea; I need not repeat it, you have it before you: If they are in sense and substance the same words that have been spoken by the King and the Lords and Commons in parliament; he that will not be satisfied with that authority, will not be satisfied with any. Then what do we say? We say, that the prosecution of the public justice received an interruption: Does not the king say so, and more, in his speech we have set forth, wherein he recommends it to both houses, that justice may be done? What is the meaning then but this? If the further prosecution of the offenders goes not on, justice is not done. And so we speak but the king's words. We say, they are not tried, or they were not tried; they themselves complain of it to this day; and therefore justice did receive an interruption. I am confident, without reflection, that honourable person my lord Danby, in this point, hath said words much more liable to exception, though truly words that I believe deserve no rebuke. He has complained, that justice was not done in this case, because he was not tried, and that when he desired to be tried too; but his liberty taken away, and he forfeited that which was dearer to him than lands or honours, his health, whereby he endangered his life, and lost all the comforts of life. If it were lawful for him to say, as certainly it was, That justice was not done in his case, why might not the city say so? Either these lords ought to be condemned, or they ought to be acquitted: It is hard to say justice is done, when they lie so long in prison, and are not either acquitted or condemned.

Then we say this, That the making provision for the preservation of the king's person, and of his protestant subjects, received an interruption. To this part we give this answer: We set forth, That there were bills depending in the parliament for this purpose, and that is agreed to us by the demurrer; and that these bills could not pass into laws, any more than the lords could be tried, but in parliament. Why then if it be so, that the matter cannot be done, nor provision made, but, as that proclamation, that issued for the fast, said, and as the addresses of both Houses for the fast do say, by the blessing of God upon the counsels of king and parliament; if these counsels, or the king and his parliament are interrupted, this is not done. To make such an high crime of this I do not understand; I would not be

thought to speak any thing to justify that which is really a crime; but this is that I say, it is not in law unlawful for us to petition the king, or address to him: But, my lord, to take off the edge of this business, I shall beg leave to read to your lordship a speech of the king's made the 6th of March following, and therein there are these words, The further prosecution of the plot.

My lord, let any man read, and spell, and see how in substance the words in our petition differ from the words of the king, making those laws necessary for the security of himself and the kingdom, and this spoken the 6th of March, when this very petition now complained of was presented in January or February before, and there was no parliament between. No man will say, that there were laws sufficient for the security of the king and kingdom, when the king himself speaks of the necessity of making such: So then, those laws that were preparing received an interruption. The lords were not tried: Is not that an interruption of justice? Since they could be tried no where else, as must be granted; and the king recommends it to them as not done, but necessary to be done. So the king said before, and so it is implied here. There is no such thing said in the petition, That the king did interrupt justice, and the proceedings of the parliament: It is an inference and a consequence made by wit and art: not that the king did interrupt, or intend to interrupt justice; but it says, By the prorogation of the parliament the public justice received an interruption.

My lord, suppose at that time there had been a pestilence here, and the king had been as much resolved to meet his two houses as they him, but by reason of the pestilence he were necessitated and forced to make a prorogation; then there comes such a petition from the city, and says, That by reason of this prorogation those bills that were depending did not pass, and the public justice received an interruption: What is the offence of this? It is all true. If there be bills depending, and impeachments, that can no other where be tried, they do receive interruption by a prorogation. Can any man say this is false? The charge in the replication is, That we did falsely and maliciously say, what? that which is true, and that which the King had said before, and that which the Lords and Commons said after him, That till those things were done they were not safe; and those things as yet were not done.

My lord, there is this further in it, the petition is set forth *in hæc verba;* and therefore I may take any thing out of it to explain it, and restore it to itself; for this indeed is a very restrained construction of the petition.

It says, when this interruption of the prorogation was received, That the king for urgent causes, and very good reasons, did prorogue the parliament. It is his prerogative to do so? and God forbid but he should have it. I think, without doubt, we should be more at a loss for a want of that prerogative, than we can be by the use of it. It is mine, and I believe every good man's opinion, that that prerogative is very necessary and profitable for us all; but it is the consequence of it, that this interruption of justice is received; nay, we are so far from saying, that the king did interrupt justice, or intending it, that we say, we do hope the king's gracious intentions were only to make way for the better concurrence of his majesty and his parliament. The king does, for great causes, and best known to himself, who has the prerogative, prorogue the parliament; whereby, as a mere consequence, not as the king's intention, the public justice is interrupted: Nay, this we affirm was with a good intention in the king, that he might be the better enabled to concur with his parliament, as it is set forth in the petition. Can there be any thing more properly said? It is the greatest justification of the prorogation that can be. The king has prorogued the parliament: What to do? Why justice hath in view received an interruption, but not in the intention of the king. We know what the meaning of it is, and so we set forth in our very petition, it is to gain time, that he may the better concur with his parliament. It is a great commendation of the king's purpose, instead of charging him with injustice, that he did resolve to concur with his parliament for such ends, and accordingly did prorogue the parliament.

Now the Attorney General hath put in, that it was *ea intentione;* there is the sting of the business, to put in those words, to make that which we may lawfully speak, of itself to be an offence. But truly that signifies just nothing: It can never hurt a thing that is true, it has great authority in it, if it be applied to a thing that is unlawful; but if in substance it be true, and the thing itself justifiable, those words make nothing in the case; and I think I need not argue that point, but refer myself to the great case that was in Westminster-Hall; and that is the reversal of the judgment given in this court against my lord Hollis, which was a reversal in parliament; and is printed in the last impression of Mr. Justice Coke's Reports by order of parliament; and there they explode all the notion of *ea intentione,* and this business. A man speaks words that he might speak in parliament (though I know not whether he might, or no,) but the great thing is, if words, that in themselves are tolerable to be spoken, be spoken, you shall not come and say they were spoken with an ill intention; though, as I shall shew by and by, this hath a kind of fatality in it, and that is this, that it is done with an ill mind by a corporation that hath no mind at all.

Mr. *Attorney General.* Just now you said it had a mind, and reason was its mind.

Mr. *Recorder.* I said as my lord Hobart says that a by-law to it is a mind, as reason is to a man, but it hath no moral mind. My lord, then I say, the citizens of London were indeed at that time under great consternation, by reason of the conspiracies that had been discovered

in parliament, and in the courts of justice; and it had been declared by the late lord chancellor, at the trial of the lord Stafford, which your lordship may very well remember, 'That 'London was burnt by the Papists; and there- 'fore it was no wonder, that they were desirous, 'that themselves and the kingdom should be 'put into great security against those enemies.' This, my lord, I confess is a tender point, and I would not speak a word in it without a law book to back me. I remember that my lord Hobart says, that zeal and indignation are fervent passions. The city of London had great indignation against the papists for this conspiracy against the king and kingdom, and the religion established by law. There was no disaffection in the city at this time, when this petition was made, sure; and I wonder, that any man should say, that knows London, and was acquainted with it then, and looks upon this petition which passed 'nemine contradicente,' that they had such an intention as is insinuated: and pray let him read the names of the worthy aldermen that then sat upon the bench, and the other names of the common council-men then present, and then let him say, if, without reflection, the king have more loyal subjects in the city of London than these men were. And do you think, if there had been in it any sedition, or any of those ill qualities that make up the ill adverbs, which are joined to it in the replication, not one of all those loyally disposed men would have spoken against it? But alas! all of it passed 'nemine contradicente.'

My lord, I say, that if the matter of it be justifiable, as I think it is, then all these words will signify nothing, if there were never so many more of them: and the presenting and carrying of it to the king, that is no offence, that is not so much as pretended to be one. And, my lord, I think it a very harsh translation of the word into Latin, when the petition says, that the parliament's proceedings, or the public justice, received an interruption, to put that word of *Obstructionem* in; truly I think a better word might have been found to express the soft expression in the petition: and they need not have put that hard violent word *Obstructionem*, when to make English of it they translated it Interruption.

But, my lord, they do admit, I say, that the making and presenting of it to the king is not the offence, so much as the publishing of it, by which it is exposed to many others besides. Now to excuse that, the answer we give is this; and it is that which will carry a very reasonable ground of justification in it: certain citizens, that were private men, had petitioned the common council, and thereby they were importuned to make known the desires of the city, to the king, and it was reasonable to make known to those citizens what the common council had done, to prevent false rumours, which we knew were rife enough in those days; and to shew, that there was nothing ill in it, we did print it. And it is also all driving at the common interest, at the king's safety, the preservation of the church and the government established: all this they did desire might be known to these citizens, and all others that inquired about it: and therefore they printed it, to evidence that there was nothing of ill intended in it. And I do wonder, I must confess, that this objection of the publishing of this petition should be so much insisted upon; for they say, that the mayor, commonalty and citizens of the city of London did it; and say not any thing of the common council, that they did print it: now they that did vote it, knew it without printing; and it is alledged in the pleadings, and confessed by the demurrer, that the mayor, commonalty, the citizens of London, that is, the corporation, consists of above 50,000 men, which cannot well be intended otherwise. Why then, here is a petition that is agreed to be well enough lodged as to the persons that voted it, it being the liberty of the subject to petition; and if this had been only presented to the king, though it had been by those 50,000 men, nay, if it had been by 10,000 men, who had been the corporation, it had been well enough, so it had not been printed, but only kept private to themselves: Why then it is very strange, that that what is known to all London, so great a part of the kingdom, should be lawful, but it should be heinously unlawful to send the news of it further. It went further than the city of London; and therefore it is such an offence as shall be a forfeiture of the corporation. My lord, there is the case of Lake and King, the petition to the parliament was scandalous in itself, yet it stood protected, being presented to the parliament; and it was lawful to print it, provided it were delivered to a committee of parliament, or only to those that were members; though it is said there, that the printing of it is a great publishing; for the composers, correctors, and other persons that are concerned in the press, read every letter of it. But it was answered, that printing is but a more expeditious way of writing; and if he had employed 20 clerks, it had been a greater publishing than three or four printers. Possibly the printers might not read it, or not be able to read it well, or not all of them read it at that time.

Now here, my lord, sure it was lawful to acquaint the citizens what they had done, if you take it to be the act of the common council, and the common council to be the representative of the city. It was always agreed by the House of Commons, that any member might send the votes to those that sent them thither, and whom they represented; they have blamed indeed men for sending the debates, but never for communicating the votes: and what they may do by writing, that they may do by printing. Why then might not the citizens of London, who by custom choose those common council men, well desire to know, and might well know what they had done? and then what they might do by writing, they might by printing; for that is but another way, though a more

suitable and compendious way, of exhibiting any thing that you would have go to many. And if it be lawful to impart it to all the city, and all the city does know it, though it does go further, it is no matter; for what is known to London, may very well be known to all the nation besides, without offence, if it did go further. Besides, it shall never be intended it was published further, or that any others knew of it; for it is said to be published in the parish of St. Michael Bassishaw, in the ward of Bassishaw, and that is in London, to the citizens of London, and so they only talked of it amongst themselves. Besides the main thing which I go upon, is, if there be no ill in the thing itself, the *ea intentione* can make no crime by a bare affirmation, which we deny; and if it might be well said or done, it is lawful to print it, and the publication is no offence neither.

My lord, the next point I come to is this, that a corporation cannot possibly commit a capital crime, or any other crime against the peace: And I shall offer this dilemma, either it was done seditiously, or not; if not, then there is no sufficient assignment of a cause of forfeiture: if it were, then it is a crime for which the offender is indictable; and that, I say, is absolutely impossible for a corporation to be guilty of. And here I will throw in also that business of the toll; and I will, for argument's sake, admit the taking of a wrongful toll to be robbery, and then let the argument go on. I have heard it said within the bar occasionally, that a corporation is intrusted with the government; and that they may commit treason, and raise sedition, as Mr. Solicitor hath said; I suppose it must be under their great seal: But I confess, I believe it is rather spoken to amuse than to satisfy: But I really think it is no ill nor unjustly thing for me to say, nor against the government to affirm, that it is impossible a corporation can commit treason, or that it is intrusted with the government in any such kind.

But first, my lord, I shall shew you what opinion former times had, and that because such an opinion as this hath been broached of late days.

L. C. J. Mr. Recorder, will you be much longer? Because I must sit here at *Nisi prius* this afternoon, and yet I would fain hear the argument, if it would not be too long.

Mr. Recorder. No, my lord: I have almost done, and will cut short.

In 21 E. 4. fol. 13. b. it is said by Pigott, that a mayor has two abilities; the one to his own use, to make and to grant, and to do as another natural person does; and then the mayor, as mayor and commonalty, hath another capacity to their common use and profit; and that is but a name, an *ens rationis*, a thing that cannot be seen, and is no substance; and for this name or corporation, it is impossible they can do or suffer any wrong, as to be beat or be beaten, as such a body; but the wrong is made to every member of the body, as to his own proper person, and not as to the name of corporation; nor can the corporation do a personal wrong to another; nor can they commit treason or felony as to the corporation, nor against any other person. And if a writ of debt be brought against the mayor and commonalty, or other such body, upon an obligation, and they plead it is not their deed, and it is found their deed, they shall not be imprisoned as another single person shall. The same law is, if they are found disseisers with force, they shall not be imprisoned, nor in a writ of ravishment of ward shall they either be imprisoned, or abjure the realm: for such a body is but a name, to which such an act cannot be done. So says Catesby in the same book; In a writ brought against them no Capias shall issue, because they are but as a dead person in law; and the appearance upon a Capias cannot be otherwise than personal. And so to this purpose says the chief justice there; If this body will do any thing, it must be done by writing. And all along it is the tenor of the whole case, that a corporation cannot commit treason, or any other crime. But the reason of the thing is above any authority. Suppose, that they under their common seal should commit treason, and you bring an indictment of treason against the mayor, commonalty, and citizens of the city of London, what judgment shall be given against them in their corporate capacity? What? It shall be, that 'Suspendatur per 'collum corpus politicum.' And then, what execution shall be done upon that sentence? What? must they hang up the common seal? Nothing else you can do can affect them; but in their private capacity, there they may be punished as single persons.

A penal statute says, that he or she, that offends against the law, shall forfeit so much, or incur such a penalty: Is a corporation male, or female, that it should come under such a provision? But the real reason of the law is this, it is a civil being, it is *Ens civile*, it is *Corpus politicum*; it hath civil qualities, but it hath no moral qualities; and all offences consist in the immorality of them, and there must be malice to make that immorality. No words or acts are treason or felony, unless, there be a traiterous mind, or a felonious mind; and therefore a madman cannot be guilty of treason or felony. Serjeant ——, brought an action for these words, that he had spoken treason; it was moved in arrest of judgment, that this cannot be actionable; for he might speak treason in putting a case: Ay! that were well, said they, if it could be understood so; but we must intend it, that he spoke treason, as his own words *ex corde suo*, which makes it treason; for treason consists in the immorality of the mind.

Another reason is what Pigott said, as I said before, That a corporation is but a name, an *ens rationis*, a thing, that cannot see or be seen, and indeed is no substance, nor can do or suffer wrong, nor any thing where a corporal appearance is requisite. What my lord Dyer says in Moor 68, that he never saw, is,

I believe, true in general, what no man ever did see, that a corporation could be bound in a recognisance or statute merchant; and why? because it must be acknowledged in person: and so in this case, the guilt follows the person, but cannot a mere capacity. In all crimes the offender must appear in person, and plead in person, and suffer in person; but you can never bring the mayor, commonalty, and citizens into gaol, to appear and plead to an indictment, to receive a judgment, or suffer execution. Can a body politic, that is invisible, appear in person; but then there is this great objection: by this means, they say, if there be no punishing of them, there is no government, and they may commit treason under the great seal, they may raise armies, and instigate a rebellion, and all with impunity. My lord, I say no, and I give two answers to it, that are not to be replied to; and the first is this:

1. All these persons, that are met together, though they are met *corporaliter*, in their corporate capacity, for the acts of the corporation at that time; yet when they go out of their corporate business, and commit treason or felony, the crime does not *egredi personas*, every one of them is a traitor or a felon; and notwithstanding they appeared there under the pretence of a corporation, yet they are all liable in their private several capacities, every one of them must be indicted personally, and suffer personally: for when they go about to do such a thing, it is out of the business of the corporation; and they must answer for their own particular offences. But,

2. I have another answer to give to it. This objection is to be retorted on the other side, that if a corporation authorize the levying of war under their common seal, they shall be affected by it in their politic capacity, and are liable to the law in that capacity only, and must suffer in that capacity only: and the consequence of that is, they are discharged in their private capacity; and this is a law of indemnity and protection for all crimes; for a man cannot be liable two ways for treason, or felony, or any other crimes: if he be not liable in his private, he is in his public capacity; if not in his public, he is in his private. And what is the consequence of that? This is a dispensation for a corporation met together in a body, to do any illegal thing, or to commit any enormous crime; for the king's counsel say this, We are responsible for it in our politic capacity; and what execution can then be done to punish that corporation with such a punishment as the law inflicts, that is, imprisonment, or death, any more than upon an action of debt brought against them upon a bond, and *non est factum* pleaded, and found for the plaintiff? Can they be imprisoned? and the like. So that this shall protect and shelter them in the commission of any capital offence; for if they are to suffer for it as a corporation, you must take judgment against them, as the law gives it; and how will that be done against an invisible body? What will be the execution against the Corpus Politicum, that can neither see nor be seen?

I think this mighty plain; and I must confess, I wonder how it could ever enter into the mind of any man, that a corporation could commit a corporate crime. I have, as it became me, in regard of the duty of my place, and before that, for my own learning, read Stamford's Pleas of the Crown, my lord Coke's 4th Institutes, Poulton de Pace Regni, my lord Hales's Pleas of the Crown, Dalton's Justice of the Peace, and other books on that subject; but I defy any man to shew me in any of those treatises concerning criminal matters, any resolution, that ever a corporation could be so concerned, that they should be brought before a justice of peace, or proceeded against upon any law for treason or felony, or be hanged in their political capacity.

My lord, I shall conclude all my discourse of this kind (and I have almost done, because I perceive I incroach upon your patience) with an observation I have made upon the 19 H. 7, c. 7, and it is the statute, that makes provision against corporations, that made bye-laws against the prerogative. That statute says, That some corporations did so; now an higher offence than that, sure, cannot well be described; and there that law says, that those that do so, that make such bye-laws against the prerogative, shall forfeit for so doing, for every offence, 40*l.* unless they are confirmed by the chancellor and treasurer, and chief justices, or any three of them. Now to what purpose was this statute made; if the making of an ill by-law (and worse cannot be than a by-law against the king's prerogative) should be a forfeiture of the being of a corporation? How vainly did the king and parliament employ themselves to make a statute, that a corporation should forfeit 40*l.* for such an offence? No man will say they had rather take that penalty than another, when they might have a greater, if a greater could be had by law. If they might have had a Quo Warranto, and thereby destroy the corporation, surely they would not have stood for the penalty of 40*l.* for they might easily have got more money: No, they might have said, We will never pass it by, unless you will give us 4,000*l.* or a far greater sum; nor shall you have your corporation again, without you give us a considerable recompence for it. And when the process and the proceedings were so expeditious and easy to come at in a Quo Warranto, as it was easy in those days, why should they put the king to the delays, in an action of debt for so small a penalty as 40*l*? So that I take it to be a direct judgment of the parliament in that case, that no corporation should or could be forfeited for the making of any by-law that was irregular, though it were even against the king's prerogative.

But to hasten to a conclusion, I have all this while, my lord, supposed, that the mayor, commonalty, and citizens of London have done

this: But it is not so; this is not the act of the mayor, commonalty, and citizens, it is not the two hundredth part of the corporation, it is but the act of the common council; and we have distinguished ourselves by pleading, that it does not consist of above 250, when the city contains above 50,000. I must confess the council is not taken notice of much in law; as is seen in Warren's case, 2 Crook 540, and 2 Rolls 112. Warren, being one of the common council of Coventry, and displaced, sued out a writ of restitution; and upon that writ it was returned, that by custom the city might place and displace *ad libitum;* they there held, that the custom was good: But it is not so of a freeman or alderman, because he hath a freehold; but a common council is a thing collateral to a corporation, and the office of a common council is nothing but only to give assistance and advice, which they may refuse at their pleasure. In Estwick's case in Style 32, and 2 Rolls, 156, it is said, That it is a place merely by custom, and that the common council is properly but only a court of advice; and my lord, you shall never intend more than that they were a court of advice: All the rise of their power is but by custom, and that custom is pleaded to give advice for the benefit of the city, and make by-laws for the good of the corporation; and that is confessed by the demurrer, and you shall intend no more than what is opened in the pleading.

And then it is evident this was done by a very small part of the citizens of London; and that does no way affect the whole corporation sure. In James Bagg's case, 1 Rolls fol. 226, it is said, That if a patent be procured by some persons of a corporation, and the greater part do not assent to it, that shall not bind a corporation. And if so be a charter sealed, and sent by the king, because not accepted *in pais,* by the greater party, bind not, shall an act done by a few, and an act done, that tends to a forfeiture, bind the whole in point of their being? There is no ground to say, that the common council represents the city, no more than a counsel does his client, or an attorney his master; only as far as is for the benefit of the city, they are chosen and intrusted to make by-laws; if they offend, they are but ministers and officers, and so they are within the statute of Edw. 3, which I mention, though I think we have no need of that in the case to help us; if they make an unreasonable by-law, it is void, and every man that is aggrieved by it may have his remedy, may bring his action. Shall you supply this by an intendment, that they have such a relation? that they are the representatives of the city of London? that they have a power to forfeit the corporation? No, my lord, by law they are part of the corporation, but they have no such power to forfeit the corporation. A custom shall never be construed to enable a man to do a wrong; and a great wrong it is, that they that are trusted, and trusted but for a year, and trusted but for the good of the corporation of which they are part, should give up the being, or, what is worse, forfeit the being of that corporation. The custom of Kent, that makes an infant capable of making a feoffment, shall never enable an infant tenant in tail to make a feoffment, so as to work a discontinuance of the estate tail, and put the heir to his Formedon. Every illegal act of their's is beyond their commission, and a nullity of that is all in respect of themselves; and it is as if they had never done it as to the corporation, for they are by no means the corporation; for though they use the common seal in some cases, at other times, so do the court of aldermen in other cases; but it is only in other cases wherein they are particularly intrusted. If an act of common council say, that I shall have such and such lands of the city's, that act signifies nothing, but as a direction and advice; when it is under the common seal, it is an act of corporation, and proceeding by advice of common council, it binds.

Now, my lord, this is the more unreasonable, because we know, that the practice of the common council in London being to advise for all the inhabitants, they are chosen, by the unfreemen as well as others; and it is a strange thing, that they should have a capacity to give away the liberty of the citizens, when they are chosen by others as well as them. They had no such trust for them; nay, all trust they had was to keep their liberties, and not to destroy them. Has any man a trust to destroy himself? Sure no man is trusted by God himself to be *Felo de se.* And certainly then you can never understand it to be in the nature of a trust to destroy another; and the least citizen, my lord, has as much and as true an interest in the corporation of the city of London, as the greatest: And therefore 250, if they had been much the greater number of the citizens, would signify nothing to the rest of the body.

My lord, I shall only say this little more: Here is no crime charged relating to them as a corporation: Here is indeed a fine word used, that we did this 'contra fiduciam in corpore 'politico repositam;' but all this is but an imaginary trust, the king never gave them a power or authority, or intrusted them to make by-laws that were unreasonable; he gave them a power to make reasonable by-laws, and so he does every corporation. And the same law that gave them the power, limits that power, and says, if they go beyond that power, it is a nullity. And these acts relate not to them as a corporation; the Petition is not so much as said to be against any trust reposed in the corporation; certainly there never was any such trust. Did ever the king intrust them to advise him about the matters contained in the Petition? And if not, then it is not *contra fiduciam;* therefore it relates to particular persons: If it be an offence, I hope it is none of the corporation's.

But then the levying of money, that is *contra fiduciam;* they took upon them an il-

legal and unjust power in the common council. Suppose it so, how does this belong to the corporation? It is an incroachment upon property, it is the most arbitrary thing in the world. Whether they have the market, and the dominion of it, or not, is matter of fact, and being pleaded, is confessed by the demurrer: And then for the power of making by-laws, that is a thing that cannot possibly be taken from them while they are a corporation; it is that which must be in them as a corporation, like the faculty of reason in a man, to express his resolutions by. And it is no more, than if a man, that has a market, bid his servant go and remove such as have stalls there, unless they will pay so much. That direction is as good a law as this, and as bad a law as this, and no more. There is nothing else in it but the direction of the officers, what they shall do in the ordering of the markets, and disposing of the city's property.

Then as to the formal method of expressing themselves, whether it be by act of common council, or under the common seal, or by their natural voice, it is all one, it is not a thing that concerns them as a body politic: but if it were illegal and mistaken, I say, the penalty is only, that it shall be void. What the common council, nay, what the corporation does within the limits of its authority, is good, what beyond that it does, be void. If I command my servant to distrain for rent, and he kills a man in the doing of it, this, as to me, is void; but as to himself, that is chargeable upon him. And what I say of the common council, I say of the corporation itself, that it is a capacity, and a limited capacity; it is the act of the members, not of the corporation, if they do wrong. The common council can act for the good of the city and the city can do no more, if they themselves should meet. Croke, Eliz. fol. 85. the queen makes a lease for years of lands to the men of Chesterfield, by the name of Aldermen, and they by that name grant all their interest to Clerk; says that book, this is void: for the queen granting them a lease as to the aldermen of Chesterfield, this makes them a corporation, and gives them a capacity to take, but not to grant. And so Rolls, Abr. 1. p. 513. And therefore no corporation is to be considered as a corporation, but only when it acts according to the capacity allowed to it; and as to the rest, it all turns into their private capacity, but it affects not the body, nor hath any such relation as to bind it.

My lord, all the question here is, Whether there shall be such a person *in esse* as this corporation? Whether the city of London shall subsist as such a person, to sue and be sued, to plead and be impleaded? There is nothing of government or misgovernment in the case; but it is all about our capacity, and nothing else whether we shall be defendant or plaintiff in any court.

My lord, Magna Charta, and all the other acts, that have gone in confirmation of it, shew the great care of the government in all ages to preserve the city of London; and I look upon them as so many declarations of the immortality of it, and of all other corporations. I shall use a strange argument perhaps at first hearing, but it is to me a great evidence for us that Magna Charta does not confirm our being, but our liberties and privileges; it says, That the city of London shall have all its liberties, it confirms its leets, its markets, and all those things, that is, it confirms all that it has; it has not saved indeed, if a corporation indeed be built upon a corporation; but that particular liberty may be destroyed, as that of Bridewell, and the like, but it does more than confirm its being, for it does implicity declare, that that was impossible to be forfeited: they confirm what needed confirmation; but for their being there was no need of that; it only confirmed the supervenient liberties, without which it might be a corporation; but as to its being, it meddled not with that. And if it were not so, it were an unreasonable thing, that we should have so many acts of parliament, that give such particular powers to the mayor and commonalty of London; and scarce any act of parliament, that relates to the public, but London is mentioned, and taken care of in it. Are not all these declarations, that London should stand for ever? Would not any one have said else, pray what do you put such confidence in London for? There is not such a fickle thing upon the earth as the being of the corporation of London. If they lay but 6*d.* upon a joint of meat, they are gone, and there is not a month in the year but they forfeit their being

The act for administration hath a proviso, that says, it shall not extend to London: Why does any man think, that this law was not intended to be as perpetual for London, as for other parts of the kingdom? They did not question but London would be a corporation as long as England was England. It would be a strange thing in the example of it, that the world should be taught by one instance, that a corporation can be ruined, when so many people put their trusts in those corporation, and so many vast inheritances depend upon them. And I think the king and the government, or those you call so, are more concerned to preserve London, than all the persons that are in it. I would not speak it in this place by way of argument for my client, but I think I could maintain it in all places; only I hope and believe I shall have no need for it.

My lord, all innovations (as this must certainly be a very great one) are dangerous; this frame of government has lasted and been preserved for many hundreds of years, and I hope will be so as long as the world endures.

My lord, I am sensible I need your patience; but I have just done. Here is a charge that has very little, indeed there is nothing in the matter of it; but the weight and consequences are fitter to be meditated upon, than spoken of. And therefore for these reasons I do pray, that these liberties may be adjudged to us, and we may be dismissed out of this court.

Now, my lord, if your lordship please, I will give an answer to Mr. Solicitor's authorities.

Lord Chief Justice. I suppose you do intend to argue it again, and therefore there will not be so much need of that now; besides, it is late, and I cannot stay.

Attorney General. My lord, I think it may be very proper to have one other argument, the first week in Easter term.

Lord Chief Justice. Take what day you will, Mr. Attorney.

Attorney General. Let it be the first Friday in the term, if you please, my lord.

Lord Chief Justice. Let it be so. Look you, Mr. Recorder, I perceive you do agree, that the Petition, setting forth, that the king having prorogued the parliament, and thereby that common justice had received interruption; you have justified in your plea, (I took it always to be so) and now at the bar, that the king by the prorogation did interrupt the justice of the kingdom.

Mr. *Recorder.* No, no, my lord: then I have reason to speak again, to make myself rightly understood.

Lord Chief Justice. Why, look you, you do agree, that the king had prorogued the parliament, and thereby that public justice was interrupted; if that were so, by whose means, and by whom did the public justice receive interruption, if not by the king? I did take it to be so really, and that you had justified it.

Mr. *Recorder.* My lord, I do agree, as we say, and the king himself said, that these acts were not passed, nor the Lords tried; and so justice was not done: and I would ask your lordship, or any other indifferent person, whether justice were done, or necessary provision for these things made, if those bills were unpassed? if it were so, it is a natural truth, that thereby the trial, and acquittal, or condemnation of the Lords was interrupted; and so was the security of the king's person, and the Protestant religion, the bills not being passed. For the king calls upon the parliament to pass them the next session, therefore they were not passed in the former session. This is by no means a charging of the interruption of justice upon the king; every great thing, that is done by the king, may have a prejudicial influence, it may be, as to some particulars; but to say, that thereby justice is interrupted, is not to charge any blame upon the king; because, though it may be prejudicial in one particular, yet it may be useful to the public. No doubt, if the king do prorogue the parliament for never so great ends, and necessary causes, yet if I have but one bill passing there, suppose it be a private bill about naturalization, or the like, if a prorogation comes, it is naturally true, that that is interrupted; but that is not laying a blame upon the king.

Lord Chief Justice. May it be said, that the public justice is interrupted, if a bill for naturalization, or the like, pass not before the prorogation? I speak it for this only, that they that argue next may think upon it. The Petition does say, that the public justice was interrupted: did they mean it was true? or did they mean it was not true? If they did mean it was true, then you have done well to justify it, to say it was so, and the king had done amiss in proroguing the parliament. Yet it seems, the common council of London, neither by charter nor prescription, had any right to controul the king, nor to be of the king's council neither; and therefore it was a matter purely *dehors.* If the matter were not true, why do you put in your Petition? If it be true, justify it, if you can. But here is the matter; I would have a good answer given me to this point: the Petition was to the king; if so be the Petition had been delivered to the king, (as it may be it was) it was but one single Petition to the king; that might be well enough, if there had been no more in the case, it is very possible it might not have been a question at this time: but pray, I would know of them that argue next, by what law or authority it was, and what was the meaning of it, that that which did not require two clerks to write, in order to its being presented to the king, must be printed? By what law is it to be justified? The printing and publishing of this Petition, and sending it all over the nation, whereby the mayor, aldermen, and common council of the city of London, do let all the nation know, that they do look upon the king as one, that by the prorogation of the parliament had given the public justice of the nation an interruption? Pray by what custom or law is this published? In the case *de libellis famosis* (even in the case of a subject) it is adjudged, that if you print a libel, though the matter of it be true, you shall be punished for it: now when it is argued again, I would desire some good satisfaction in that, what reason or ground there was for printing or publishing this Petition, unless it be to that intent which is set forth by Mr. Attorney General in his replication?

Now for the other point, as you have ordered the matter, you hold, that a corporation cannot be forfeited. Mr. Solicitor did take some pains to argue, that there was no statute, that did protect you from a forfeiture; he was not aware of what you did insist upon: you say, that by the common law corporations cannot forfeit their being; if so be they cannot, there is an end of the question. But I pray you do you take it, that a corporation can commit any corporate act, or no? For according to your definition of the matter, if nothing will serve but the act of the mayor, aldermen, and all the citizens, I believe I may safely say, and so will every one else, that never any corporate act was done by the city of London since it was a city.

We know on the other side, and you, when it makes for your turn, told us, that the mayor, aldermen, and common council could make by-laws, and they were good, and binding, that is, when it lay in your way. For you make a prescription in your plea, and so also

you have said at the bar, that they may make by-laws to bind the corporation, so that it seems when it is for your conveniency, then the mayor, aldermen, and common council can do as much as all the corporation; but when you come to be touched with something, that you have done, in which you have gone beyond what you should have done, then the citizens are 50,000 men, and these are but 250 persons, that have done these things. Either the mayor, aldermen, and common council are the governing part of the corporation, or else they signify just nothing: if they be, then whatsoever they agree upon binds the whole, and must be taken as a corporate act; or otherwise you will bring it to this pass, that the corporation can do nothing at all. For if the whole corporation be not bound by such an act, then it is impossible for you ever to do an act that shall be an act of the corporation, so that that will be pretty hard for you, that are for the city, I think, to maintain. Then I have but one word more (I give no opinion, but only tell you what I would have you apply yourselves to): is the trust of making by-laws annexed to the lord of the market? or it is annexed to the lord mayor? or it is annexed to the corporation? Surely the power of making by-laws is annexed to the corporation; and I cannot see how, as owners of the markets, they have that power. Now by your distinction, where there is a franchise that does necessarily depend upon another, there the abuse of any part does forfeit the whole franchise. If then this power be annexed to the corporation, as sure I think it is, (but I reserve myself till I have heard a further argument about it) then consider, whether or no, when they have abused that power, in making this by-law, that is knit to them as a corporation, it does not affect the being of a corporation? For it is strange a corporation should commit a fault, and not be punished for it. I tell you, I deliver no opinion in any thing now, but these things I would have you give me some satisfaction in; and there are indeed several other things, that will require consideration: I only hint these now.

The Second Argument was in Easter Term, on Friday, April 27, 1682.

ARGUMENT

Of Mr. Attorney General (Sir R. Sawyer.)

Attor. Gen. This case between the king and the city must be acknowledged to be a case of importance, both as it refers to the general government of the kingdom, and that of the city in particular. As it concerns the particular of the city, it doth not bode such dismal consequences, as some men endeavour to frighten their neighbours with; as if it were hereby designed to demolish at once all their liberties, and to lay waste and open the city of London, and to reduce it to the condition of a country village, than which nothing could be more maliciously suggested of so excellent a prince, who hath given such large demonstrations, not only of his general care of all his people's welfare, but of his more especial and particular kindness to this city of London. This Quo Warranto is not brought to destroy, but to reform and amend the government of the city, by running off those excesses and exorbitances of power, which some men (contrary to their duty, and the known laws of the land) have assumed to themselves under colour of their corporate capacity, to the reviling of their prince, the oppression of their fellow subjects, and to the infinite disquiet of their fellow citizens. I shall not recount the mischiefs which those exorbitances have of late wrought within the city, both as to its peace and profit, as likewise to the obstruction of the free course of justice, that few causes escaped the crime of maintenance from a divided party. These exorbitances committed by the city, casting so great an influence over the whole kingdom, make the king's interposition in a course of law necessary, by gently laying his hands upon them for their cure. Herein the politic body of his subjects resembles the natural, that the disaffected members are best cured by laying on the king's hands upon the body. It hath been observed, that the city of London was never better governed, nor flourished more, than after it came from under the king's hands. The reason given by Edw. 1, at his parliament in 18 Edw. 1, of denial of the petitions of the citizens of London, to be restored to their former state, scil. To have a mayor and their ancient liberties, is this: 'Quia sunt in bono 'statu, et omnia bene, et in pace, et nullum 'commodum apparet' to change it then. The city was in as good plight, both as to its quiet, and good government and profits too, whilst in the hands of the king, under the common law government, as it would be in the hands of the corporation. Neither did the city suffer by being in the hands of the crown, as it was in the reigns of Edw. 1, Edw. 2, Edw. 3, and Richard 2, nor their ancient customs and privileges destroyed; but they were thereby indeed restrained and held within the modest rules of government, in subordination to the general government of the kingdom: and therefore the danger threatened by this suit will not be so fatal to the being or well-being of the city, as was suggested. Nay, I may with great assurance say, that if the city receive the least harm hereby, their, or their managers, obstinate and final impenitence must draw it upon themselves. For though the conclusion of the replication upon the forfeiture be, That the liberties be seized, and they 'ab 'iisdem penitus excludantur,' that is but the formal conclusion upon assignment of forfeitures; it shews what the judgment of the law may be, if demanded by the king's Attorney, and necessitated by the city's obstinacy, but doth not exclude the king's grace. But the importance of this case, to the general government of the kingdom, is of another na-

ture; and the consequences thereof, both to the king, and his subjects in general, appear now far greater than before, from the manner and grounds of the defence made for the city at the bar: viz. from the general topics of corporations, That they are immortal and indissoluble; that no treasons or seditions against their prince can be committed by the members of a corporation, even though those members meet, and act jointly in the same manner and method, as they do all other corporate acts; no, though they should vote raising of men against their prince; and should give authority, under their common seal, to levy money for that purpose; that murders, felonies, and oppressions of their fellow subjects, either by unjust imprisonments, or levying money upon them; that none of these crimes committed by the majority of the members of any corporation, and authorised under the common seal, will affect the corporation, or the government thereof, in point of forfeiture: But a corporation once constituted, is out of the reach of the common law, to determine its being, or its governments, for any causes whatsoever. If such notions as these could be true, or should receive the least countenance in a court of law, it would be unsafe, either for the king or any of his subjects, to live in or near a corporation. And the complaint made by the Commons in parliament 21 Ed. 3, that the increase of franchises tended to the extinguishment and overthrow of the common law, would soon be made good to the purpose, when such great bodies of men, as the corporations within England consist of, shall jointly have a power allowed them, 'Quidlibet 'impune audendi,' without being capable of separation. The distinction between the politic capacity, and the natural, to subject the one to punishment, and not the other, was framed in the Jesuits school, to encourage subjects to rebel against their princes; but never yet so far improved the distinction to apply it to corporations, which, if they had thought of it, would have been more efficacious to their purpose, than as they applied it; assurance of impunity being the strongest argument for a commission of any crime. The Case being of such consequence both to the king, and his subjects in general, I shall endeavour to examine it by the rules and precedents of law, that I may sever what is mere notional, from what is of substance in it. I forbear to trouble the court again with opening the whole pleadings, but shall take the case as it hath been opened: Wherein the general question is, 'Whether by any thing disclosed upon the pleadings, it appear to the court, that the mayor, citizens, and commonalty of London, have forfeited their right of being and acting as a body politic, and subjected that right to be seized into the king's hands?'

In stating of the question, I forbear to style it a franchise or liberty, that I may not by anticipating preclude the force of Mr. Recorder's argument, That it is no liberty or franchise; but may reserve the entire consideration thereof to its proper place. And therefore I shall call it a right, for such most certainly it is; and it includes both 'Jus agendi, et Jus habendi.' Before we can arrive at the main question, certainly preliminary points have been moved and debated; some to the form of the suit and pleadings, others relating to the matter thereof.

To the form Mr. Recorder took three exceptions:

1. That the information is not well laid, because not brought against particular members by name, which ought to be in all cases, where the right of corporations is questioned or struck at.

2. That the replication is worse, importing a contradiction both to the supposal of the information, and to itself; because it denieth London to be a corporation, which the information allowed, and admitted it too, to be a corporation, by assigning causes of forfeiture.

3. That no judgment can be given upon these pleadings, either of Seizure or Ouster; not of seizure, because the king cannot seize what he cannot hold when seized: And the body politic, by which name it is sued, cannot be ousted of itself.

The great triumph Mr. Recorder had erected upon the strength of these exceptions, as for an assured victory already obtained, makes it necessary for me to give a more particular answer to them, than their weight would otherwise require. For the authorities cited by him argue very little to this purpose: And indeed he hath been so unfortunate in quoting of authorities, that how little so ever they seem to make for him, as to the point he produceth them, yet they flatly make against him in some other material point, not only by his authorities, but his objections themselves, to the form of the information, admit, that a corporation is in its nature separable by judgment of Ouster against the particular members by their natural names. The opinion of my lord Hales, in his Common-place book, Quo Warranto, fol. 168, pl. 7, argues, he did not think of the indissolubility of corporations; but it is no opinion, that the only way to impeach them was by a suit against particular persons; for it is only a short reference to the cases of Cusack, and others of Ireland; and Farrer and others of the Virginia company: Which cases (as also that of Fisher, Holden, and others of the borough of Hebmerley: the case of the Musicians, and the Bermudas company; and the other cases cited by Mr. Recorder) do fully prove, that corporations are franchises, and may be questioned and impeached in the very point of being corporations by suits of Quo Warranto. And they do prove, that the suit may be brought against some particular members by name: And against the rest of the corporations by the general words; as, 'Et alios liberos homines, et 'alios burgenses, et alios de fraternitate.' And these general words are material and operative; for a judgment thereupon binds the

whole. In the case of Cusack (Pasch. 17. Jac. Rot. 2.) against particular members by name, 'cum diversis aliis civibus civitat' Dublin',' judgment was given to out not only the particular men, but 'alios cives, et successores suos.' Upon the Writ of Error, it was assigned upon record as one of the causes of Error, that judgment was given to out the corporation of those liberties; yet no parties by their names of incorporation; but judgment was affirmed. And the quere that is made in Rolls 2 Report, in the case of Ferrers (Mich. 21, Jac. 1, Rot. 9.) and others of the Virginia company; whether the corporation were barred? probably did arise from the non-observance of the records, where judgment was given, as well against the 'alios plantatores,' as the particular men made parties. In both these cases the suit was as well against the rest of the corporation as the particular men: The appearance by Attorney was entered for both, and the plea, as well in the name of the rest, as the particular men, and judgment against both. And the judgment against the Virginia company discharged that company.

These, and the other precedents produced by Mr. Recorder, do prove, that the king's suit may be brought against particular persons by name, and against the residue of the corporation, by a general name of 'et alios homines;' or against particular persons, and also against the corporation, by the very name of incorporation, as the case of Bermudas company: But they do not argue the king hath not a further election, either to bring his suit for questioning the corporation, by the proper name of incorporation, without naming of particular person, or by some other general name, which sufficiently describes the persons. I shall therefore apply these answers to the objection warranted by precedents of law; that wherever many persons are jointly concerned in charge or discharge, and the king hath cause of suit against them, he may sue them, either by naming some particular persons, with a general reference to others; or he may sue only by a common name of description, without admitting them to be a corporation, especially where the general name sufficiently describes the persons, who took this corporation; and this as well for offences at common law, as against statute laws. Where murder is committed in the day-time in a walled town, 'tota villata oneratur;' and so for repair of highways, or nuisances in highways, repairs of bridges, and for levying of the hue and cry. The king's suit, either by indictment or information, hath been used both ways, either naming some few particular inhabitants, but then always with a general reference 'et alios inhabitantes,' which is essential, otherwise both indictment and information would be naught; or they are frequently only by the general name of inhabitants, within a parish, hundred, or county, as the case is, without naming any particular inhabitants at all. To produce instances of this nature would be infinite, the cases frequently falling out both at the assizes and in this court. It is so in cases of Quo Warranto. Rot. 15, 23, R. a Quo Warranto against the inhabitants of Denbigh, [Mich. 27 Eliza. Co. Ent. 537,] for using several liberties, as to hold a court of pleas before the bailiff, and choosing two aldermen, &c. upon plea and demurrer, judgment of seizure is given, 'et quod inhabitantes capiantur.' A Quo Warranto brought by Gerrard the Queen's Attorney, against 'Homines et tenentes Manerii de King's Haurston in Com. Bedford,' [Hil. 40 Eliz. R. 38,] for claiming to be discharged of knights-wages, &c. they pleaded the manor to be ancient demesne; and their plea was confessed, and judgment for the tenants, without naming any particular tenant. These general names of inhabitants and tenants were sufficient descriptions of the persons whom the king sued; and yet this suit, by those names, works no conclusion that they were a corporation. So 'Cives, Burgenses, et Communitas' of such a place, are general names to describe the inhabitants of the place by, antecedent to their being a corporation. The like of mayor, bailiff and burgesses, mayor and citizens, and 'pontenarii?' where burgesses is but an addition of the name of an officer to the common name of the inhabitants, and properly describes the persons whom the king sueth. By these names of general description, they are capable to take this right of incorporation by the king's grant. The grant doth not enable them to take this right: and if by such general names in the king's grant they may take, there can no reason be assigned, why they may not be sued by the same name they took, when they are questioned for this right, be the name of corporation the same, or any other. Upon pleadings in the case of a common person, 'Major et Cives' shall not necessarily be intended a corporation, without it be especially set forth.

Inter Jerom and Neal, 20 Eliz. B. R. 1 Leonard 106, in trespass and battery, the defendant pleads Salisbury an ancient city; and a custom there, that if any affray be committed upon any officer, upon complaint to the mayor, he, as a justice of peace, might send for the offender, and justifies, under the commandment of the mayor, to bring the plaintiff before him: And on demurrer joined, and judgment against the defendant, one of the grounds thereof was, that it did not appear that Salisbury was a corporation, although it did appear that Salisbury was a city, and had a mayor; much less shall it conclude the king, who is not so strictly bound in his suits as common persons are. It is true, that in the case of Maidenhead there are three judges against Mountague, of opinion, that they need not set forth they are a corporation, because they are not questioned for it by their information, but supposed to be one, and questioned only for a market, which they claimed by the king's grant. In the same case it is agreed, if they had been sued by any other general name, but the very name of in-

corporation, they should not be intended a corporation, according to the case of the king against the corporation of Denbigh. And whoever looks into the record, must conclude Mountague's opinion to outweigh that of the other three judges. The suit against them was by the name of the 'pontenarii,' the grants which they plead, recite the corporation of the 'pontenarii' to be dissolved, and the grant is a new grant to the bridgemasters: So that there was no room for any intendment, that it was a corporation before the grant, against their own plea; but that which seems in the case to have preserved the bridgemasters, is, that the judges inclined to an opinion, that it being for maintenance of a bridge, which was of necessary and public use, the grant itself might amount to a new incorporation, which was a plain waver of the former opinion; and if the three judges had continued their opinion, judgment would have been entered for the defendant; but no judgment was ever given in that case: So that mayor, citizens, and commonalty of London being a general name, sufficiently describing the persons against whom the suit is brought, may be used in the king's suits without any manner of conclusion to the king. But in the next place, it is yet stronger, where one of the articles of the suit is for usurping the corporate right, that prevents all colour of pretence for any conclusion; herein this case differs much from that of Maidenhead, as to the form of the information. And in such cases, where the questioning the right is a special article, the form of the information is the same against all corporations, whether by just title, or altogether usurped, and by wrong; the suit supposeth them all to be by wrong, and usurped; and whether by right or wrong, cannot be known, till the title by pleading be disclosed and discussed; and many times not then neither, because the liberty may be lost by default of pleading, upon *Nihil dicit*, or mispleader, by pleading a wrong title, or insufficiently pleading a right title.

A Quo Warranto 'contra Præpositum et 'Burgenses burgi sive villæ de Card,' [B. R. R. 5 Car. 1. Rot. 28.] for claiming to be a corporation, and divers other liberties: They plead, that they claim nothing but under the bishop of Bath and Wells. It appears by the plea, that they had no good incorporation, and judgment might have been entered against them: But the bishop obtained a grant from the king of a new incorporation, which I have seen and perused, and thereupon a *Noli prosequi* was entered.

A Quo Warranto against the commonalty of the city of Canterbury, [Hil. Car. 1. Rot. 25.] for claiming to be a corporation, and divers other liberties: They plead to all, and several issues taken in several parts of the plea, and breaches assigned to others for a forfeiture. Quo Warranto against the bailiff and aldermen of New Radnor [B. R. Mich. 20 Jac. 1 R. 17.] is of the same nature; and multitudes of others I could produce, where the suit is brought in the same form as our's, to question the right of a corporation against them by their corporate name.

My last answer is, that where the king proceeds for a forfeiture upon breach of condition, the right is not determined till judgment of seizure; for it is a mistaken ground, that forfeitures to all purposes relate to the time of the forfeiture: For as to copyhold estates, offices, and liberties, in case of the king, which may be determined by breaches of fact, they are not avoided till the fact, which causes the forfeiture, be found upon record: So that the suit is well grounded against them by the name of mayor, citizens, and commonalty: for they continue such till seizure, and till then are a corporation *de facto*.

2. I shall be short in my answers to the objections to the replication, because they are in effect already answered by what I have said. The traverse of the title by prescription is pursuant to the supposal of the information, which supposeth they have usurped that very liberty, and puts them upon shewing their title by that name; even put the case they have a good title by that name, by this patent, or by act of parliament, and they will wave it, and set up a title by prescription. And this was done in the case of Canterbury before, and in the case of New Malton: [Trin. 6. Jac. 1. Rot. 3.] where, upon the very same information as our's against the bailiff and burgesses of New Malton in Com. Ebor. they pleaded their title to their corporation by prescription, and issue taken; and it proved fatal to them; for verdict and judgment went against them.

Then for the contrariety of the replication to itself, none appears; for the traversing of the prescription by such name, is no denial; but it may be a corporation by prescription by another name, or it may have that name also by grant. And the farther replication is, that assuming upon themselves to be a corporation by that name, they committed the several acts, which are assigned for breaches. And that is the only advantage the king hath. By informations of Quo Warranto he may go upon the title, and take advantage of any defect therein, or of the pleading thereof, and may also assign breaches for a forfeiture, as is held in the case of Maidenhead bridge. In the case of Canterbury, issue was taken upon some liberties, breaches assigned to others. The king may plead several pleas, and take several issues and demur to part, as he shall be advised.

3. The objection, that no judgment can be given upon these pleadings, ariseth principally upon two notable errors, against plain and express authorities of law.

(1) That nothing can be seised into the king's hand, which the king cannot hold and enjoy when it is there.

(2) That every judgment upon a forfeiture ought to be a judgment of Ouster.

These mistaken grounds having been so often made use of by Mr. Recorder, in other parts of this argument, for supporting a sup-

position, that a corporation cannot be forfeited, I shall (to avoid repetition) leave them to be considered when I come to his main argument; and therefore shall proceed to consider the preliminary points moved relating to the matter; viz.

First, Whether the right of incorporation of being a body politic may be forfeited, or seized into the king's hands?

Admitting it may be, then;

Secondly, Whether the acts of Common council, or the members assembled in common council, which is all one, may work such forfeiture, or cause of seizure?

First, As to the point, I must confess the weakness of my understanding, that upon what hath been offered from reason or authorities of law, I cannot apprehend it rendered in the least doubtful to a court of law, whatever it may be in a common hall, and public assemblies of the city, where strong lungs have a preference before a rational head, but that the right of being a body politic may be forfeited, or suspended.

It was moved as a doubt by Mr. Solicitor, but as a vulgar error obtruded from public prints upon the unthinking and unwary citizens; which possibly gave encouragement to the many exorbitances committed within the city, and particularly to those now laid to their charge; and, I thought, sufficient had been spoken by Mr. Solicitor to have prevented the growth of so mischievous an error. But for that Mr. Recorder did *ex animo* espouse that opinion, as if no man were in his right wits, that did not concur with him in opinion, and as if there were something in it indeed, hath laid his main stress upon it, and erected it as his palladium to defend the city by. And probably this image (for, if examined, I fear it will prove no other than a work of imagination) may make that impression upon some men, that, conceiting themselves to be citizens and aldermen of an invincible and immortal city, incapable of dissolution, they may dream of being an independant commonwealth within a kingdom, and unaccountable to the king, or his laws. It is therefore made necessary for me (with your leave) to mis-spend some of your time in speaking again to this point; which I shall do.

1. By briefly stating what this right is, whence it ariseth, and for what purpose it was framed or introduced?
2. I will examine the reasons and grounds produced by Mr. Recorder, why it cannot be forfeited?
3. Then I shall offer the reasons and authorities of law, that it may and hath been forfeited and seized into the king's hands.

In speaking to all which I will not so far distrust the memory of the Court, as to repeat what hath been so well urged by Mr. Solicitor from reason and authorities, but shall endeavour to avoid it what I can.

1. As to the first thing proposed, this right of a corporation, aggregate of many, (to which I shall confine my discourses, being the only thing under consideration) is a right granted to many natural persons to be, have, enjoy, and act as one body and person. It confers 'jus 'Personæ, et Personam efficit,' which our law books express by the names of Persona Politica, and Corpus Politicum, and, as such, is capable of all civil rights, both 'habendi et agendi.' The instruments of creation of this right, and the claims thereof upon pleadings, do best declare the nature of it, viz. 'Quod homines In'habitantes, Cives, Burgenses,' or such other general name, describing the persons who are to take, 'sint unum Corpus Corporatum re, 'facto, et nomine.' And when prescription is made for a body politic, &c. 'Quod Ho'mines et Cives,' or 'Homines et Burgenses 'sunt, et a tempore cujus,' &c. 'fuerunt unum 'Corpus Corporatum re et facto per nomen.' So that it is something more than a notion, or mere name, Corpus Corporatum fully expresseth it, a body made up of several visible bodies 'in unum collecta et vinculo Juris unita.' And a corporation is every whit as visible a body as an army: for though the commission or authority be not seen by every one; yet the body united by that authority, is seen by all but the blind; and if the king or the law demand the authority, it must be produced and shewn, and is as visible in the eye of the law, as any other right whatsoever, whereof natural persons are capable. It seems strange, and almost beyond all excuse, that the Recorder of London should never have seen that great body politic assembled; unless he will excuse himself, that he is the mouth of the city, and not the eyes. Sir James Bagg's case, Co. 11, b. allows it to be such a right, that every member, separately considered, hath a freehold therein; and all, jointly considered, have an inheritance which may go in succession. It is the same right which the Civilians style Collegium, or Universitas, and so styled here in Bracton's time; scil. 'Si Rex concesserit 'alicui—Universitati sicut Civibus vel Burgen'sibus.' [Lit. 250. Bract. 28, f. 56. Co. 10, b. fo. 14.]

Natural persons, as such, are capable of taking and holding this right. It is neither taken nor held in their politic capacity, but their natural; for many men, as men, are capable of union, which is evident by the charters of creation, and the pleadings in all such cases; it is 'Homines et Burgenses, Homines et 'Cives,' who are constituted 'unum Corpus 'Corporatum.' And as the natural persons are an essential part constituting the body politic; so all the operations and exercise of this right are only performed by the natural persons, 21 Ed. 4, fol. 14. That book and other authorities, are express in the point; though in a case so evident, there needed no authority. And therefore when the question is of Non user or abuser of franchises by a corporation, it must of necessity be intended for some acts or negligence of the natural persons, or those

officers that are employed by them. And the question will rest only upon this, what acts, or what omissions of the natural persons, will affect this right, wherein all the members of the body have an interest?

This right is merely of human institution; and therefore as to its birth, form, extent, or limits, is directed and supported by the municipal laws of each country, and therefore for that reason is styled by our books political. By the constitution of our laws, this right, as all jurisdictions and franchises, is lodged in the crown, and thence only is derived. Bracton upon the question, 'Quis concedere possit libertates, et quibus et qualiter transferuntur?' thus resolves it: 'Dominus Rex habet omnia 'Jura in manu sua, quæ ad Coronam et Regalem pertinent potestatem, et Regni gubernaculum; habet etiam Justitiam et Judicium, 'quæ sunt Jurisdictiones; habet etiam ea quæ 'ad Pacem pertinent. Ea quæ dicuntur Privilegia, licet pertineant ad Coronam, possunt 'ad Privatas Personas transferri, sed de gratia ipsius Regis speciali.' And then sheweth, that such grantees as usufructuaries may enjoy them, 'donec amiserint per abusum vel non 'usum.' The whole current of our books to this day concur with this ancient author in this point, that none can make a corporation but the king; such power cannot be prescribed for, it is so inherent to the crown. The principal case was of the Whitelawers in London, who prescribed, that by the custom of London, the men of any art or mystery might act as a guild or fraternity, and were capable of a devise; and plead their custom confirmed by several charters; and, no doubt, would have pleaded some of the acts of parliament now pleaded, if the learned counsel had then thought there had been any thing of force in them. Judgment was given against them, for that none had such power but the king. In that case it appears, that the abbot and prior of Westminster were one entire corporation, and divided by the king, and, after the severance, a Quare impedit maintained by the prior against the abbot.

Some corporations are by the king alone, as dean and chapter, mayor and commonalty; some by the pope alone; some mixt, by the king for their temporal possessions, by the pope for their spiritualties. Whether the king grant them by charter out of parliament, or in parliament, or by act of parliament, the king is still the donor, and the fountain and spring from which this and all other liberties flow. [Bro. Corporat. 34.] A title by prescription always supposeth a grant in or out of parliament, and is allowed by law for supporting long possessions, grounded upon ancient grants before, time out of memory; but by what title soever these or any other rights are derived down, whether grant or prescription, their natures remain the same, and they are governed by the same rules of law, and are equally subject to the like civil accidents, the one as well as the other.

The last thing inquirable into this head is, To what end and purpose such corporations were elected, and allowed by the policy of our laws.

The general intent and end of all civil incorporations is in order to better government. Government relates principally either to persons or things: that which relates principally to persons may be properly called general government; because, properly speaking, persons only are the subjects of government. That which relates to things is called special government, because limited to the managery of particular things, as trade, charity, and such like; for the government whereof several companies and corporations for trade were erected, and several hospitals and houses for charities. Of this nature are the Trinity Houses for regulating navigation; and so the College of Physicians, the Corporation of Parish-Clerks, and a multitude of other special corporations in England. The only end of erecting these special corporations, was, for the better order and government of the several matters specially committed to their care.

The corporations for general government only, are those of cities and towns, mayor and citizens, mayor and burgessess, mayor and commonalty, and such-like. The corporations, as they are for the government of men only, having nothing especially committed to their incorporation, so they are erected for no other end or purpose than government. And if either at the time of the incorporation, which very few are, or afterwards they have any special matter committed to their care, it is purely collateral to the ends and design of erecting these sort of incorporations within cities and towns. This appears by the charters of creation both ancient and modern; the form is much the same, which is after this manner:

'Nos volentes, quod de cætero imperpetuum in eadem Civitate, Burgo, aut Villa [as the case is] Libertat' et Precinct' ejusdem habeatur unus certus et indubitatus modus pro custodia pacis nostræ, ac pro bono regimine et gubernatione Civitatis, Burgi, et Villæ, ac Populi ibidem inhabitantium, et aliorum illic confluentium; et quod Civitas, Burgus, aut Villa, pace concordia, et quiete sint, ad formidinem et terrorem malorum delinquentium, et in premium bonorum; ac etiam ut pax nostra ceteraque facta justitia et bono regimine ibidem melius custodiri valeant et possint.' These are the grounds upon which corporations are erected.

The limits and extents of their corporations, and jurisdiction, are limited by their characters; and there is a plain difference made in many charters between this and other liberties, as to the end of granting; this being erected only, 'pro bono regimine,' being a burden, and chargeable, in the execution of that public trust. Many other liberties and privileges, both of ease and profit, are granted to them 'pro meliore 'sustentatione' of those charges, which the government would necessarily require. Since the Statute of Mortmain they cannot purchase

without a special *Non Obstante*. They cannot engross trade, by excluding foreigners; Norris and Stap's case, Hob. 211. So that no private benefit can be assigned to be the end of erecting them. The power of making by-laws, which is incident to a corporation, is only for better government: and by that rule they must be judged.

Having considered the nature of a body politic aggregate, whence it flows, and for what purpose it was erected.

2. I proceed to examine the grounds and reasons produced, why it cannot be forfeited, or seized into the king's hands?

Many things were produced by Mr. Recorder, to make good his assertion, more 'ad captandum populum,' than to persuade a court of law. I will not mis-spend your time in perusing the jocular part of the argument, which may make the citizens smile one way, and the learned in the law another way; but I shall collect together what seems to have any force of argument. The grounds the argument went upon seem to be these:

(1) That a corporation is no liberty or franchise, but a mere capacity of suing, and being sued.

(2) That a corporation, in its nature, is not capable of being forfeited or dissolved.

(3) That it cannot be surrendered.

(4) That the forfeiting or dissolving of any corporation was never put in practice, nor so much as came within the compass of any man's imagination.

(1) As to the first, A corporation is no liberty, but a capacity. Now it is proved, even just as all the rest will appear to be proved, by strong averments, and quotations of books that prove no such thing. The authorities were 1 Inst. 250. Bro. title 'corporation and capacities.' In the Institutes the words are, 'a body 'politic is a body to take in succession, framed 'as to that capacity by policy.' The authority is express against him, that a body or person politic hath a capacity to take in succession, and is not a mere capacity; and the other words of the same author, are, 'and made into a body and capacity to take and grant:' so that this authority fails; it neither proves it no liberty nor to be a mere capacity.

That of Bro. tit. Corporation, proves less, for capacity is of larger signification, and incident to natural persons, as well as corporate persons, and such instances are set down under that title of Alienees, &c. and it is a great imputation to the memory of so learned a person, that he should think, that corporations and capacities were synonymous, or that he should tautologize in a title in an Abridgment.

The definition Mr. Recorder gives of a corporation, 'that it is a capacity of suing and being sued,' which served him for many a jest in his discourse, is no better than to define a man to be 'animal bipes,' or which is nearer, a mere capacity of walking with two feet. Although authorities fail, and prove not the matter, yet it is of that importance to the cause, that a corporation be no liberty, that something must be thought upon to make it out. For if it be admitted to be a liberty, the authorities will be too strong, that every liberty and franchise carries with it a condition, that it be used, and well used, the breach of which will amount to a forfeiture. And therefore, when nothing else can be found to prove it no liberty, recourse must be had to the negative argument, backed with strong averments, that it was never so stiled in any authority of law, except in one case, in the town of Helmsly, Co. Ent. Quo Warranto, and Mr. Noy's opinion in Hayward and Fulcher's case, grounded only upon the case of Helmsly. But one swallow makes no spring; and it was well Mr. Recorder spied it in that case, otherwise the averment had been without any exception.

If the point had rested upon that precedent, and Mr. Noy's opinion, it would have better authorities for it, than any could be produced against it. But there are multitudes of authorities, whereby corporations are not only called, but appear to be liberties and franchises; several have been cited by Mr. Recorder, but not seen, or overlooked by him.

In the case of Cusack and others [Pasch. 17, Jac. 1, Rot. 2.] in all the parts of the record it is stiled a franchise or liberty; and particularly in the continuance, 'Curia advisare vult,' and time taken to advise upon it as a liberty. So in the case of Farrer [Mich. 2, Jac. 1, R. 39.] and others of the Virginia company throughout the record stiled a liberty and franchise, even in the judgment itself. Mr. Noy knew of these cases, and many more before this time; but knew it to be the guise of learned men, in clear cases, and of daily experience, not to repeat many authorities.

The records of the cases cited by Mr. Recorder of the borough of Hebmerly, the case of the Musicians, and Bermudas company, &c. do all call it a franchise or liberty, [T. 6, Jac. 1, R. 3, Hil.] The cases I have already cited do so too; against the bailiff and burgess of New Malton; against the mayor and commonalty of Canterbury; against the portreve and burgess of Chard, [2 Car. 1, R. 25, P. 5, Car. 1, R. 28.] Many more I have perused, but conceive it too much to trouble the court with them at present. It is certainly true in all the records of Quo Warranto, wherever there is a special article against a corporation for being a body politic, it is always impeached by the name of a franchise and liberty; and multitudes there are of that nature. And in so clear a case I omit to mention the writs of Non Omittas, for entering into corporations, and the returns of their bailiffs; which make out evidently, that corporations are franchises, and the limits of the corporation, and the limits of the franchises are all one.

(2) The next argument is drawn from the nature and qualities of bodies politic, that they are invisible, immortal, impeccable, and therefore impatible, with a large jargon of 'non ens, et 'ens rationis.' Certainly this argument was

fetched from the clouds at the city's charge; and it cost them dear: For I cannot believe it could enter into the reason of any man, much less of learned men, that a body framed by the policy of man can be immortal; or that a body, compacted of many bulky visible bodies, can be invisible; or a body, whose very parts and members are mortal, is in its own nature immortal. Mr. Recorder admits, that the death of all ends the corporation; and therefore if any learned men have used such hyperbolical expressions, most certainly they never intended the citizens of London, or other populous town or city within England, of whom the question is, but of some corporation in Utopia, where the citizens neither eat, drink, nor die, or at least of some corporation that never had other existence but in the brain.

The authorities cited were Co. 1 Inst. 9, Bulstrod. 233, 21 Edw. 4, 13. and many others; and many more might have been cited, and to as much purpose; as Co. 10, fol. 32, Sutton's Hospital, brings in a whole regiment of authorities speaking to the same purpose. I do not remember that book was cited, and there was reason for it; for in conclusion it spoils the argument, viz. that these expressions are of corporations in abstracts, not coupled with particular men of this or that town, where the men act all, and the corporation doth nothing otherwise than what the men do. If it be considered abstracted from particular men, it is but a bare right and coupled in the notion of it with men in general, who are the proper subjects of government, and remains only in notion, and may well enough sustain these epithets which have been given it, as all other rights and notions may; but whilst it remains such, it can no more sue or be sued, than commit treasons, felonies, riots, or other trespasses, either against the government or particular men; neither hath it any existence *in re et facto*, but in the brain.

The case indeed that is cited 1 Inst. 9, is applicable to any particular corporation; the case is thus put: If a man gives lands to a mayor and commonalty, or other body aggregate, consisting of many capable persons, without naming successors, the law construeth it a fee simple, because in judgment of law they never die. If this be any authority, it is from the immortality of many persons capable, for they are the persons who are said in judgment of law not to die. Where my lord Coke's sense is plain, that these natural persons, though capable to take in their natural capacities jointly, which the law would adjudge an estate for lives; yet the grant being made to them by their corporate name, they take in that capacity, and the grant is not determinable upon their death, but shall continue with the corporation whilst it continueth. That my lord Coke never dreamed of immortality of a body politic, fully appears in his writings: 1 Inst. 13, where he puts the case insisted on by Mr. Recorder of a dissolution by death of abbot and monk. He after puts the case generally of other corporations, as dean and chapter, mayor and commonalty: If lands be given to them, and the corporation be dissolved, the lands shall escheat to the donors, upon a condition in law: in the first grant, if the law raise such condition upon grant of lands, much rather doth it upon the grant of the incorporation, where the intent of the donor is as special, and upon a greater trust. That my lord Coke understood it of other dissolutions than by death only, he refers in the margin to the case of the Knights Templars, which was not dissolved by the death of the members. That corporations were dissolved many years before the statute De terris Templariorum, 17 Edw. 2, the statute recites, the corporation was dissolved, and that the king and several other lords had entered upon all their lands and escheats: The judgment of the parliament was, they were well dissolved, and the lords well intitled by escheat, as the law stood; and therefore by act settles them upon the Hospitallers. This corporation was dissolved by the pope, and upon the ground of Non User. The end of their corporation was for guiding Christian pilgrims to the Holy Land and Jerusalem, which the Saracens and Turks having overrun, and possessed themselves thereof, the members of the order never came there, but disposed of themselves in several parts of Christendom. The order was erected by pope Honorius, 21 H. 1, A. D. 1120, and was dissolved by Clemens Quintus, 4 Ed. 2, A. D. 1314, 13 years before the statute: and their spiritual corporation, which was the principal, being dissolved, the power of holding lands, conferred by temporal princes, determined, 2 Inst. 431, and H. 432.

1 Inst. fol. 102. the case is put where the tenant held by Homage Ancestrel of a body politic dissolved; the homage is gone, though a new corporation be founded by the same name. That my lord Coke never entertained such an opinion, appears by his argument in the case of the dean and chapter of Norwich, when attorney general. His mistress's heart was much upon that case to preserve their lands; and it was well argued by Mr. Attorney and no doubt well studied; but this topic, from the indissolubility of corporations, never came into his head. Besides the statutes of confirmation, he insisted upon these things: First, That the words of the surrender were not sufficient to surrender the corporation; Secondly, That they were the bishop's council, and in some sort one corporation with him; Thirdly, From the great mischiefs which would ensue. This new invention alone would have done the business, if he had been so fortunate to have found it out; or if any of the judges had thought of it, they would not have gone about it so long as at length to ground their resolutions only upon the points which did arise upon the statutes. Fitzherbert [N. Brev. fol. 33.] is of the same opinion, That if an abbey be dissolved, a presentation shall escheat to the lord.

(3) The next argument produced by Mr. Recorder was, 'That a Corporation could not be surrendered;' upon which head, I will not entertain your time, for these reasons: First, Because it was not to the question, and that Mr. Recorder admits, that many things may be forfeited, which cannot be surrendered; Secondly, Because the point may come judicially into debate, some dislike having been taken to surrenders lately made; and I choose to refer myself to that question which comes properly in judgment; Thirdly, But my last and principal reason is, that he hath produced no authority of law to make good his assertion.

The authorities of the cases of the dean and chapter of Norwich. Mich. 40 and 41 Eliz. and Hayward and Fulcher's case, Hil. 3 Car. 1. which both relate to the same surrender, and are in effect the same case, only in the latter case the surrender is disclosed to the court to be larger than did appear in the former case; and though many books are cited, yet they all contain but these two cases, which make strongly against him. For throughout these cases, both in stating the question, arguments of counsel, and resolutions of the judges, it is plainly admitted, that a corporation might be surrendered. Otherwise the stating of the question in the first case, upon the effect of the words in the surrender of all their possessions and cathedral church, Whether sufficient to surrender the corporation? and the arguments thereupon, and the resolutions of the judges was needless: but it was plainly admitted, that a corporation may be dissolved; and it was the common law point they did resolve, that they were all idle and illusory. And so in the second case, Whether the dean and chapter, without the bishop, could surrender the corporation? [Palmer 501. Jones 168. Palmer 503.] it is all along admitted, both by the counsel upon the grounds they went upon, and by the judges in their resolutions, that it might be surrendered, 'concurrentibus his quæ in jure requiruntur;' and therefore, by the resolution of the judges, it could not be done without the bishop, because he had an interest in them. And when Whitlock in his argument had recourse to a more general reason, which was, That the surrender could not be good, because then they should be *Felo de se*, which is against nature; Jones takes him up, and flatly denies it, and saith, That a dean and chapter might dissolve themselves by Cesser; or if all die, or resign, the corporation is dissolved; but concurred with him, that the surrender did not dissolve it, because the bishop was no party, nor consenting; and in the end Whitlock concludes his argument, that it could not be done without the bishop. And the saying of Whitlock in that case, 'That the king may grant, but not dissolve a corporation,' is certainly true in the same sense as it is of lands, and all other rights whatsoever; the king may grant, but cannot resume without cause; yet all may be forfeited upon due cause, and by judgment of law returned to the king.

(4) The last topic of argument, by which Mr. Recorder concluded a corporation cannot be forfeited, is a Non User; because never any corporation was forfeited, nor did it ever enter into any man's imagination, that it could be forfeited. This indeed doth put the proof upon me; and Mr. Solicitor hath already made it out with great learning by several instances of corporations seized into the king's hands for forfeitures committed by them, some by judgments, others by inquisitions finding those forfeitures. But Mr. Recorder with one blast hath blown them all away; that they are but mere sounds, and look big with seizure, and seizing of liberties into the king's hands, but, when strictly examined, they are of no substance; and the fruit of all the examination ends in a difference he hath found out between seizures and forfeitures; much such another difference as was that between a liberty and a capacity, upon which the whole weight of the argument turned, 'That a corporation was no Liberty, but a Capacity.' And if so little a distinction be enough to answer the weight of Mr. Solicitor's arguments, it will be in vain for me to attempt further instances, unless I can reconcile this little difference, and shew it to be as ineffectual as that between a Liberty and a Capacity was before; and therefore I crave leave, in the first place, to examine this short answer to so many and so great authorities.

It is objected, that those are precedents of seizures, but not of forfeitures; for seizures in the case of the king's suits, and of the bishop's temporalities, are of the same nature as seizures upon the Grand Cape's and Distringas in suits between party and party, only to answer issues. And when liberties of towns are mentioned to be seized, the towns only are seized, and not the corporation, which remains *in statu quo*; but where a forfeiture is, there must be judgment of Ouster. Every sentence almost of this answer is contrary to all the books and records of law, that I know of. The authorities cited to prove the differences are Nat. Brev. fol. 161. 162. which saith, inquire into the causes of seizures, and causes of forfeiture; but what these causes are, which may be causes of one, and not of the other, are not disclosed. But my lord Coke, in the countess of Shewsbury's case determines the difference, and makes them all one. There are, saith he, three causes of forfeiture or seizure of offices for matter of fact, Abuser, Non User, and Refuser. He makes the causes of both to be the same: Forfeiture is but the fact upon which the seizure is grounded, where the subject hath title of entry for a forfeiture, in the causes of the entry different from the causes of the forfeiture. So in the king's case, where liberties are seized for an Abuser, whether it be by judgment, or upon an inquisition, or presentment, finding the abuse: can it be a question with any learned man, but the seizure is for the forfeiture? The king cannot seize without cause, and the cause must be some fact in breach of the condition in law annexed to the liberty.

The other authority produced is of the Quo Warranto against Roger Mortimer, cited 2 Ed. 3. 29. in Strata Marcella, Co. 9. fol. 28. where upon denial of aid, and the defendants not answering over, judgment was given of fore-judger of the liberty, and error brought; where Scroop saith, that in some cases franchise shall be put into the king's hands, in some cases seized in the right of the king until fine; and in some cases it shall be fore-judged, which holds for ever. I do admit this case to be good law, but it makes nothing to the purpose to prove the difference; or that seizures by the king for misusers are not for forfeitures, or that judgment of Ouster are only evidence of forfeitures, or to prove a seizure in the king's suit is of the same nature as the Grand Cape or Distringas, upon mean process in the suits of common persons. And because neither the book cases, nor Mr. Recorder, have given any light into the cases, which may vary the judgment in a Quo Warranto, I will endeavour to state the matter, how it stands upon seizures of liberties.

(1.) Liberties may be seized into the king's hands by the award of the court, which, in that book, is styled, 'Put into the king's hands;' and that in two cases principally:

Where the defendants are summoned to appear at the king's suit, and make defaults.

Where a contempt appears upon record, in returning or executing the king's process.

I shall give instances of each. For the latter, 12 Ed. 4, fol. 5, in case of bailiffs, upon error, the bailiff appeared, and prayed a day to bring in the record; they failed at the day: The better opinion is, their franchise shall be re-seized. And Vavasor there saith, if a lord of a franchise do any trespass, or contempt to the king's court, it is cause in the same court to reseize the franchise. For the former, 15 Ed. 4. 6, in Quo Warranto, if the defendant appear not at the day, the liberties shall be seized; and if he doth not replevin them, as in Eyre, they shall be absolutely forfeited; for the statute of Quo Warranto directs the king's courts to proceed in Quo Warranto as in the Eyre.

Trin. 16 Jac. 1. Brigg's case, in Quo Warranto, the defendant appeared not at the day; the liberties were seized, Roll. Rep. 2 part, fol. 46.

Trin. 17 Jac. 1. Roll. 2. part, 92, Quo Warranto against the mayor and burgesses of Wigmore in Com. Lancast. upon default made at the day, it was agreed by the court, That if they shewed not good cause to excuse their default, their liberties should be seized into the king's hands; This being in the case of a corporation, the 'Capias in manus' should be of the politic person which made the default. Where seizure is by award of the court for a contempt in court, the court may admit the parties to affix and order restitution; so where by award of the court, on default of appearance at the king's suit, a seizure is made, which is in nature of a distress, to bring in the party, by putting him out of the possession of the liberty, till he appear and replevy; the court, if the defendants come in time, and pray it, may deliver them the possession upon replevin; and this by the new statute de Quo Warranto, 30 Edw. 1. Before that statute the general writ of summons to answer to liberties, as also the particular writs of summons upon the king's special suits, superseded the use of any liberty till the justices met on the day of return. Which mischief was remedied by that statute; if they appeared not at the day, the liberties were to be seized in nature of a distress, to enforce their appearance. And upon appearance, if they demanded to replevy them, the judges might deliver back the possession of the liberties upon security to prosecute their claim, and answer the mean profits, if any, in case judgment were against them; much in the same manner as the practice in the court of exchequer upon all seizures to this day, by the seizures the king is in possession: But if the party appear and plead, and put in security, he is by rule of court permitted to receive the profits. But this statute not limiting any time for his appearance, or to reply, that remained as it did before upon the old statute of Quo Warranto, 18 Edw. 1, which refers to the practice in Eyre: So that if the party did not replevin in time, the former seizure would amount to a seizure after judgment by default, which is final.

(2.) Again, liberties are seized into the king's hands by judgment of court in the king's suits, whether the judgment be by default, or *Nihil dicit*; upon demurrer, or issue tried, this judgment is final, and the court cannot admit to a fine, or award restitution, unless upon error brought. This court is to set the fine upon the *Capiatur*, but not the fine for redemption: that is purely in the king's breast, 'et ex gratia Regis.' There is no such formal judgment of seizure until fine; but this upon judgment and another seizure upon inquisition, or presentment, which I shall mention, are the seizures in the king's right, represented in Mortimer's case, but frequently entered 'quousque Dominus Rex aliud præceperit.' What was intended by a judgment of Ouster in that book, and in what cases by the course of the king's courts it ought to be, will best appear by an ancient rule, taken and agreed by the judges in Edward the Fourth's time, before they were promiscuously used. The rule is thus: Where it clearly appears to the court, that where a liberty is usurped by wrong, and upon no title, either by the king's grant, or otherwise, there judgment only of Ouster shall be entered: But where it appears, that the king or his ancestors have once granted a liberty, and the liberty be misused, judgment of seizure into the king's hands shall be given. These rules carry their own light with them: That which came out of the king's hands, as Bracton useth the word, is properly returned there again by seizure, or (as our ancient books phrase it) by re-seizure. But that which [illegible] e thence, but merely

usurped upon him, shall be vacated,' and by judgment of law declared null and void.

There is another case, which is there likewise resolved, and that is, where it is doubtful to the court, whether the liberty commenced by grant, or by wrong; that for the uncertainty the best and safest course is, that judgment be given of seizure. This last case was the principal case in that book, the question arising upon a default, What judgment should be given? and by that rule judgment was given of seizure, not of Ouster. And agreeable to these rules, all the judgments which I have met with have been given; and this course hath been found most beneficial to the subject, who, though by forfeiture, mispleading, or default, he may lose his liberty, may have recourse to the king's mercy for restitution.

In the case of the bailiffs and aldermen of New Radnor, which was by default, judgment of seizure only was given. [Mich. 20. Jac. 1. Rot. 17.

In the case of New Malton, [Trin. 6. Jac. 1 Rot. 3,] though the issue, that the corporation was by prescription, was tried against them; yet having long acted as a corporation, they might have mispleaded their title, as the city of London hath done, in claiming that by prescription, which commenced by grant within time of memory, judgment only of seizure was given, and not of Ouster. In all cases of disclaimer, judgment only of Ouster shall be given; upon the same rule judgment only of Ouster was given in the case of Staverton, reported in Yelverton and Crook: But the entry there is mistaken; for it is entered Mich. 8, Jac. 1, Rot. 2, for it appeared to the court, that it was a mere usurpation without title; for that no such court as he claimed could be gained by prescription, nor indeed by grant, through the meanness of his estate. Mr. Recorder insisted upon this judgment, as a measure for all judgments upon forfeitures of liberties, but plainly mistook the reason of it. Upon the reason of these rules, in such cases where grants do appear, but either the parties are not capable of taking, or the liberty granted no allowable by law, the course hath been to enter a mixed judgment both of seizure and of Ouster.

In the case of the inhabitants of Denbigh, who claimed by charter several liberties; but it appearing they had no capacity to take yet the usurpation being by colour of letters patents, the judgment was mixed both of seizure and Ouster; for there was no possibility of restitution, because they were not capable. [Hil. 27 Eliz. Rot. 15, Co. Ent. 537.]

And in the case of Cusack, [Pasch. 17 Jac. 1. Rot. 2.] it appearing to the court that the liberties granted did not pass, nor could be lawfully used; yet the usurpation being by colour of a grant, judgment of seizure was given, as well as Ouster, in these cases, as likewise in sir George Reynell's case; and by multitudes of cases of offices seized, it appears, how vain the objection was, that the king cannot seize a corporation, because he cannot have it, or be the mayor and commonalty; for not only what the king may have or hold, but what he may dispose of, are in judgment of law, said to be in his hands; and it is the proper office of the hand *disponere*, as well as *tenere*. And what but colourably came out of the crown, though it cannot subsist by law in a subject, shall be seized, as in Cusack's case.

(3.) In the last place there are other seizures, which are by process by commission of inquiry upon inquisition found, or upon presentment; and such are always for forfeitures, upon faults found in breach of conditions annexed by law. That the king is in possession of all incorporal rights by such seizures upon inquisition, appears by the resolution in sir George Reynell's case. In these cases of seizure for forfeitures no court, or the lord of the liberty, whether body politic, or natural, can admit to a fine, and thereupon make restitution; neither is there any other way by law to take off the king's hands, but by direct traverse of the fact, if the fact found be not true; or by demurrer, if the fact found be not in law sufficient cause of forfeiture. The facts upon which such seizures have been made, have been generally so notorious, and the consequence of law upon them taken to be so evident, that I never met with any such inquisition ever traversed or demurred to; but the application for restitution hath still been to the king's grace. And these inquisitions have been taken either *ex officio* by the sheriff, or by special commissions. The sheriff by his general commission is intrusted with the preservation of the whole county, and the public peace thereof.

And though in the grant of corporations and other liberties, there be special clauses exclusive, *Ita quod*, &c. Yet these clauses, as the grants themselves, have another *Ita quod* annexed to them by law, that they preserve good government, and do not abuse the franchise, by committing or permitting riots and great disorders in breach of the public peace; which if they do, is by law a *Non Omittas* to the sheriff, to inquire and take care of the public peace within the liberty.

The town of Hereford was seized into the king's hands by the sheriff of the county, for holding of a market contrary to the king's prohibition. Upon certificate thereof into chancery, the king's writ issues to the sheriff, approving thereof, and commanding him to keep it in the king's hands, 'Donec dominus Rex 'aliud inde praeceperit. Rot. clauso.' 15 H. 3. memb. 7. Hales lib. K. fol. 41.

Of seizures made upon presentments, and inquisitions taken by commissions, there are many instances, some whereof I shall mention when I come to the precedents. The seizures upon judgment, or for a forfeiture, which are always in the king's right, do as effectually put the king into possession, and oust the natural persons from using the right, as any judgment of Ouster whatsoever. And the dif-

ference between such seizures, and those upon the grand Cape, which are only upon mean process, and in right of the subject, and in his aid, is too apparent to be further inlarged upon. There is some resemblance between this seizure upon the grand Cape, and that in the king's suit for default, that appearance for both are upon mean process, and both repleviable, if the defendant or tenant come in time.

There is also a further resemblance between them, which makes not for Mr. Recorder's purpose; and that is, in that both are lost for ever, if the parties come not in time. For at common law, if upon a 'præcipe quod reddat,' and the lands seized into the king's hands upon the grand Cape, the tenant makes default, and comes not within forty days, he could not wage his law to excuse his default, but the demandant should have judgment to recover the land presently, 15 Ed. 4. fol. 7.

The difference that it was not the franchise or liberty of the corporation, but the towns themselves were seized into the king's hand, is as void of authority as of law. Sometimes indeed 'Civitas et villa,' in records, are used promiscuously for the franchise and freedom, which is jointly used and enjoyed by the inhabitants, exempt from the common law jurisdiction: and in such case, the seizure of the city or Ville, and of the franchise, is all one; and the inhabitants thereby put under the government of the common law, discharged of the franchise. But if the town or city be taken for the natural persons who are the inhabitants, or for the houses wherein they inhabited, which they must be upon Mr. Recorder's distinction, otherwise it will be a distinction without a difference; neither the inhabitants nor houses were ever seized, or could be seized into the king's hands upon such inquisitions as have been found, and judgments of seizure that have been given. The only proof for this difference was a strong averment, that whilst the city of London lay under the several seizures sometimes of the mayoralty only, at other times of the whole franchise, the corporation was as vigorous as ever, and *in statu quo*; not so much as suspended, but did exercise all corporate acts as before. An averment against the express sense of all the citizens when under those seizures, and against many authorities of law.

At the parliament, 18 Ed. 1. [Roll. Prerog. 204.] The citizens (for they had then no mayor) petitioned the king in parliament, 'Quod Rex 'velit eis concedere pristinum Statum, sc. Ma'jorem et antiquas Libertates.' They petitioned not for their houses, or the liberty of their persona, those were never seized; but to be restored to the mayoralty, and their ancient liberties, which were under seizure in the king's hands. If the corporation had been *in statu quo*, they would not have troubled the Commons to present such a petition, nor the king to grant so idle a petition, as 'eis concedere 'pristinum statum;' but they, who knew their condition better than Mr. Recorder, could admit themselves out of possession both of their mayoralty, and their ancient liberties, and pray to be restored to them. And the king's answer was, he was not at present advised *statum mutare*. My lord Coke's opinion is, that the chapter, when no dean, or commonalty, when no mayor, have not capacity so much as to make continual claim, nor to take by purchase, nor sue any action [1 Inst. 263 b.]

If the Commons of London meet on Michaelmas-day, and choose a mayor, the old mayor not present, the election is void; and so any other act without the mayor. (21 Ed. 4, 27.) If the commonalty in the vacancy of a mayor make obligation under their common seal, it is void; how much stronger will the case be, when the whole franchise is seized? (21 Ed. 4, 69.)

I have now removed the objections which lay in my way, by opening the nature and effect of seizures of liberties into the king's hands, and where judgment of Seisure, and where of Ouster are properly given; whereby it may appear, that this special 'Capias of Capias in manus Regis' is as proper an execution against the body politic, as the common Capias against the body natural; and in judgment of law the politic person is as properly said *civiliter mortua* by judgment of seisure, as the natural person is said *civiliter mortua* by judgment of any attainder for any capital offence. Mr. Recorder acknowledges, that in case of natural persons, when the law gives forfeiture of the body, or of the liberty of the body, it is all one in judgment of law; the law is the same when it speaks of bodies politic, to forfeit the liberty of the body politic, and to forfeit the body politic.

3. My way thus cleared, I will lay down the grounds and reasons of law, upon which I conceive, with some clearness, that corporations may be forfeited and seised into the king's hands, as well as offices, or any liberties whatsoever; and then shall instance in some further precedents, whereby it will appear they have been forfeited and seised. My grounds are principally these:

(1.) That there is a condition in law annexed to the franchise of a corporation, upon its first erection, as strong, if not stronger, than to any other franchise or liberty whatsoever.

(2.) That there is nothing extraordinary or peculiar in the nature of a corporation, to hinder taking advantage of the condition broken, or to exempt it from the common condition of other liberties in consideration of law.

(1.) As to the first, wherever the law introduceth or alloweth any right upon a trust, or for the benefit of the public, it implies a condition, that the trust be discharged, and the ends of its creation complied with. This condition implied by law is of stricter obligation than conditions express; it shall bind infants and femes covert, 8 Co. 44. The principal case is of offices; but the book saith, 'So it is of all 'liberties and franchises.' And indeed through-

out our books, the cases of offices of public trust and franchises run parallel; and the greater the trust is, or of greater necessity to be performed, the condition is still the stricter. And therefore in franchises, as well as liberties, if the franchise be for the better administration of justice, and of necessity, Non User will be judged a breach of condition; but where not of necessity, bare Non User will not be a breach; yet Refuser, which is an obstinate and wilful Non User, may be a breach; but in case of all liberties and franchises whatsoever, Abuser was ever judged a breach of the condition. This matter, upon the question of forfeiture of an office, is well stated in the countess of Shrewsbury's case, 9 Co. 50. Now this franchise of a corporation is granted upon a far greater trust and confidence than any other liberty whatsoever, as I have already shewn; viz. For the government and peace of the inhabitants, and others coming within the liberty of the franchise, in subordination to the general government of the king; and that they are intrusted therewith by the king upon the public account of government only, and not for any private respect or benefit whatsoever. Other franchises are either subordinate and auxiliary to this, as to hold courts, have gaols, and such like, for the better administration of the several parts of government; or else are of profit or ease, 'pro meliori sustentatione' of the charge and burden of this subordinate government. And therefore Banks, in the argument of Hayward and Fulcher's case, Palmer 495, calls it the Principal Liberty, and other liberties the Accessories.

In the case of Knights Templars, the corporation was dissolved upon account of Non User, though without their default; but the end of their institution ceased. (Inst 432) The case is much stronger where it is a voluntary Cesser, as where the abbots and monks put off their habit, and leave their houses; this Non User will be a good cause of discharging the order. Where the commonalty have power to choose every year a mayor, if they do not choose a mayor, their franchise shall be forfeited, or they may be fined, upon this reason, that common justice fails for want of such an officer, which was a breach of the condition annexed to their liberty by Non User, 21 E. 4, 14. It appears by this case, That the commonalty, in the vacancy of a mayor, are to this purpose a corporation, to choose a mayor to perfect the body; and it is the only corporate act, that they are by law enabled to do without a mayor; and this right may be forfeited too. And as by never choosing a mayor, they themselves would dissolve the corporation; so by forfeiting their right, it is in the power of the law to dissolve them. It also appears expressly by this case, that the king may proceed either for a fine, or upon a forfeiture, as he may do in the cases of all offices and franchises whatsoever, as he shall be advised.

If Non User in some cases (as I have shewn) will forfeit a corporate right, no shadow of reason can be offered, why Misuser or Abuser will not do it as well as in all other liberties. For as greater the trust is, or stronger the condition, so an Abuser of that trust is a far greater breach of the condition, than a simple Non User. Single bodies politic have indisputably such conditions annexed to them upon the trust of their creation; and the breach of the condition is in law good cause of separating the politic person from the natural, by deprivation, which in the civil law is of the same effect as judgment of Ouster by the common law; and their suspension hath some resemblance with our seisures into the king's hands. If Mr. Recorder had but observed the different laws that spiritual corporations and civil corporations are guided by, he would not have raised his wonder to that height, that Quo Warrantos were never brought against monasteries, bishops, deans and chapters, parsons and vicars, and that bringing it now against the city of London threatened the whole hierarchy of the church; when, with his leave, all these, if they offend, may by law lose their corporate right, which may be severed from them by certain instrument called Deprivation, the edge of which is no sharper than judgment of Seisure, or Ouster in our law. And certainly the union between the politic and natural body is as close and as strong in single corporations, as in aggregate; and the same authors have bestowed upon them the same epithet, and that they cannot commit treason and felony; and the body corporate of the bishop, parson, prior, alien, &c. is as invisible, immortal, and as politic as that of aggregate bodies. Yet not only treason and felony, but far less misdemeanors committed by the natural persons will forfeit the corporate right, and amount to a breach of the condition annexed by law. So little crimes, as waste, and wilful dilapidations, will be causes of forfeitures; many of the cases whereof are put in sir James Bagg's case, to which I refer, 11 Co. 98. For I do take that case to be an express judgment in point, That there is a condition annexed by law to every corporation, and that the breach thereof is a forfeiture. The resolution there is, that any member of the body may forfeit his corporate right, and may by law be divested of it, which right is there called his Freedom and Liberty. And it is the same right or liberty, in which all, jointly considered, have an inheritance, wherein each member hath a freehold; for they are not seised of this right in their corporate capacity, but as natural persons, the question being of that right which gives them the corporate capacity. And what any member may forfeit, every member may; and the same acts which will forfeit the right of every member, separately considered, if done jointly by all the members, will have the same effect. What act will amount to a forfeiture, that case generally determines, whatsoever is contrary to the duty and trust of a member; especially if the fact be contrary to his oath, the oath of allegiance by the statute 7 Jac. c. 6, is made a

part of the freeman's oath. The case goes further, and assigns many particulars, which will be breaches of the condition, viz. Attainders, forgery, perjury, conspiracy, or any other infamous crimes, at the king's suit; if these will be sufficient cause, there can be no doubt but treasons, felonies, and oppressions, seditions, and other attempts in disturbing the government, will be good causes of disfranchisement of any or many of the members who commit such crimes; and this upon the tr and condition implied by law, upon the firs erection of the corporation; for the presen members are under no other trust or conditio as to this matter, than what the law impose upon the first members.

I cannot see how the counsel for the city can evade the force of sir James Bagg's case unless it be by a distinction of two:

1). Between every man, and all men; every man may forfeit his part, but all men cannot forfeit the whole: just such anothe distinction as was made to all the precedents between seisures and forfeitures.

2.) The other distinction seems to have little more colour, and it is between th king and the corporation.

The corporation, say they, are intrusted by law with power over their members to remove them for acting against their duty; but the king cannot disfranchise any particular member: and if he cannot disfranchise any one member, much less can he all members, or seise their liberties into his hands, which in law amounts to a disfranchisement of all the members.

I answer, The king may do both the one and the other; and in saying the king can do it, I mean in course of law.

1.] The king doth it, when the subordinate ministers and governors within the corporation do it; for they do it as his ministers in execution of his laws; and it is their duty to do it, according to the trust he hath reposed in them, and the power he gave them; and this authority is greater or lesser, as he is pleased to grant it, as it appears by sir James Bagg's case. If the king grant them express authority to remove, they may remove the offender before conviction at law. But if no express power be granted, a conviction at law must be first had; and the judgment of the law directs their duty, and they are accountable herein to the king in his courts of law: if they mistake the law, and displace a member convicted of an offence, which amounts not to a forfeiture, the party shall be restored by Mandamus; an excellent precedent of restitution, if they do not their duty, to disfranchise where the offence requires it.

2.] The king may do it, [Dier, 333. 13 Co. 9 Car. 1. memb. 29], by commanding them to do it by his writ out of the court where the conviction remains, or out of the chancery, as he may the coroner of the county, mayor, and other officers, as the precedents have been. A writ to remove the mayor of Berwick. So where an alderman is dead, the king may send his Mandamus to choose another, as done in the case of Lanceston, P. 8. Car. 1. 23 R. Hale, Corporat. Pl. 5. If they yield not obedience, they may be fined, or may incur the forfeiture of their liberties, as the case may require.

3.] In case the corporation cannot do justice in punishing and displacing the offenders, either because the majority are offenders, or favouring, or abetting the offenders, there being a failure of justice in the franchise, which the law will not permit, by judgment of law the city or Ville shall be restored to the government and jurisdiction of the common law, by seizure of the franchise into the king's hands.

4.] Failure of justice, and the not suppressing and punishing of notorious riots and tumults, have been adjudged good causes of forfeiture of liberties: and the plea of non-ability to suppress them, disallowed as any cause of excuse, as to the point of forfeitures of the liberties, which doth and will appear by the precedents insisted on by Mr. Solicitor, and what I shall superadd. So that I conceive the authority of sir James Bagg's case remains unshaken, that there is a condition annexed to the franchise of a corporation, the breach whereof will be a forfeiture. The greater the trust of any member of a corporation is, the stricter is the condition; as where any of the members are chosen into any places, which more immediately concern the good government of the corporation, a less crime will be the cause of his removal, than will be a disfranchisement of a private member, as in the case of an alderman.

It was resolved, for being a drunkard and haunter of taverns, he being a magistrate more immediately intrusted with the government, was cause of removal; though he have freehold in the place, yet it is upon special trust and confidence. [Taylor's Case, Trin. 14. Jac. 1. B. R. Roll. Restitution 455, pl. 1.] The law will be the same, if the magistrate gives the least encouragement to popular tumults, or frequent conventicles, and unlawful assemblies. And it is no objection to say, that some statute laws have laid a penalty for the offences, as it is in the case of drunkenness, and many offences of officers; and in common law offences, the law provides a penalty against the offender by fine or imprisonment: and yet the same offence, if a breach of condition, will be cause of disfranchisement, as appears in sir James Bagg's case. The penalties inflicted by statutes or common law, are for the breaches of particular laws; but the displacing of a magistrate is for breach of the general trust of his place, wherewith he is intrusted for the public; and having broken that trust and condition, the law adjudgeth him unfit to be intrusted, 'ne quicquam detrimenti capiat Respublica.' The question, what acts of a member will forfeit his corporate right? is nowhere in our books so distinctly put as in sir James Bagg's case. But the question, what

Acts of the members, and of what number of the members, will forfeit the whole franchise? I know no-where distinctly put in our books, but as they lie scattered in the instances of forfeitures taken, and franchises seized; otherwise than upon the general rules of Non User et Abuser of the trust committed to them. But the Civilians do largely treat upon these questions; whether the cities, colleges, and universities may be forfeited and dissolved, and what acts of the members will be causes of such forfeitures? And therefore I crave leave, before I conclude this head, from the condition annexed by law to all corporations, only to mention one of them. It is Oldradus de Ponte (fol. 29) in his book intituled, 'Consilia sive 'Responsa, et Aureæ Quæstiones:' Where he debates the point at large *pro* and *con*, and puts the objections of some authors, which are much the same enthusiastic raptures, as have been made use of in this case; viz. that they have no souls, but are immortal bodies, and such-like stuff. But he resolves the question thus: I will repeat his own words: 'Sed 'licet non habent veram personam, tamen 'habent personam fictam fictione Juris. Et 'ideo dicit Lex, quod Municipium Curiæ et 'Societatem personæ sustinent: Et sic eadem 'fictione animam habent, et delinquere possunt, 'et puniri, ea tamen pœna quæ possit cadere in 'eas, scilicet, quod privetur Privilegiis, et sic 'Capite minuitur. Et sic sicut vera persona 'per mortem naturalem desinit esse quod 'erat, sic ista persona ficta per mortem Civilem, 'quæ est, ut privetur Privilegiis, desinit esse 'quod erat, quia amodo non erit Universitas.' And then assigns the causes generally: 'Et 'quod Privilegia possint revocari, cum incipi- 'unt esse iniqua vel damnosa. Et non potest 'esse magis iniquum, si utatur eo in contume- 'liam concedentis.' Though this be a full opinion of a learned man, as to the case in question, both as to the general question of forfeiture, and the particular breaches assigned; yet I use it not as an authority; but only to shew the concordance of other laws with the law and practice within this kingdom; and that learned men have before now not only dreamt of such a thing, but have concluded the point upon debate and reason of law, that corporations may be forfeited and dissolved, when their privileges, as used by the members 'in- 'cipiunt esse iniqua vel damnosa.'

(2.) My other ground is, that there is nothing extraordinary or particular in the nature of corporations aggregate, to exempt them from the condition of single corporations, or of other liberties: if there be, it hath not yet been shewn. It must arise either from the number of the persons who take, and are the subjects of this liberty, because they are many; or from the right conferred upon them. The number of the persons constituting this body contributes nothing towards the indissolubility thereof, pleaded for. They were several natural persons before the Union, and remain so many natural persons; and by retaining their natural capacities, are as capable of being separated, as they were before capable to be united by taking this right. And as to the number of the persons, a corporation differs nothing from other communities, which may assemble and act in a body: as the voluntary societies in inns of court and chancery, and armies, which act under commissions, to some persons to collect and assemble others to act jointly under them. These societies have their peculiar rules and laws to act by, and act jointly, and in a body, as corporations do: but yet, in the one case, if the members so agree; or in the other case, the commission be revoked, they are all separated, and the union dissolved. So as to the nature or numbers of the persons collected, a corporation differs nothing from other societies not incorporated. From number may be presumed a greater duration, and it is most probable many may outlive one; but it is certain that many shall die as one man, and probable, that all may die before others elected, which was admitted to be a dissolution of the body politic: but ingenuously distinguished, that this was rather a separation of the persons from the body, than of the politic body from the persons. Be it so, it is admitted then they are separable, and that number cannot protect the natural persons from being severed from the body politic by natural death. And I have already shewn, that number contributes nothing to the indissolubility of a corporation, by separation of the members one from the other, which is called a civil death; and in cases of civil death, the separating the liberty from the person, or the persons from the liberty, is all one. To take the office from the officer, or remove the officer from the office, is all one; and so in disfranchisement, to take away the freedom of a member, or to remove him from his freedom, is all one: and so in forfeiture of franchises, the judgment of Ouster is formally putting the persons from the franchise, and judgment of Seizure taking the franchise from the persons; but in effect they are the same, viz. a separation between the persons and the franchise. And this separation being wrought by a condition in law annexed upon the Union, the number of persons can no more prevent it, than where lands, or incorporate inheritances, are granted to many and their heirs upon an express condition that no advantage be taken of the condition broken, because the grant is to many men.

From the nature of the right or franchise, as little can be inferred for this inseparable union pretended.

1. In its creation, it is merely by the policy of man, and the rule is taken in Calvin's case, 7 Co. fo. 25. That what is by the law of man, may be altered. And divers other books speaking of the effects of human constitutions, laying down as a certain rule, 'Quicquid colli- 'gitur dissolvi potest;' mortal beings cannot confer immortality.

All rights whatsoever are incorporate, and sometimes *abusive* are styled immortal, which

by intendment of law is only, that they have continuance so long as any persons subsist capable of having them: and in this sense the right to lands and corporate inheritances are of greater duration than many liberties, and particularly those of corporations; because they subsist when they return to the crown, which many liberties do not, but are then extinct. Strata Marcella, 9 Co. and 15 Ed. 4, fol. 6.

2. As to the nature of this right, whether it be considered as a right of taking and holding in another capacity than that of natural persons, or as a right of taking in succession, under neither consideration can it import any inseparable quality. In the former, it is both the same with that of single corporations, and plainly implies a trust. In all the cases of our law, where-ever any persons take in another's capacity than their own, it is always upon trust, as executors or administrators, churchwardens, &c. and all single corporations: and where the law creates the trust, the law provides remedy, if the trust be broken, for putting the trust into safer hands. And likewise, if considered as a right framed by policy, to take in succession, it is in substance the very same with that of single corporations, and if any advantage be in point of duration, it inclines to the side of single corporations; as better framed by policy to have continuance, than the other of aggregate corporations.

1. Because the choice of the successions, whether elective, donative, or presentative, is placed elsewhere, and not in the person himself, that it cannot be in his power to prevent the succession.

2. Because the law leaves it not in his power to determine the corporation, either by surrender or forfeiture, but during his life; and so cannot prejudice his succession.

But in lay corporations the power of succession being intrusted with them by elections to continue it, the whole right is in them, and consequently in their power to determine it, either by not electing, or electing those the law incapacitates, which is the case of Worcester; or every man of them may for good cause be disfranchised, or the franchise for cause seized, and consequently, for want of succession, fail. Besides, to go in succession, doth not necessarily imply a perpetuity. Goods may go in succession, as to churchwardens. A chattel lease may go in succession. The king grants lands for years, rendering the rent to the aldermen of Chesterfield; they take in possession as a corporation, Cro. Eliz. 35. (Mich. 26). The same case, Hales, Corporation, pl. 25. Upon these grounds that there is a condition annexed to all corporations as well as other liberties, and that there is nothing peculiar in the nature of corporations aggregate to exempt them from being liable to seizure for breaches of that condition, I conclude, corporations may be taken into the king's hands by seizure; which is a separation of the liberty of being a body politic from the natural persons who (as Bracton phraseth it) were but *usufructuarii* and had not *absolutum dominium*. And by this separation the natural persons are only restored to the government of the common law.

The mischiefs that would inevitably follow, were the law otherwise, have been insisted on by Mr. Solicitor. It were to set up independent commonwealths within the kingdom; and according to the judgment of the parliament 21 Ed. 3. would certainly tend to the utter overthrow of the common law, and the crown too, in which all sovereign power to do right, both to itself and the subjects, is only lodged by the common law of this realm.

The answer Mr. Recorder applied to the mischiefs, that they may be otherwise punished, is of little avail. Though he did not express in what manner they might be punished, yet it must be intended by fine, or at the suit of the persons injured by their oppressions. The same answer may be applied to the oppressions by officers, and the abuses of all liberties whatsoever, and likewise to excuse the disfranchisement of any one member of a corporation: But that is no sufficient remedy to cure the mischiefs, whilst the cause still remains and is in as great power to oppress, as before; which nothing can sufficiently restrain, but the loss, at the least, the fear of the loss of that power. To put the subjects grieved to contend with corporations for their relief by their several actions, were for the common law to lay a greater burden upon them, than what they suffered from the corporation; as was sufficiently experimented in the case of the duty of water-bailage of London, before the Quo Warranto was brought to rescue them: And if they recover damages, those damages can only be levied upon the common goods and estate of the corporation, 8 H. 6. 1. And many corporations have little or nothing in common stock, and few corporations sufficient to make satisfaction for all their oppressions. And to prosecute for a fine is no satisfaction to those who are injured, nor doth remove the cause of the oppression. 'And the law would be deficient, if such inferior jurisdictions, or corporations, were not subject to the common law upon the like conditions as other liberties, franchises, and inferior jurisdictions are. [19 H. 6. 64. 9 H. 6. 36. Fitzh. Ex. 128.]

Mr. Recorder hath affirmed it with great assurance, that never any till this suit ever so much as thought of resuming corporations, which are subordinate governments. I shall only request of him, and of the other gentleman of the city's council, to shew me the opinion of one learned man of this kingdom, or any other nation, deliberately delivered upon the question, that fedatory and subordinate governments cannot, for any cause whatsoever, be forfeited or resumed. That *de facto* they have been resumed in other nations, is testified by many authors, with their opinions, that *de jure* they may so be; which I forbear to trouble the court with. Within this kingdom of that nature are counties palatine, the Cinque ports, the liberties of Ely, lordships, marches,

and such-like, and the corporations of cities and towns; which are all held of the crown of England. What the practice and judicial opinions have been concerning these liberties, according to the law of this land, Mr. Solicitor hath shewn in several instances; which I shall not repeat, but shall produce some others to prove the same matter. I beg leave to rescue a very considerable precedent produced by Mr. Solicitor, from the gloss Mr. Recorder was pleased to put upon it, that it was an act of parliament; when it is no such matter, but a judgment of the King's bench in point upon a forfeiture. It is the case of Sandwich, cited p. 9. Ed. 1. Rot. majus 35. Kane. The record is amongst the plea rolls, in the treasury or tally office.

It was upon an information at the king's suit presented by the sheriff of the county against the mayor of Sandwich, and three others, for assaulting the sheriff's bailiff upon execution of the king's writ within Stanore, beating the officer, and taking the writ from him, and tearing it, and stamping it under his feet. They plead to the jurisdiction, that Stanore was within the liberty of Sandwich, within the Cinque ports; and that 'De aliqua seductione fac' corporis Regis, non tenentur respondere alibi,' than at the court at Shepway. The plea was over-ruled upon this ground, that none could claim such a liberty without express grant; and they shew no charter for it, and were ruled to answer over. They insist upon that exemption, and refuse to give any farther answer; whereupon judgment was given, that they be committed to prison: And the judgment goes farther, 'Et quia Johannes Dennis Major de 'Sandwich convictus est de transgressionibus 'prædictis: et factum Majoratus in his quæ 'tangunt Comitatum est factum ipsius commu'nitatis, consideratum est, quod Communitas 'de Sandwico amittat Libertatem suam.' This is an express judgment of this court upon the forfeiture of the liberty, for a crime committed by the mayor and others, in a matter relating to the whole liberty. Before this, the franchise of Sandwich was seized, as forfeited into the king's hands for a notorious riot committed by the inhabitants, in obstruction of justice, 3 Ed. 1.

The case upon that record was thus: upon an inquisition found of purprestures within the king's warren of Dover, by stopping a water-course, whereby the warren was overflown, a writ issued from the court of Dover, to distrain the offender by his goods, to amend and remove the purpresture: the officer distrains the cattle of Simon Ercheston, who was the offender, and lived at Sandwich, within the Cinque Port. Some of the men of Sandwich make rescous; and when the constable of Dover sent messengers to complain to the mayor of Sandwich of this rescous, and to require redress; after the complaint made, and no redress had, several of the men of Sandwich fell upon the messengers, and severely beat them. Then the constable sent more officers to see right done, against whom the town was barrocaded and chained, and his officers kept out by the townsmen in hostile manner. Then the constable went in person, and after some time suppressed the tumult, and upon their submission, the commonalty prayed the constable would deliver their submission to the king, which they then delivered to him under their common seal; and accordingly was delivered by the constable to the king and council, and adjourned into parliament: And the mayor, bailiffs, and commonalty ordered to be there at a certain day, before the king and his council in parliament. Upon hearing thereof in the presence of the mayor and bailiffs for the whole commonalty, judgment is thus entered upon that record; 'Consideratum fuit per Dominum Regem et con'cilium suum in Parliamento, quod Majoratus 'et Libertas de Sandwich pro prædictis Trans'gressionibus in manus Regis capiatur, et tra'datur in custodia Constabulario de Dover, ad 'disponendum de prædicta Villa secundum 'communem Legem et Consuetudinem Regni, 'non obstante aliqua Libertate.' It evidently appears, both by the form and matter of it, that that form was judicial, and not legislative, and agreeable to the forms of judgment in the other common law courts, and in our law books. Here is a judgment only of seizure upon a forfeiture, yet it amounted to a real ouster; for the town was actually divested of the liberty, and delivered up to the government of the common law. For 'capiatur Majoratus et Libertas de Sandwich' in the singular number, in 'manus Regis tradatur in custodia Consta'bulario suo,' who is the common law officer, within the Cinque Ports, is no more than leaving the town to the government of the common law; which is fuller explained by the subsequent words of 'disponendum de Villa secun'dum Legem et Consuetudinem Regni.' And it appears by this record, that there is a difference between the liberty and the 'ville,' though sometimes 'ville' is used for the liberty of the 'ville;' but here the mayoralty and the liberty are seized, and the 'ville' delivered over to the common law officer. [Pasch, 3 Ed. 1. Kane' 51. Dorso Rot. majus.]

The next precedent I insist upon, is that recited by Mr. Recorder, the case of the town of Cambridge, but lamentably defaced by my lord Coke's marginal note, and Mr. Recorder's averment, that by the record it appears to have been by common consent of parliament. I rather insist upon this, for that Mr. Recorder hath acknowledged its force, that it worked upon the Corporate Right, and was upon a forfeiture; but lays the force of it in its being an act of parliament, when in truth it is a plain judgment of a court of law, and it appears by the record it was no act of parliament. Mr. Recorder cited the record 8 R. 2. No. 11. 4. Inst. 228. and it is probable Mr. Recorder looked no further than that book for it: in the margin it is so cited, but miscited; yet in the body of the book, in putting the case, it is truly cited; for the record is 5 R. 2. 45. to 66. and it is evident by the marginal note; and my

lord Coke's saying it was the common consent, misguided Mr. Recorder, to affirm it to be an act of parliament, when the contrary appears by the record. The complaint to the king and council in parliament against the town of Cambridge as for a great riot committed, and an assault upon the university; and the fact in substance is the same as related in the fourth Institute. It was prosecuted at two suits, the one against the late mayor and bailiffs, who were at the time of the riot in their natural capacity; the other against the mayor, bailiffs, and commonalty, in their corporate capacity; the writs returnable 'coram nobis et concilio 'nostro.' The former mayor and bailiffs appear, and plead in their natural capacity, that they were neither assenting nor aiding to the riot; neither did nor said any thing, that might turn to the damage of the university, unless only by coaction, and outrageous compulsion: and there seems to have been no further proceedings in that suit. Upon the other writ, the mayor, bailiffs, and commonalty appear, and pray they may have a copy of the articles, which were read to them, and counsel allowed to them, and time to answer; and such answer was returned, as is mentioned in the 4th Inst. But in the record it is said, it was answered by the court; and that the court told them, that at present they should not be put to answer to the crime, (which must be in order to a fine) but only touching their liberties. [Cotton's Records.] Then touching their liberties, they put in a plea by their counsel, to the jurisdiction of the court, which is omitted in my lord Coke; only he saith, after many dilatory shifts and subterfuges following therein, the court over-ruled the plea to the jurisdiction, and ruled them to answer in chief; and if not, judgment should be entered by 'Nihil dicit.' They then pleaded a frivolous plea, partly Not guilty, partly in excuse; and the king's serjeant replied, and the plea was held naught. Thereupon they submitted, as to the franchise, to the king's grace, saving that it might be no conclusion to them, if they should be called in question for the crime. Whereupon judgment of seizure was only given. The words of the record say thus: 'Nostre Seigneur le Roy de 'Assent des Prelates & Seigneurs en cest Par-'liament fist seiser la dit Franchise en sa 'maine come forfeit pur la ditz Causes.' Throughout the record it appears by all the proceedings they were judicial; but the plea to the jurisdiction of the court, and the judgment by the king and lords only are demonstrations it was no act of parliament, nor adjudged by the legislative power, but by a court of law.

It appears upon the same record, that the king granted several of the particulars which were seized to the University, who enjoy them to this day. 'Et la Remanante de la Franchiss 'de la dit Ville' the king granted to the mayor and bailiffs, to hold of him and his heirs, at the ancient rent of 101 marks.

33 Ed. 1. Plac. Parl. 277. The liberty of the city of Winchester seized into the king's hands by judgment of the king and lords, for suffering a hostage of Baion, who was committed to their charge by the king for safe custody, to escape, to the king's great damage. The writ of seizure is directed to the sheriff of the county, 'quod prædictam Civitatem Win-'toniæ, et Libertatem ejusdem Civitatis, cum 'omnibus ad eas tangentibus sine dilatione 'capiat in manum Regis, et eas salvas custo-'diat, donec Rex aliud præceperit.' Whereby the franchise being seized, the men of the city are put under the government of the common law officer. Afterwards the city compounded with the king for 500 marks, and then the king 'reddidit eisdem Majori et Civibus 'Civitat. et Libertat. prædict. habend. et 'tenendum in forma qua eas tenuerunt ante 'captionem earundem in manus Regis,' and letters patents of restitution were granted, and a writ of restitution directed to the sheriff.

These were judgments by the king and lords in parliament, upon forfeitures, and were judgments of seizure only, according to the settled rule and practice in the common law courts.

Mich. 18 Ed. 3. Rot. 161. B. R. in the treasury or tally office. A judgment of the King's-Bench against the town of Ipswich, upon a forfeiture. The bailiffs of Ipswich are impleaded by the king, upon a special information, reciting that in the King's-bench, sitting there, several malefactors were indicted for the death of one John Holtby; and that many of the said town, 'tam de majoribus quam de 'mediocribus,' did comfort and encourage the felons after the felony committed, and treated and entertained them with viands and great joy. And, after the departure of the Justices, kept a mock court publicly, and summoned the justices, and the officers of the court, to appear under several pains. To which the bailiffs appeared, and were opposed, by the court, why they did not attach and stay the malefactors? They answered, the malefactors flew to sanctuary. Being further opposed, that they did not attach those of the town, that furnished the malefactors with 'esculenta, et poculenta,' they pleaded, 'quod non ausi fuerunt, eo quod tanta 'fuit multitudo gaudentium et plures eorum 'fuere e parentela malefactorum:' whereupon judgment was given 'contra Balivos et com-'munitat. Quod custodia ejusdem Villæ seisi-'atur in manus Regis, et quod aliquis ex parte 'Domini Regis, qui sit ausus ad pacem domini 'Regis manutenendam, se intromittat in eadem 'Villa, quousque Dominus Rex aliud inde 'dixerit.' Which the record shews, is the bailiff of the county, the common law officer. And the mayor and the bailiffs in open court surrendered their staffs of office. This Judgment is agreeable to those in parliament, and of seizure only.

R. Claus. 7. Johan' Memb. 24. Civitis et Libertas Norwici was seized into the king's hands, for hanging approvers without the licence of the king or his justices; and the mayor was

summoned to answer for the damage done to the king. Rot. Fin' Memb. 10. (13 Ed. 1.) the liberties of Norwich seized for a great riot, and burning the church: The case is mentioned Roll. Prerogative, fol. 204. The liberties of Norwich were again seized, 21 H. 6. upon a presentment of a great riot taken before Fortescue, and afterwards regranted to them, 27 H. 6, Patt. Roll. Memb. 19. The case is cited by Mr. Noy, in the case of the city of London, concerning the death of Dr. Lamb, Cro. Car. 252.

The liberties of Oxford were seized, 32 H. 3. for a great riot committed by the townsmen, when the king's brother was there, and killing of his brother's baker. The writ to the sheriff runs thus; 'Quod capiat in manus regis villam de Oxon: ut eam salvam custodiat ad opus Regis, ita quod major et homines ejusdem nullam inde habeant administrationem;' the king in the same year pardons them, and grants them restitution, and a writ to the sheriff to put them into possession, 32 H. 3. Memb. 13. Hal. Lib. L. f. 326.

Again the liberties of Oxford were seized 29 Ed. 3. and part of their liberties granted to the university, which are enjoyed by them to this day, and the residue restored to the town; the seizure was for a riot committed, Rot. Claus. 29 Ed. 3. M. 21.

20 H. 3. The liberties of Evesham, for using false measures, when the king was there, and afterwards, upon submission of the abbots and monks, the king makes restitution to them, R. Cl. 26 H. 3. M. 8.

18 Ed. 1. The town of Southampton was seized into the king's hands, for wounding, even to death, an officer in serving the king's writs: they after submitted to a fine, and took a new grant, and raised their fee farm rent to 20*l.* per ann. Roll. Prerog. fol. 204.

It would be too great a trouble to the court, to cite more precedents of seizures for forfeitures. In all these instances restitution was never made by the court, but by the special grace of the king, after submission to him, and upon such terms as he was pleased to accept; and in some cases was pleased to restore them to the whole; in other cases, but to the part of the liberties. That this liberty of being a body politic may be seized into the king's hands by Quo Warranto, Mr. Recorder in effect hath admitted it if the suit be brought against particular members, and the cases produced by him prove it. For in the case of Cusack, the *Curia advisare vult* was upon that very point of being a body politic: and the case of the Virginia company, the very liberty of being a body politic is by the judgment seised into the king's hands.

I will give some instances where it hath been done, in cases of Quo Warranto, against them by the incorporate name.

Fitz. Avowry 129. In the Iter of Lancaster, a Quo Warranto against the bailiffs and commonalty of Lancaster: they appear, and claim by a charter of king John, whereby the king grants to them all such franchises, which the borough of Northampton had; but do not set forth upon record what franchises Northampton had: nor do make title to the franchise by prescription: and for that reason judgment was given, their franchise be seized into the king's hands as forfeited.

In the case I before cited, a Quo Warranto against the bailiffs and aldermen of New Radnor, and judgment against them by default, that the liberty should be taken and seized into the king's hands, though afterwards it was reversed, because *in misericordia* was entered instead of a *Capiatur pro fine*; yet it is a judgment in point, that a corporation might be forfeited and seized by default in pleading. [B. R. Mich. 20 Jac. 1. Rot. 17.]

The case of New Malton, Trin. 6. Jac. 1. R. 3. is an express authority, that this liberty may be seized by judgment in a Quo Warranto against the inhabitants of a town, by their corporate name. It is brought against the bailiffs and burgesses of New Malton; and the form of the information is the very same with this against the city of London. They plead by their corporate name, and entitle themselves to the liberty by prescription; and verdict and judgment against them by their corporate name of seizure only, that the liberty be taken and seized into the king's hands; and which is more, the 'Capiantur pro fine' against them is entered against them by the corporate name of 'Ballivi et Burgenses,' though the corporation by the seizure was dissolved; and the reason, no doubt was, that that general name was a sufficient description of these persons who were liable to the fine for their usurpation. And no doubt can be made, but that the true liberty may be forfeited and lost, by insisting upon a wrong title, as well as by default or any other forfeiture whatsoever. This town lies under the weight of that judgment to this day; and are no corporation; and being opposed by the interest of the Lord Eure, who prosecuted that Quo Warranto, did never obtain any restitution or regrant.

A Quo Warranto against the bailiffs and burgesses of Berkhamstead in com. Hertford [Mich. 15 Car. 2, 23 R.] They appeared, and judgment *pro defectu responsi* given of seisure, Pasch. 16 Car. 2, and they are no corporation at this day. In the ancient eyres, the justices in eyre, when upon claims put in, the liberties were lost, either upon some defect in pleading, or for some small abuser or mistake, the justices were intrusted with the king's mercy, to admit to a fine for redemption, and make restitution: But judgment first passed for seisure. And regularly upon the general summons of Quo Warranto in eyre, or special suit of Quo Warranto, which are all founded in the same right, no other judgment can be given, if for the king, but a Capias in Manus, or of Ouster; if for the defendants, a judgment of allowance, or 'Eat sine Die.' The 'Capias pro Fine' is collateral, and for the usurpation, not for the cause of forfeiture or

seisure. It was one of the articles of inquiry in eyre, how they had used their liberties? If an abuse was found, though never so small, judgment of seisure was given; though afterwards redeemed by fine upon submission. Quo Warranto upon a claim of view of frank pledge in eyre. [Rastal. pl. 1, fol. 540.] It was demanded of the defendant, if he had any pillory or tumbrel? he answered, he had not. Judgment was prayed on the behalf of the king; for that amounted to a forfeiture; and if that were not sufficient, that then it might be enquired on behalf of the king, how they had used the liberty? The jury find, that the defendants and their ancestors had view of frank-pledge, but find that the defendants had taken amerciaments of offenders against the assize for bread and beer, amounting to two shillings, in such cases where the offenders should have been punished by the pillory and tumbrel. 'Ideo consideratum est, quod Visus capiatur in manus Regis.' And then they pray they may have their liberty again upon a fine, which is granted to them, upon pledges for well using of their liberties. And there is no difference where the liberty is lost upon a defective claim or mispleading, or for a forfeiture in Quo Warranto; the judgment is the same of Capias in Manus; and it is all one, whether the cause of forfeiture be found by a jury, or confessed upon the pleadings, in a Quo Warranto.

The next preliminary point which was moved, is, whether the acts of common council be the acts of the corporation, and do oblige them?

It seems a strange question, that when to assemble, consult, determine, and to make orders and by-laws for the rule and government incident to every corporation, without special clauses of grant, and that herein only consists the exercise of the politic reason of the whole body, it should be doubted, whether what they determine and resolve upon, being so jointly assembled, be a corporation act, or may affect the corporation? Upon the erection of all corporations, this power of assembling, deliberating, and determining for the corporation, is either intrusted with a few particular members, whose continuance in that trust (both as to the present members, and the succession of them) is directed by the several charters: Or else it is intrusted with the whole body, and that either expressly in plain words, or by implication of law, when the charters are altogether silent therein: The law in such case lodgeth the power of assembling, debating, and determining for the corporation, in all the members; and the whole, jointly assembled, (or so many of them as upon notice shall appear) constitute the common council: And such assembly is not stiled the common council from being retained and giving of counsel, as Mr. Recorder would have it, in which sense he only, and the common serjeant, are the common council of the city; but they are so called from their joint assembling and consulting for themselves, who constitute the body politic. In the same sense, the parliaments of England, by many authorities, are called 'Communia Regni Concilia.' This power, thus lodged in the whole, may be the whole, or the major part, which always binds the whole, being lodged or delegated to a certain number, which may represent the whole. In such case, where the power is transferred, those members to whom it is transferred constitute the common council in the same manner, and their acts are of the same obligation, as where all meet, unless the delegation were not general, but certain cases reserved for the determination of the whole, as hath been done in several corporations; but in all cases not excepted, their acts are the acts of the whole body. Where the common council is constituted of the whole body, or of all the members who will meet upon notice, there is no room left for doubt, but their acts, and the acts of the whole corporation are the same. Mr. Recorder seems the only person that ever doubted it, and is not to be beaten from his holds.

First, That the common council consist only of particular members, and their acts bind only the members; 'et actio non egreditur personam.'

Secondly, That no corporation act can be without the common seal.

Thirdly, That the acts of the common council of London are under the protection of the statute or charter in parliament of 1 Edw. 3, their acts are personal, and they but ministers of the city; and that the charter provides, that the liberty of the city shall not be taken into the king's hands for any personal trespass of any minister of the city.

For the first, I have already demonstrated, that there are no acts of the corporation, but what are performed by the particular members; I will not repeat. I have produced many instances, that in point of crime the acts of particular members do affect the corporation, touching their liberty. That they do so in point of wrong between subject and subject, the cases are infinite; I will only mention the authorities: 9 H. 6, 36, b. 8 H. 6, 1, a. and 14, b. 45 Edw. 3, 2. b. 15 Edw. 4, 1, b. 5 H. 7. 26, a. 4 H. 7, 13, a. 32. H. 6. 9, a. 7. I shall add one case more, that absolutely destroys Mr. Recorder's hypothesis, upon which he relies, 'That a corporation cannot do or suffer any wrong;' it is 48 Ed. 3, 17, b. The mayor and commonalty of Lincoln bring covenant against the mayor and commonalty of Derby, upon a deed of covenants made by the predecessors of those of Derby to the predecessors of Lincoln, that those of the town of Lincoln should be discharged from toll for their merchandizes brought to Derby. In their court they assigned for breach, that two of the burgesses of Derby by name did exact and take toll of several of the burgesses of Lincoln. The defendants first take exception to the count for variance from the writ; that the writ supposeth and alledgeth the breach to

have been committed by the mayor and commonalty, and the count assigns the breach by two burgesses: The exception is over-ruled, and the court held pursuant to the writ for the breach of covenant, which binds the whole, and must be made by members. Then it was insisted upon, in point of law, That the act of the two burgesses did not oblige the corporation. It was admitted, that the act of all the members met together would oblige the corporation: But it was resolved, that it was a breach, and obliged the corporation; and that the taking of toll by their officers was a taking of toll by the corporation; and the reason given is, that all the members of the corporation cannot, by any common intendment, be understood to meet together to take toll. Here is an express judgment, that 'Crimen egreditur personam,' and shall render the corporation liable for wrongs done to a particular member of another corporation. Much stronger is the case of the king upon breaches of the condition in law, as I have shewn, where the acts of the particular members, committed against the king's officers, are adjudged done against the king, and render the corporation liable; but when all meet together, and do not act, I may say it was never yet doubted but the corporation was obliged.

The case of Warren, [Trin. 17 Car. 1. Cro. 540.] which was cited, of the place of common council-man of Coventry, is nothing to this purpose; nor the reason given, That such place was collateral to a corporation; which was no more, than that the court could not *ex officio* take notice of it as a fixed place or office, but must take it upon the return; it being variously used in several corporations, as I have shewed; and the custom being returned to choose and remove them *ad libitum*, the court could not judge otherwise, as they may of the freedom of any member, which is the same in all corporations. And therefore in the case of Estwick and Bret, common council-men of London, where the court could take notice; they were chosen for a time certain, the court adjudged they could not be removed without cause, and granted restitution, [Trin. 23 Car. 1. Rol. Restit. Pl. 8. fol. 456.] That the members of a corporation can be punished only in one capacity, and not in both capacities, and impeaching them for treasons and felonies in their corporate capacities, will be licensing them, or at least giving them an exemption and encouragement to commit these crimes *impune* in their natural capacities, is a strain so much above *Ela*, that I cannot understand it. Sir James Bagg's case teacheth other doctrine, That the punishing of any of the members criminally for infamous offences, by fine, imprisonment, or pillory, at the king's suit, doth not exempt the criminal from disfranchisement.

The many precedents I have produced do prove, that the rioters or members, who committed the cause of forfeiture, were not discharged by proceeding against their liberties. In the case of Norwich, for hanging the approvers, the liberty was seized for misgovernment, and process issued against the mayor to answer it at Westminster, *criminaliter*. And in the case of Cambridge, the Court told them, they did not then put it upon them to answer criminally, but as to their liberties. And they themselves knew, that by seizure of their liberties they were not discharged of their crime: and therefore in the plea of submission they insert a saving, that it might be no conclusion to them, in case they were impeached criminally. Mr. Recorder doth admit, that if all the members commit treason, and be executed, the politic person is destroyed as well as the natural persons, and that justly too for so great an offence; and therefore the extent of forfeitures doth not encourage, but deter offenders from commission of the crimes. And the citizens, when they know that their riots, oppressions, and libelling of the government, do not only subject their persons to punishment, who are the immediate actors, but also subject the constitution and government of their city to be questioned, will look upon themselves under stricter bonds for discharging their duties, than common subjects are. And therefore the nobility, who have so great a share in the government, for treasons, do not only forfeit their lands and lives, but their right of peerage, which is a special trust for government; and that was forfeited, in cases where their lands were not forfeited, but only during their lives, upon the condition annexed to that special trust; as before the statute of 26 H. 8, if a nobleman (to him and the heirs males of his body) having entailed lands, commit treason, his lands are not forfeited from his heir in tail; but the dignity is forfeited and extinct, and not supported by the statute of Donis, by reason of the condition annexed, Nevil's case, 7 Co. fo. 34. The law is the same, where the dignity is granted in parliament, or by act of parliament, it is no less forfeitable in one case than in the other; the condition the law annexed is still the same. If when the members of a corporation, *corporaliter* assembled, commit treason against their prince, it must certainly be acknowledged to be against their duty, in whatever capacity they be considered; especially since the statute of king James, which makes the oath of allegiance to be part of every freeman's oath; and the corporate right is held of the king. If the law allowed no other way of taking advantage of forfeiture of the corporate right but by executing of all the members, the law itself might be accused of as great tyranny as ever was practised by the greatest of tyrants. And to this, and nothing else, the principle laid down by Mr. Recorder, that treasons, murders, and felonies of the members do not affect the corporation in law, doth directly tend, viz. to introduce cruelty.

The objection that no acts are corporate acts, or can affect the corporation, but what are under the common seal, nothing certainly can be more vain than such an assertion. Then no

mayor, sheriffs, or other officers, ever acted legally in their choice by the corporation, because not under the common seal: then no by-laws are valid as corporate acts, because not under the common seal: the same may be said by most of the corporate acts in cities and towns.

In the case of Cambridge before the king and lords, 5 R. 2. Birdfield and other burgesses appeared on the behalf of the commonalty. The court demanded of them, if they had authority under the Common Seal of the town? They answer, the town had no Common Seal, but that they were chosen at a common assembly of the town summoned for that purpose, which is the Common-Council, to appear for the commonalty, to answer and receive 'ce queux la ley volt,' and the authority was adjudged sufficient. The common council say they, are but ministers of the city, and the liberty of the city hath a special protection against the personal acts of their ministers by their charter in parl. 1. E. 3. I have a copy of that charter by me from the records in the Tower. The king's grant indeed is, 'de assensu Prælatorum, Comitum, Baronum, et 'totius Communitatis Regni in instanti Par'liamento.' The considerations of the charter are 'pro melioratione Civitatis,' and for the laudable services of the mayor, aldermen, and commonalty, performed to the king and his ancestors; but the grant is only 'Civ. Civi'tatis prædict. habendum sibi et successorib. 'suis.' The words of the grant are: 'Quod 'pro aliqua personali transgressione vel judicio 'personali alicujus ministri ejusdem Civitatis 'non capiatur libertas illius in manum nos'trum vel heredum nostrorum, nec custos in 'eadem Civitate ea occasione deputetur; sed 'hujusmodi Minister, prout qualitas trans'gressionis requirit, puniatur.' These are all the words in that charter, which refer to this matter; and the same were granted to them in some former charters out of parliament. This appears by this charter in parliament, that 'Libertas Civitatis,' which is the franchise or corporation, had been seized, and might be seized, for some personal miscarriages of the ministers; for it is merely the king's grant that exempts them from it for the time to come. I do agree, that every personal miscarriage of their ministers was never any cause of forfeiture; but it must be miscarriages of omission or commission, which amounted to a misgovernment within the corporation. As 30 H. 2. Rot. Cl. memb. 5. The city of London was taken into the king's hands, for not levying a hue and cry upon the death of persons who were slain, Hale Lib. L. fo. 269. H. 3. memb. 2. Their liberty seized for giving of false judgment in the hustings, Lib. L. 309. These are sufficient to shew what are the 'personalis 'transgressio,' and 'personale judicium' intended to the charter; though many the like instances may be produced. Who are the ministers intended, partly appears by the charter; but fuller by other authorities, viz. Mayor, and Aldermen, and Sheriffs, who are in that charter expressly mentioned. But this charter did not prove of any great or long advantage to the city, in differing them as to this privilege from other corporations; for they were met with, either by excessive fines set upon their officers for personal defaults and false judgments; or that it excused the city only upon the first offence; and if again they committed the like offence, it was no longer personal, but become their offence, because they did not displace their officer to provide against his reiterated crimes. And therefore, as Mr. Solicitor hath shewn, the liberty of the city of London was after this seized into the king's hands for misgovernment; besides the punishment of their ministers became difficult, because the offences being committed in London, the inquiry of them must be by men of the same, who favoured these officers. And thereupon, to settle this matter, an act of parliament was made by the same king, which is in print. The principal grounds of the act, as the act recites, 28 Ed. 3. c. 10. were that the notorious errors, defaults, and misprisions for default of good governance of the mayor, sheriffs, and aldermen of London, could not be enquired of, nor found by men of the same city. The act settles the rule, that for the first default of the mayor, sheriffs, and aldermen, they shall forfeit 1,000 marks; for the second offence 2,000 marks; and for the third default, the franchise and liberties of the city shall be taken into the king's hands, and this for the defaults of their ministers; which is a plain judgment in parliament, that the franchise of London may be forfeited; and explains the charter of the first Ed. 3. And to make the remedy effectual, these defaults are omitted to be enquired after by the juries of foreign counties; and so shut the door against all pretences for the charter, 1 E. 3. and former charters. It is enacted, that the ordinance shall be held firm and stable, notwithstanding any franchises, privileges, or customs. By this law the fines of their ministers for their first and second offences, in breach of good government, are ascertained, which by the former charters were at discretion: but for the third offence of their ministers, their franchise might be seized as before 1 E. 3, and their other charters might, for the offence of misgovernment, and from thence till this statute for the second offence. But neither the charter 1 E. 3, or this law, did extend to any outrageous acts of their members, as breach of their duty and good government, but only to the personal acts of the mayor, sheriffs, and aldermen, in their several trusts committed to their managery. Under this law the city of London stood till 1 H. 4, from which king the city expected greater favours than ordinary, as having merited them by being the chief instruments of his promotion to the crown; but the manner wherein they were instrumental, I forbear to mention. Yet from that king they could obtain no more, as to the forfeitures for the per-

sonal offences of their ministers and officers, than to be put into equal condition with other cities and boroughs. The statute, after recital of 28 Edw. 3, that our lord the king considered the good and lawful behaviour of the mayor, sheriffs, and aldermen, and of the commonalty of London towards him, and therefore willing to ease and mitigate the penalty aforesaid, by assent of Lords and Commons hath ordained and established, that the penalty aforesaid, as well of the 1000 and 2000 marks, and the seizure of the franchise, shall not be limited in a certainty; but the penalty in the case shall be by the advice and discretion of the justices, as other cities and boroughs be within this realm; and that the remnant of the statutes stand in their force; So that from 1 H. 4, the city of London never could pretend to any other exemption from forfeiture of their franchise than other cities and boroughs may.

Here I crave leave to join some other records to those produced by Mr. Solicitor, particularly relating to the city of London.

2 Pat. Roll. pars. 2. memb. 9. The king appoints John Lord Breaton custos of the city, with commission to amerce and punish the aldermen and others of the city, according to their demerits.

8 Ed. 2. Memb. 3. dors. A writ issues for the orderly choosing of the mayor and sheriffs, which began then to be tumultuous, and, as the record saith, 'Quod quidem populares et 'plebes, conspiratione inter eas habita, dissidia 'innumeraque facinora in dicta civitate nocte 'dieque perpetrantes, conventiculaque clandes'tina in locis privatis facientis, non vocati et 'summoniti, hujusmodi Electionibus se im'miscent communicationibus et clameribus.' The writ recites the elections to have been 'per Aldermannos et alios cives discretioris et 'potentiores;' and commands that they be so done, 'prout in eadem civitate antiquit fieri 'consuevit:' Otherwise, that the king would not admit them, when presented to him, or his exchequer.

14 Ed. 2, pars 2. memb. 22. The king grants the office of mayor, seized into his hands at the Iter in the Tower, to Robert Kendall, *durante beneplacito.*

15 Ed. 2. pars 1. memb. 2. The king first replevins to the aldermen, sheriffs, and citizens the office of mayor, who present to the king Hammond de Chigwel for the office, and the king admits him; and then the king grants to the aldermen, sheriffs, and citizens, the mayoralty to hold at the king's pleasure.

26 Ed. 2, memb. 5. The king absolutely restores to them the mayoralty, to choose as before the seizure into his hands.

16 R. 2, pars 1. memb. 28. dors. A commission issueth to the duke of Gloucester, and several lords and judges, to inquire of the defaults of the mayor, aldermen, and sheriffs, upon the statute of 28 Ed. 3.

16 R. 2. memb. 2. dorso. The commissioners sat at Eaton, in Com. Bucks, and the mayor, sheriffs, and aldermen, were convicted of several miscarriages, and the liberty of the city (by the judgment of the court) seized into the king's hands; and the king (by the advice of his council at Windsor) constituted Baldwyn Badington Mayor in the room of William Venner, and two other sheriffs, and 24 aldermen, to hold during the king's pleasure; and they all took their oaths before the king and his privy council: And in that record the prior of Christ-church was sworn an alderman.

16 R. 2. pars 2. memb. 31. In the same year the king, at the intercession of the queen, grants to the aldermen, sheriffs, and citizens, that they might use their franchise, as they did before the seizure; but with this clause of restriction, 'Quousque aliter ordinaverimus.' Upon which the city chose John Hend mayor, and John Shadworth and Henry Venner sheriffs, who were removed the same year by the king, and Henry Dalingrugs appointed mayor, to hold during the king's pleasure.

16 R. 2. pars 1. memb. 36. The record assigns the cause, 'Pro minus discreta et in'sufficienti gubernatione et regimine civitatis 'nostræ.'

20 R. 2. The king makes full restitution to them of their liberties; in print, and in the charter pleaded.

22 H. 6 memb. 25 dorso. Elections of mayor and sheriff beginning again to be tumultuous, a writ in the nature of that in Edward the Second's time issued, commanding the choice to be 'per Aldermannos, necnon discretiores 'dictæ civitatis, adhuc specialiter summonitos,' according to the ancient custom: And after, in Edward the Fourth's time, the choice was settled upon the livery-men by act of common-council.

So then there can remain no question, but that the mayor, sheriffs, aldermen, and all the commons in council assembled, may commit acts for which their franchise may be seized; And though there may be no real difference where all the commons assemble, and where only a certain number elected by the rest; yet I shall not farther discuss that point at this time, because that question doth not arise upon this record. For the offences wherewith they are charged are both laid, in the replication, to be committed by the mayor, citizens, and commonalty of London, by which must be intended the whole body.

The whole body plead to it; but in the rejoinder they do not traverse; and deny they did the facts: So that as to the actors, it must be intended they are the same persons, who are sued and defend upon record, which are all the members of the corporation

There are two branches of the first offence laid in the replication:

1. That the mayor, citizens, and commonalty in common council assembled, did make and publish a law for levying of money.

2. That the mayor, citizens, and commonalty, by colour, of that illegal by-law, did ex-

set and levy upon the king's subjects divers great sums of money.

In the rejoinder they take it by protestation, that no act or fact of the mayor, aldermen, and common council, is an act or fact of the body corporate, or politic; which is 'Protestatio 'juris, non facti,' and is that error I have endeavoured to refute, that the acts of all the members of the corporation assembled in common council, are not the acts of the corporation. But yet by this protestation of matter of law they would insinuate a Not Guilty as to making of the law, and seem afraid to own it, and do not barefacedly own it. But after they have entitled themselves to the markets, in such a manner as I afterwards consider, then they proceed to number the people, which surely was not done upon any legal ground to move your judgments. Then say they, that time out of mind there hath been a common council not exceeding 250 persons, elected out of tne freemen; but do not say of what number it doth consist, nor by whom elected, whether by citizens or foreigners, by the mayor, aldermen, or by whom chosen, so as the court may judge of the matter of law so strongly protested, whether they were the representatives of the whole body, or no. Then they say, sir William Hooker mayor, and the aldermen of the city, 'ac communarii, sive cives 'de communi concilio ejusdem civitatis;' which may as well be intended of Mr. Recorder and the common serjeant, who are 'de 'communi concilio civitatis,' as of any other; for the persons are not named, nor is it said they were elected, nor by whom, nor any words of reference to the custom alledged; but generally, that they met in 'Communi 'concilio secundum consuetudinem civitatis,' not referring to the former custom alledged, But being met, they made the by-law for the several sums of money, to be received for the use of the mayor, citizens, and commonalty. Which rates, and no other, the mayor, citizens, and commonalty, 'exegerunt et perceperunt,' according to the by-law. 'Qui quidem actus sive ordinatio est 'eadem lex' supposed, by the replication, to be made by them the mayor, citizens, and commonalty. And traverse *absque hoc*, that any law was made for monies of persons coming to the markets *aliter vel alio modo* than they had before set forth. I know those learned gentlemen who signed this plea, and the other to the charge of the Petition, if they could have found sufficient matter of justification to either, they would not have suffered them to appear upon record in such uncouth dresses; and therefore deficiency of matter may excuse the insufficiency of pleading; for there is skill shewed in the contrivance to have drawn on a demurrer; for nothing was dreaded more than an open examination of the facts upon a public trial, which would have fallen very little short in both cases, as to the aggravation laid in the replication.

Upon this pleading the mayor, citizens, and commonalty have confessed, that the by-law was made for them, and the monies to be levied for their use. They have also confessed, that by force of that by-law they exacted and received the monies; and their justification will be considered by and by. But as to the making the law, they neither confess it made by themselves, nor by any deriving authority under them; neither do they traverse, or deny it. For the averment, that it is the same law, and the traverse, that any law was made *aliter vel alio modo*, is no legal denial, that the whole corporation, consisting of mayor, citizens, and commonalty, did not make that law upon which an issue could be taken. Besides, if Mr. Recorder would have the court intend, that the common council, set forth in the rejoinder, is a distinct body of men from the politic body of the whole city, the whole plea amounts but to the general issue. What the consequence thereof will be, I will consider upon the point of the crimes set forth; but at present the court cannot otherwise intend, but that they that made this law and this petition were the same mayor, citizens, and commonalty, who are expressly charged therewith, and in their pleas they do not traverse or deny it. It is just such another plea, as where an information is brought against several persons for killing and taking away of the king's deer; the defendants should plead, that certain persons, not naming them, nor from whence they come, nor by whom sent, pretended a custom to kill the king's deer, and according to that custom they killed the king's deer for the defendant's use, and the defendants carried away the deer. Who (I pray) shall the court intend killed the deer, but the defendants, or some by their authority?

I now come to the main point of the case: 'Whether by any thing disclosed upon those 'pleadings, there appears a sufficient title to 'the king, for the court to give judgment of 'seizure of the franchise of the city of London?' The title I insist upon for the king, is for a forfeiture by acts done by the mayor, citizens, and commonalty, in breach of their duty, and the public trust reposed in them upon their first erection. It is my part to maintain, that the causes assigned are sufficient in themselves, and sufficiently disclosed to the court, for the court to give judgment upon. I shall consider them,

First, As they stand upon the replication, as crimes laid to their charge, which will amount to a forfeiture of the franchise.

Secondly, How they stand upon the rejoinder and other pleadings, whether sufficiently traversed or denied, confessed and avoided, or in the least extenuated?

First, The crimes laid in the replication, are two in general:

1. Oppression of the king's subjects by colour of law: and,

2. Stirring up seditions by libelling their prince, and his government.

These two only are laid in the replication,

but collected out of many sufficient causes for seizure of any franchise. The notorious riots committed in the face of justice, to the comforting and abetting of criminals, and terror of the judges; and those not only not suppressed or punished by the magistrates, but countenanced and encouraged by them. The tumults of many thousands, exposing and burning in effigy several of the king's Protestant subjects, not suppressed or punished by the magistrates; but by some encouraged, and by contributions supported. The encouragement of libels and libellers of the king and government, by and within the city. These and many more I could enumerate, are common offences to the city of London, with other cities, and populous corporations; but these are such as have been in the cases produced adjudged causes of forfeiture of the franchises for misgovernment.

And in these London hath but imitated itself in former times, and other cities and boroughs.

But in the cases insisted upon, London hath out-done itself, and all other cities and boroughs too, by assuming a power to make laws for levying of money upon foreigners for their own use; and to deliberate, adjudge and condemn their prince's public actions, and publicly libelling of them to his subjects. Never did London before now, or any other city or borough, (in times of peace, and not under an actual rebellion) commit the like breaches upon the government, to assume a power superior to any the king hath in like cases, to lay burdens upon his people, and to levy money, and to invade the king's prerogative by deliberating and determining of his public actions to the consequences thereof, and publicly libelling them to the rest of his subjects. And in execution of such unjust power, that the mayor, citizens, and commonalty, did make and publish a law for levying of money upon the king's subjects, as well foreigners, as others, coming to the public markets with provisions. And chargeth several particulars, and divers other sums imposed upon all comers to the markets, whether they sell or no; and that if any person refused to pay, he should be put out of the market.

Again, That the mayor, citizens, and commonalty, by pretext of this law, made by themselves, and for their own private lucre, did exact and levy yearly, of the king's subjects, sums of money amounting to 5,000*l.* per ann. and converted and disposed the same to their own use, in subversion of the good government of the city; in oppression and depauperating the king's subjects coming to the markets; in raising the prices of provisions in markets, to the damage of the king's subjects; to the manifest disherison of the king and his crown, contrary to the trust reposed in them as a body politic.

In the first branch of their levying money, there is this crime laid to their charge: an abusion of the liberty of a body politic in it's highest point of trust, viz. of making laws for the better government of its members, and other the king's subjects repairing to the city. This is no distinct liberty from the body politic, but incident to it, as hath been shewn; and therefore cannot for any abuse be singly lost, or severed from their body politic, no more than the body politic can subsist or attain the ends of good government, without such a power, which the law raiseth for a better discharge of that trust. But the law entrusteth no corporation with a power to levy money for their private profit, be the colour what it will; nor can such power be derived from the crown to any corporation; neither can any authority be produced, that gives the least countenance to such an authority: the case of Blackwell-Hall is express against it; that was ruled good, because it was *pro bono publico* and not *pro privato lucro*; it was but a small reward for the officer who attended that business; the city got nothing thereby. Corporations, as well as other communities not incorporate, are by law entrusted with power to raise money for uses public to the community; but such power is confined to the precincts of the community; they cannot lay their charge upon foreigners; as for reparation of churches, highways, bridges, and such-like public charges. These crimes, at common law, came the nearest treason of any. Sir Thomas Halley, 20 R. 2, for preferring a scandalous bill, was adjudged to die as a traitor; his life spared at the instance of the bishops; and after 1 H. 4, N. 9, upon his petition, the judgment was reversed. To lay impositions upon the king's subjects was not only an incroachment on royal power, but of the power of parliaments And what incroachments of royal power were treason, what not, was in the breast of the judges, as appears by the petition in parliament, 21 Ed. 3, N. 15, and after settled by the statute, 25 Ed. 3. Certainly that they have an immediate tendency to a rebellion, is evident. To alienate the subjects affection from their prince, is a great step that way; and for so great a body of men (both for riches and reputation) to adjudge and publish, that the king, by his prorogation, hath interrupted the public justice of the kingdom, and the necessary provisions for his own safety, and the preservation of his Protestant subjects, is in effect to determine and publish the king unfit for the government, and by necessary consequence would alien the affections of such as should believe them. Add to this the power they assume, and justify, to levy money to their own use, upon foreigners as well as citizens, and that to any sum; which Mr. Recorder pressed as the force of his argument, that little or more made no difference. When those they have persuaded to draw their affections, shall be assured of such a legislative power to assist them with supplies; what consequences may be expected, every man may judge. Especially if one thing more had been effected, as was contrived and endeavoured to be established; that London should become the

asylum of all malecontents, as Rome was heretofore, who might there vent their gall against the government impune, and without fear of conviction.

I shall consider the offences particularly, as they stand upon the replication, as to the levying of money.

1. They are charged, that they in common council assembled, respecting only their private lucre, and in breach of the trust reposed in them for good government, did assume upon them an illegal and unjust power and authority to levy money upon the king's subjects to their own use, without any lawful authority. And the city of London have by several charters such express power given them, but it is confined to their own members; neither the king nor the law ever gave them any power over foreigners, to charge them for the private profit of this city. Now to assume such a power is a plain usurpation by a body politic upon the crown and the law, and is a manifest breach of that trust for good government, by an open and avowed oppression of the king's subjects by colour of law, which is the worst of oppressions; and therefore the law not only gives a new name, but layeth heavier penalties upon oppressions committed by persons in public trust. It is called extortion, and oppression, where committed by any person in public offices or trusts. It is not sufficient, that the injured persons may have their actions, or that they may be fined at the king's suit; but the law gives a forfeiture of the places of trust, and all may be exacted from them, if the king please. The persons injured may recover their damages: they may be fined at the king's suit, and their offices seized; the law adjudging all these penalties but equal to the crime. The markets, as they stand upon the replication, must be intended free markets, as the streets of London are for all the king's subjects to have recourse to with their provisions for supply of the inhabitants, without payment of any toll. The sums of money, for buying whereof the law is made, as set out in the replication, cannot be for any toll of markets, nor for piccage or stallage, which may be annexed to markets; but imposition upon the persons or goods coming and brought thither, whether they sell or not, and whether they have any stalls or not. And the process is admirable, that if the person refuse to pay, he shall be turned out of the market; as if the law were, that every man that walks in the streets should pay 6*d.* and if he refuse, he should be turned out of the city. I must confess, the process is as good as the law. Thus this crime stands upon the replication. How have the mayor, citizens, and commonalty varied it in their rejoinder? Not one jot; for as to this point of charge, that they usurped such a power, and did execute it by making a law for levying of money in oppression of the king's subjects, they give no answer at all, either by traversing or denying, confessing and avoiding. If they had traversed their making of the law, the special plea had amounted to the general issue; but as it is, there is no answer at all given to it. And therefore, if the making of such law, in the manner set forth in the replication, be an abusion of the franchise, judgment of seizure must be given for that abuse.

The reasons given by Mr. Recorder, that the making of this law will not forfeit the franchise, were these:

1. That if the king had made such a by-law in the charter of incorporation, that would not have forfeited the corporation; no more can it, if it be made by the corporation afterwards.

I do not understand the mystic inference of this argument, unless it be to continue the allegory of resembling corporations to kings, that they can do no wrong, and consequently can forfeit nothing by their acts though against law. Where the king annexeth any power to any offices or corporations, which the law allows them not to exercise, the law doth not adjudge the whole grant void, but only those powers: but if officers or corporations shall assume upon themselves to exercise powers which the king could not grant, against the end of their institution, by extortion and oppression of the king's subjects, it is not sufficient, that the acts are void because illegal: but the offenders shall be punished in such manner as the law provides.

2. In all the suits where by-laws have been adjudged unreasonable and void, it was never held or said, that such by-laws forfeited the corporation; and if it should, every little mistake in the by-law should forfeit the corporation, which would render the state of corporations very unsteady and uncertain.

1. I answer, first, that in those suits between party and party, there was no occasion for the court to declare how far the by-law has intrenched upon the prerogative, by breach of the condition in law annexed to the liberty. But I remember, in the case of the mayor of Wicomb, Mich. 27 Car. 2. upon complaint in this court to my lord chief Justice Hales, of his refusal to sign the poor's rates, he publicly declared to him, that if he persisted in his obstinancy, a Quo Warranto might be brought to seize the franchise.

2. There is a plain difference between by-laws for regulating the actions of the members, and others within the corporation, with a penalty to inforce obedience, and a law directly for levying of money: in the latter case, the levying of the money is the principal end of the law; and to levy it *pro privato lucro*, and upon foreigners, can receive no palliation from being a mistake against all the laws and authorities that are extant. But in the former cases they have a semblance for common benefit, and possibly might be for the benefit of all the members, could the restriction be made by law; and the penalty is but collateral, to inforce obedience, and will stand and fall as the law determines of the principal. And the law no-where determines all the cases where the liberty of any members (as to trade) may not, or may be

restrained, whereby there is room left for mistakes; but against so known and universal a principle, that no corporation can levy money for their private profit, no excuse of mistake can be admitted.

3. That which shelters all other by-laws from oppression, is wanting in this; that as to the recovery of the penalty, they refer to a course of law, whereby they submit their by-law to the judgment of law for its validity, that if they have committed any mistake, it may be corrected by law. But here the remedy is plain force; if the person do not pay, he shall be turned out of the market with his goods: what was settled by wrong, shall be recovered by force. Thus Mr. Recorder's arguing makes the duty a mere voluntary payment; it is, *Solve, aut abi*, he hath his election to pay or be gone. I have not met with a more arbitrary principle asserted or defended in a a court of law. Should the king lay an imposition of 12*d*. on every one that entered Whitehall, with order to the porter to turn him out on refusal of payment, what a dust would this make, that the subjects rights to have access to their prince were invaded? why it is no more than *Solve, aut abi*. The right of all the king's subjects, to come with the provisions to public markets, is far greater, and as great as of the lord mayor, or of any of the citizens to come there; and the putting such terms upon their right is absolutely illegal, in the worst sense that word is at any time used. And herein Mr. Recorder was in the right, that more or less are not material, because every sum imposed in such case is illegal, and what is illegal, cannot be reasonable; which absolutely precludes the averment, that the sums were reasonable; which obtains only in such cases, where of common right some sum may be taken.

4. In the last place, the questioning of a liberty in a Quo Warranto, whether upon the title, or for a forfeiture, is upon the right between the king and the corporation? In case of mistakes and common errors committed, those are not to be justified upon a question of right; and if they be, are no longer mistakes, but wilful crimes. And therefore, in all times such mistakes, both in making of laws and matters of fact, have been passed by and pardoned by the charter of confirmation, 'etiam si abusi fuerint. And in the multitudes of Quo Warrantos that have been brought, most ended by submission before pleader. But where it shall be insisted upon in point of right, though in a smaller point of oppression, upon such grounds as may equally intitle them to commit the greatest oppressions, 'magis et minus,' do not affect the case in point of the right or forfeiture; but the question is, whether they have broken their trust: And if so adjudged forfeiture is a necessary consequence.

3. The third reason Mr. Recorder insisted upon is 19. H. 7. cap. 7. That there had been no need of that law, if corporations by-laws would be cause of seizure.

1. I answer, that statute extends not to the by-laws of cities and boroughs incorporated; but to guilds and special fraternities.

2. It extends to good by-laws as well as bad for greater caution, that they put no new by-laws in ure till allowed; but the allowance makes them neither better nor worse, only shelters for the 40*l*. penalty, as in the Taylors of Ipswich's case, c. 11. b. f. 54. So that the by-laws are but of the same force they were before that statute, &c. If they are good laws, they may be executed without allowance; and I have before shewn, that the addition of another penalty doth not dispense with the penalty upon breach of the condition given by the common law. The other crime of oppression they are charged with, is, that they did exact and levy, to their own use, the several sums, and others, amounting to 5,000*l*. per ann. in oppression of the king's subjects, and raising the prices in the markets for their own private lucre.

Secondly, In their rejoinder, taking by protestation they are not of that value, the mayor, citizens, and commonalty acknowledge the exacting and receiving the monies to their own private use, but say not of what value they are; but be they of what value they will, attempt a justification. It must be admitted, that if the justification be insufficient, the court cannot otherwise judge of the crime than as it is laid in the replication; where it appears to be as great extortion and oppression of the king's subjects, and continued for many years together, by colour of an authority usurped by them, as ever was practised by any subjects upon their fellow subjects; which cannot be denied to be an apparent breach of that trust committed to them, for the better administration of the laws and justice to the king's subjects.

The parts of their justification are these:

(1.) A custom, that time out of mind, there have been public markets within the city.

(2.) They make title to these public markets by prescription, but claim not any toll of common right belonging to these markets.

So that both upon the custom alledged, and prescription made, the court cannot otherwise intend but they were free markets, as in truth they were. Then they alledge a custom, that time out of mind, they used at their charge to provide places where the markets were held, and stalls and stations, and other accommodations for the market-people, and surveyors, and other officers, for the better government of the market-people; and did cleanse, and were bound to cleanse, the market-places. And for defraying of their charges for all the time aforesaid, they had and used to have 'diversa rationabilia Tolneta, Ratas, sive denariorum summas,' of all persons coming to the market, for stalls, stations, and other accommodations for the selling of their provisions. Although they received monies time out of mind, and until the by-laws, they cannot tell what these sums were, nor what to call them, whether tolls, rates, or sums of money. Tolls they could not be, that is admitted of all hands, because against common right, and to be paid upon entry into

the market, whether sold, or not. They do not intitle themselves so much as to piccage or stallage; for they make no title to the land where the markets have been, or are held. And we all know, that before the act of parliament provided at the public charge fit places, and settled them upon a public trust for market-people, what provision was made of places by the city, viz. in the public streets, where there ever was a free market for provisions, as would have been made evident, had the city tendered a sufficient issue. Besides, the sums charged in the replication can neither be of piccage or stallage; but laid upon goods brought within the market, whether the vender made use of any stall, or breaking of the ground, or no. Neither is it averred in this plea, or by any words of reference can it be inferred, that the sums in the replication are the same with those they claim; they claim only by custom 'rationabilia Tolneta, Rata, 'sive denarior' Summas.'

(3.) Mr. Recorder would justify this plea, that such a general claim, with an averment that they are reasonable, is a sufficient justification of particular charges, which are against common right; and insisted upon the claim of the city of London of the water-bailiff's office, with the fees thereto belonging; and the case of Maidenhead in Palmer's Reports, of the market, with the toll thereto belonging. These precedents answer themselves, there was no particular charge for the toll or fees, but what is charged particularly is answered; besides, the toll and fees are claimed of common right, as belonging to the market and office. In Maidenhead's case, the judges agreed, that toll according to common right might be granted by general words; but toll against common right could not, nor be prescribed for but in certainty. In that case reported by my lord Hales, Franchise pl. 11. the difference is expressly taken; and the authorities cited of 9 H. 6. 45. 11 H. 6. 14. Fit Avowry 126. That demands against common right ought to be prescribed for in certainty; and the authorities produced by Mr. Recorder in the lord Cobham's case, 1 Len. 218. Hickman's case, 2 Roll. Abridg. 125. and Roll. 2. Abridg. 265. The case of Dublin for Keyage or Granage, so the case of Hull and Hawks, and the bell-man of Litchfield, prove it. No man questions but cities and boroughs, upon good consideration, may prescribe for sums of money against common right; and may prescribe for an apt remedy for recovery of such sums; but all the authorities prove it must be prescribed for in certainty, that the court may judge of the reasonableness of it. And whoever claims against common right, must make out his demand, both in certainty, and that it is reasonable; it is otherwise, where according to common right, as in fines for copy-hold estates, it is incumbent on the tenant to shew if unreasonable. Besides, this custom is void, because they do not intitle themselves to any remedy for these uncertain sums.

(4.) The next part of the justification is, that time out of mind, within the city there hath been a common council; the imperfection whereof I have already observed.

(5.) They set forth a custom for this common council to make laws for the better government of the markets, and appointing convenient places and times for the markets. 'Et 'ex Assessione et in certitudinem reductione' of reasonable tolls, rates, or sums of money to be paid by persons coming to the market, 'pro Stallis, Stationibus, et aliis Accommodationibus;' so as these laws be profitable to the king and his people, and not contrary to the laws of the land. For the first part of the special custom, for the better government of the markets, and appointing convenient places and times, it needed not; for it is incident of common right to every lord of a market, and the grantee of every market, without special clauses, hath the same power and trust. And yet it is ushered in with great solemnity, a confirmation by Magna Charta, a charter in parliament, 1 Ed. 3. & 7 R. 2. to make good a custom, which is but the common law. Unless they set up this custom to divert themselves, who have pleaded themselves lords of the markets, and so to fix it in others who are no lords of the markets; and thence to infer, that the custom having intrusted others than the mayor, citizens, and commonalty, with the government of the market, they the lords of the market ought not to suffer for the misgovernment of those other members. The second part of the custom is insensible. To make laws and orders 'ex Assessione et in 'certitudinem reductione' of reasonable tolls, rates, or sums of money, to be paid by all persons coming to the markets, for stalls, stations, and all other accommodations. What is meant by 'Assessione' without an Anglice, I cannot imagine: it is no law term; in its proper signification, it signifieth sitting together; whence our sessions quarterly, and sessions of parliament have their name. The general rates set by the parliament upon the several counties are sometimes called assessments, and those entrusted with equally dividing the rates in the several parcels upon the inhabitants, are called assessors. In which of these senses, or what sense the city's counsel apply this word, I cannot resolve; for Mr. Recorder did not resolve it. It seems by the subsequent words to be explained 'in certitudinem ponere,' and to have some resemblance to the parochial assessments, where the duty before is imposed by law, but the ascertaining of every man's proportion is done by the assessors; and this Mr. Recorder inclined to in his endeavours to support the custom, generally for reasonable rates. And in this sense too the city seems to understand it, by waving of the assessment in the rebutter. In our surrejoinder we traverse the prescription of taking of the rates mentioned to be by the by-law assessed, and reduced into certainty; which issue they waive, and insist only upon their prescription generally alledged.

Now, if taken in this sense, the clause is wholly insensible and uncertain, because the tolls, rates, or sums of money to be paid, are not referred to any former law that imposed them; they do not so much as refer to the prescription, and the sums claimed thereby; but the clause is independent and absolute of itself. Neither can the court now intend it to refer to those sums claimed, because we would have so intended it; and therefore took an apt traverse; but the city waived it in their rebutter; and they do lie under this dilemma, that either it must be so intended, and then being traversed and waived by them, the issue must be taken against them; or it cannot be so intended, and then the custom is incertain and insensible. And it cannot be intended by the court for levying of money by a new imposition for the private advantage of the city; that (as I have shewn) would be against law, and is contrary to the prescription they have made, and would vitiate their plea, by claiming the thing by prescription, and by a new law.

6. They set forth a by-law, which imports a new imposition throughout, of several sums to be paid to the mayor, citizens, and commonalty; and they provide a new remedy, that the refuser should be removed out of the market. They aver, indeed, the sums are reasonable; but set out no fact upon which the court may any ways judge they are so; which are incumbent upon him that will claim any thing against the common right. They do not so much as aver, that the mayor, citizens, and commonalty laid out one penny out of their revenue, for providing the markets and stalls, or what other stations or accommodations they furnished the market people with, so as to give the least support to this extraordinary by-law.

And this averment was industriously left out, lest issue might be taken upon it; and sufficiently proved, that both the places, stalls, and conveniencies, were provided for out of the public monies granted by parliament, in trust for all the king's subjects coming to the market, as we have set out in our surrejoinder. Then it would have evidently appeared, that this by-law was not only in breach of the common law trust reposed in them for good government; but in breach of that trust reposed in them by act of parliament. For all the king's subjects, and these public monies received and laid out upon that trust, are made the consideration to ground the subjects oppressions upon by this by-law. Though they laid out not one penny, as appears to the court, yet they acknowledge to have received all the money to their own use; and their justification failing, it must be intended, they did it in such manner as is set out in the replication, which chargeth the highest oppression that can be possibly committed by subjects upon subjects, and is destructive of common justice and good government. It is likewise as great an usurpation upon the crown, to lay taxes upon the king's subjects without his authority, and openly and avowedly to justify it. How much superior this offence is to those, whereupon instances of seisure have been given, I leave to the observation of the court. Their reply, that the toll only can be forfeited, or at most the markets, can weigh little. That the markets cannot be forfeited, Mr. Recorder admits upon the authority of the case of Maidenhead, that toll is not incident to a market. This imposition is wholly foreign to the markets, which must be intended free-markets, wherein all the king's subjects have right to sell and buy, discharged of toll, which shall be intended to have its commencement by erection, not by grant to any person, which the king may do in cases of fairs and markets. Or if they be granted to any person, if without tolls, such grants are upon trust, for benefit of the king's subjects to buy and sell in; and the grantee entrusted with the rule and good government thereof, for the benefit of others. Besides, the seising of the markets is no punishment of the corporation, but of all the king's subjects, who are the persons oppressed, and whose rights are invaded by this imposition. The oppression is by the corporation, and by an authority they claim over the king's subjects, to lay an imposition upon their goods, and to levy it by force; which is an abuse of the power the law hath entrusted them with, and a misuser of the franchise to oppression. To forfeit the sums exacted and levied is idle, and no punishment; for they never had right to them, and so no right can be forfeited. In the case of Maidenhead, where a reasonable toll was granted, they had a right to toll, which may be forfeited by abuser, in taking an unreasonable toll, but where there is no right to take any thing, there is no right to be forfeited, but that right by colour whereof the extortion or oppression is committed. If an officer, by colour of his office, oppress, the office is forfeited, or the officer may be fined; the cases were cited by Mr. Solicitor. The levying of two shillings for the penalty of breaking the assize, forfeited the view of frankpledge. Using of false weights and measures forfeited the franchise of Evesham. And generally, whatever is an apparent breach of good government, wherewith every franchise is intrusted, will, in point of right between the king and the franchise, amount to a forfeiture; because it is a breach of public trust reposed in them by law. [R. Quo Warranto 1.]

2. I shall conclude with the last branch of their crimes laid to their charge:

For invading the king's prerogative, and publicly libelling of him, and his public acts, to the people.

The replication chargeth the several facts thus:

1. That the mayor, citizens, and commonalty, in common council assembled, maliciously, advisedly, and seditiously, and without any lawful authority, took upon them to censure the king, and the prorogation of parliament made by the king.

2. That they gave their suffrages, and ordered a Petition should be presented to the king, in the name of the mayor, aldermen, and commonalty, containing the scandalous matter alledged.

3. That they maliciously, advisedly, and seditiously, and to the intent the said Petition should be dispersed and made public, to persuade them, that the king by the prorogation had obstructed the public justice of the kingdom, and to stir them up to a dislike of the king's person and government, and to disturb the peace of the kingdom; did order the said Petition (containing the said scandalous matter) to be printed.

4. They afterwards maliciously, advisedly, and seditiously, and to the intent that the Petition should be dispersed and published among the king's subjects, to aliene and withdraw their affections from the king and his government, did print, and cause to be printed and published the said Petition, in contempt and scandal of the king and his government, and to the promoting and exciting of sedition and disturbance of the peace within this kingdom.

The crimes at common law, were *contra Pacem*, and punishable by fine and imprisonment in particular subjects; where committed by persons in public office, or intrusted with government and preservation of the peace, they are of a deeper dye. In the title of the statute, 13 Car. 2 cap. 1, for preservation of the king's person and government, they are called seditious practices and attempts; for prevention whereof that law provides, 'That if any person 'or persons shall maliciously and advisedly, '(by writing or printing) express, publish, or 'declare any words, sentence, or thing, to in-'cite or stir up the people to hatred or dislike 'of the person of his majesty, or the establish-'ed government; such person is made incapa-'ble of any office or place of trust, and to be 'further punished, according to the common 'law and statutes in such cases.'

This law takes notice, they were crimes at common law, and punishable as seditious practices. Sir James Bagg's case allows conspiracies and ignominious crimes to be causes of disfranchisement; much more a conspiracy of all the members, to libel the government, and alienate the affections of the people from their prince.

Now, what answer do they give to these charges in either rejoinder?

To the first and last they give none at all; they shew no authority for them in common council to debate, deliberate upon, and to determine of prorogations of parliaments by the king or the consequences thereof, which are 'inter ardua Regni,' and not to be treated of but by the king's writ: They are not of the king's and kingdom's common council, but intrusted to advise in affairs of the city, and 'ne 'sutor ultra crepidam.' They are charged to have done this advisedly, seditiously, and without any authority; and it is charged precedent to the Petition.

To the fourth, for printing and publishing of it, to the intent that it should be dispersed amongst the king's subjects, to aliene and withdraw their affections from the king, laid to be 13 Jan. 32 Car. 2. they say it was printed by Samuel Roycroft, by the mayor's appointment; 'Quæ quidem Petitio et Impressio sunt eadem 'Petitio, Impressio, et Publicatio,' in the replication mentioned; And traverse, 'Absque 'hoc quod aliqua Petitio concern' Prorogationem 'præd' fact', ordinat', publicat', sic impress. fuit 'aliter, vel alio modo quam;' but do not add 'vel alio tempore.' In which respect this plea is stronger than the former, to involve the city in the guilt.

Then they own, the Petition was voted and ordered to be preferred and printed *nem. con.*, to be sure to leave not one citizen out of the guilt; but they do aver, the printing was to undeceive their fellow citizens, whereas the charge is, that it was to deceive them. The whole plea amounts but to the general issue, admitting the Petition itself were justifiable, and the making of the Petition lawful. Many things in themselves are lawful, yet if done with an evil intent, and for an evil purpose, become unlawful and criminal, and upon Not Guilty, proof must be made of the evil intent; where the thing itself is lawful, there needs no other proof. To lie under an hedge on Shuter's-hill is lawful; but to lie there in wait to kill or rob a man, is unlawful, and imports scandal. To lay wool near the sea-side is lawful; but laying it there with an intent to export it, is criminal, and forfeits the wool. And it is not good in pleading to answer such intent with contrary averments; but where the intent is substance, it must be traversed or denied specially, otherwise the plea amounts to but the general issue. This manner of defence, or shadow of justification, proves one especial ingredient of the charge; that it was done *advisate*. The city say, it was done upon weighty considerations, and many occurrences deliberated upon, and relate to them, all upon record, that the court may judge, whether they had not good reason for what they did. And if they could judge, that their whole history taken together are no sufficient considerations for any subjects to agree or order any petition to be preferred and printed, to stir up the subjects to a dislike of the king's person and government, which is charged upon them, not answered; the court must adjudge the fact to be done maliciously, and seditiously. But the words of the petition are in themselves scandalous to the king and government. Petitioning is lawful, and the city of London have often petitioned the king with good acceptation, and observed a good decorum becoming subjects, both in the matter and manner of their petitions: they used not to advise or meddle in matters of state, but when sent for to advise, they confined themselves to the affairs of the city. They never before, as I have met with, charged the king's acts of state as interruptions of the prosecution of public justice. [Lukner and

Cruchly, 4 Car. Cro. 140. Lock and Lock 15 Jac. 1. Roll. Abr. 50.]

The words of the Petition are, 'Your petitioners were extremely surprised at the late prorogation, whereby the prosecution of the public justice of the kingdom, and the making the provisions necessary for the preservation of your majesty, and your protestant subjects, hath received an interruption.' To delay, interrupt, or deny justice, spoken of any person intrusted with the administration of justice, and spoken of him in point of his trust, always imports scandal; in the case of the common magistrates, they do necessarily import breach of duty; neither in common parlance amongst the vulgar, nor any history or author, that I have met with, were they ever used in any sense of credit or reputation to the person of whom they were spoken or published. Interruption of justice is a greater imputation than delay barely, because the one may be a mere omission, but interruption imports some act, whereby justice is stopped; but both are temporary denials of justice, as denial is an absolute stop of justice. 'Nulli negabimus aut differemus Justitiam,' are not only words, but the duty of every king. To say or publish of or to a king, in the point of the exercise of his kingly office, and a point of as high trust as any is, that of the prorogation of parliaments, that he hath interrupted the prosecution of the public justice of the kingdom, imports the greatest scandal imaginable: For it was more of the king's duty than of either Houses of Parliament, to promote the prosecution of public justice, especially in the cases set forth, which so nearly concerned his person; and therefore the charging of the king with the interruption of that justice, is of greater imputation to the king; and the more instances they give, it is an aggravation of their crime, by charging the king with interrupting the public justice in all these instances. And there is as much venom concealed in as few words, as ever I met with. Tacitus did never outdo the penner of that Petition, whereby all the principal attributes the law makes necessary for princes, are impeached at once, both the judgment, mercy and widom of the king. The interruption of the public justice reflects upon his justice in an high manner. The interruption of the means of his own preservation, besides his justice, reflects upon his wisdom; that the king should not take care thereof, or did not foresee the danger he put himself into, by the prorogation. The interruption of the means for the preservation of his Protestant subjects, impeacheth his mercy too, and chargeth the king with cruelty to his subjects, in taking no better care for their preservation, when under such imminent dangers; with a secret insinuation, that as he had stopped justice against his popish subjects, so he was regardless of the preservation of his Protestant subjects. What greater malice could be inclosed in a nut-shell? If words were dubious, and of a double signification, and might be taken in a good sense as well as bad, they ought not to be published by subjects of their prince; and when charged to be spoken or published in the worst sense, to withdraw the subjects affections from their prince, the court cannot intend them spoken in any other sense; that must appear upon the evidence, which cannot be in this case, because they have not pleaded the general issue, nor traversed that point. But here the words can bear no other sense, but a direct scandal to the king and his government, in the point of prorogation of parliaments. That the city so understood them, is evident by the Petition, in that very clause, where they say, they were extremely surprised at the late prorogation. Why should they be surprised? If the king had done nothing thereby, but what was just and good for his people, they had often tasted of his goodness, and could not be surprised at that. It must then be some very ill thing in the prorogation, that so extremely surprised them, and filled them with such terrors, as throughout the Petition they express. And they discover their minds plainly, that the effects of the prorogation were the causes of their surprisal, viz. The interruption of the prosecution of the public justice of the kingdom, and of making the necessary provisions for the preservation of the king and his protestant subjects; and in the next paragraph they explain themselves further, and call that a delay, which before they called an interruption; that they were even impatient of the least delay, of the long-hoped for security, whilst they see the king's life invaded, and the true religion undermined, and their families and innocent posterity likely to be subjected to blood, confusion, and ruin. The panic fear, and dismal consequences, are charged upon the prorogation. And to what other purpose do they publish this severe sentence upon the prorogation, with their dismal fears, but to affrighten the king's subjects, and beget the like fears in them? The natural consequence whereof is, to withdraw their affections: 'Oderunt quem metuerunt Populi.'

Mr. Recorder, though he could not produce one authority, that to interrupt public justice, was ever used in a good or justifiable sense; yet endeavours to evade the scandal of the words by proper answers.

That these words are not spoken of the king, but of the prorogation, as consequences of it. Is not this quibbling? The prorogation is only the king's act of proroguing the high court of parliament. And to charge the acts of a king, or other subordinate magistrate in execution of his office, with injustice, folly, or insanity, is the same thing as to charge the persons themselves.

No, saith Mr. Recorder, unless the action had been charged to have been done with such intention; but they do not charge the king: And that it is so explained in another part of the Petition, by saying, 'But that which supports them against despair, is the hopes they derive from your majesty's goodness, that

'your intention was, by this prorogation, to 'make way for your better concurrence with 'the counsel of your parliament.' Evil intention may make an act, otherwise good, to be bad and against law, by intendment of law, the intention is evil, and the person answerable for all the consequences thereof. If a man throw a great stone over the wall, and a person is killed, the law adjudgeth it murder: He cannot justify it by averring he had another intention. So in the matter of scandal, if an unlawful act or crime, which purports scandal, be charged upon a person, it is no justification, or excuse, to aver he did not charge the person, nor his acts, with doing it with an evil intent; but as the law supplies malice in the criminal, where the act is unlawful, so it intends malice in the libeller, in a matter which in itself imports scandal. Several cases may be put to this purpose. [Roll. Ab. 71.] To charge the wife with poisoning her husband, is actionable, though not alledged done voluntarily, or with an intent to kill; the law intends it. In this case, they charge that the king by his prorogation interrupted the public justice of the kingdom, and with the dismal consequences, which in their judgment would follow thereupon, and publish this to affrighten the whole kingdom; and that they were near despairing of their safety, but hoped his majesty did likewise intend by the prorogation to make way for his better concurrence with the counsel of his parliament. A pretty compliment for so infamous a charge! And if it import any thing, it is a further reflection upon the king, that he had not before concurred with the counsel of his parliament. But to fix the matter home, Mr. Recorder, in the last place, justifies this libel from the truth of the fact, that the public justice of the kingdom, and finding out means for preservation of the king and his subjects, had received an interruption by the prorogation. This toucheth to the quick, and is more than the city have averred in all their pleadings; they have nakedly represented their several facts, precedent to the Petition; and leave it to the court to judge whether there be sufficient to justify them, to make and publish such a Petition. But to aver it to be true, is to equal the crime of the Petition, in charging the prorogation with the interruption of the public justice. But I hope, upon better consideration, he will change his opinion, and likewise upon the inference he made, that if true, it is no scandal to print and publish it to the king's subjects; for in both points he is apparently mistaken. It is admitted there was a plot, and such proceedings as are set forth against delinquents; and that the king by his proclamation and in his speech expressed his sense of the plot, and pressed the parliament to proceed to trial of the lords in the Tower committed for the plot, and that there are many such bills depending in parliament. And it shall be admitted, that upon the prorogation all these proceedings were stayed, and, if Mr. Recorder please, received an interruption; and to say so is true. But in this case, if the city had been of an opinion, that the parliament, upon the king's signification of his pleasure they should proceed to the trial of the lords, did not make such haste to try them, as the city judged was necessary for the preservation of their lives and fortunes; thereupon the city should have petitioned the parliament to proceed to the immediate trial of the lords in the Tower, and thereby charge them, that they had delayed them the public justice of the kingdom, by not proceeding sooner to the trial of them, according to the king's desire Mr. Recorder would not have averred the matter of delay of justice to be true, and therefore no scandal to the parliament; but he would then have found out the difference between staying of suits and proceedings in courts by the proper judges, and the delays and interruptions of common justice; the latter are unlawful and criminal, and against the duty of the judges, but the former upon just grounds are lawful, and many times in prosecution of common justice; and many times to proceed in such cases, would be great injustice either to the criminal or the public, where the witnesses on either side are not ready, or for some other good cause the judges put off causes till another time, or adjourn a court before all the causes be tried. No lawyer can truly say, that by putting off the cause, the prosecution of justice hath been interrupted; or will it be any just justification for him for such scandal, that there were causes depending before the adjournment. The acts of inferior magistrates are not to be examined, censured, and adjudged, much less scandalized by those, that are under their magistracy; That would let in confusion, and tend to the overthrow of all government. To say of a justice of the peace, 'You have perverted justice,' is actionable; Seignior De la Ware and Pawlet, Trin. 37 El. More, 409.

Mich. 1 Car. 1, Cro. 14. Sir John Isham *versus* Yorke; 'I have been with sir John 'Isham for justice, but could never yet get any 'at his hands but injustice.'

Trin. 7 Car. Cro. 223. W. Marsham *versus* Briggs; 'sir William Marsham is but an half-'eared justice, he will hear but one side.'

Mich. 8 Eliz. Rot. 1. Walsh was indicted for scandalizing one sir Robert Catline, chief justice, and this court, by saying, 'My lord 'chief justice is incensed against me: I cannot 'have justice, nor can I be heard; for it is 'made a court of conscience.' He was afterwards discharged upon the general pardon, 8 Eliz.

They may be judged by superiors, but not by inferiors. Where the common law alloweth or authorizeth the staying of proceedings by adjournment, or otherwise; to say the act is done to delay or interrupt the public justice of the kingdom, or that thereby the public justice of the kingdom hath received interruption, is not only highly scandalous but absolutely untrue: for it is according to the rules of common law, and the public justice of the kingdom,

and may be the promoting of common justice and for the benefit of the public, and ought to be so intended, when done according to law. For the reasons of such acts, much less the secret intentions of the judges, or of the persons whom the law hath entrusted with such powers, are not to be examined, censured, or condemned by any subjects, by any corporation whatsoever. Petitions may be rejected by either House of Parliament, and so may bills, too, though they have the greatest semblance of common benefit, yet this is no denial of justice, nor to be scandalized under any such notion: they may defer the consideration thereof, or enter upon other business; that is no delay or interruption of common justice.

The king may do the like; he may reject the bills passed by both Houses, or he may advise upon them by these acts, which the law allows to be no interruption of public justice: the king may adjourn or prorogue the court of parliament. Anciently those words were used and taken promiscuously, though now from the different effects they are differently used. And Mr. Recorder owns, that the king is by law intrusted with this power, and it is happy for the subjects he is so intrusted, it being for their benefit; which is a flat contradiction to his position, that it is true, that the public justice of the kingdom is interrupted, or hath received an interruption, by the prorogation: because what is just and lawful, 'secundum legem terræ,' cannot be unjust or unlawful, which every interruption of public justice is; and if the act be not unlawful, it is no delay or interruption of justice, And if the subjects cannot examine into or censure these lawful actions of their princes, but must intend them to be upon just grounds, and for their benefit, and in order to their common safety; to charge their prince's actions with the interrupting of public justice, and of the means for his own and his people's preservation; and to publish this to all his subjects, is in judgment of law, a false, scandalous, and malicious libel; and if not sufficiently punished, where will it end? To publish a libel is in no case lawful, be the matter never so true, nay, though the party who is libelled be dead; and the degrees of the crime, where against a private person, and where against a public person, appear in the case cited by Mr. Solicitor in the Reports, fol. 125. And that it is against all laws both of God and man, and the mischiefs there represented. In the case of all common pleas, the offender shall be fined and by the statute of 13 Car. 2. all natural persons are for the future disabled, and incapable of any office or place of trust, where the libel is against the king. But where the matter is false, and the libel published against the king, to withdraw his people's affections from him, and that by the joint counsels of a corporation, there can little room for a question remain, but they have broken their original trust for good government, and misused their liberty to licentiousness. How criminal is it for private subjects to deliberate of, and determine, and publicly to censure the counsels and actions of their princes, will appear by the case of Stubs, Mich. 21 et 22 Eliz. Rot. 3. where the case was, that a treaty of marriage being on foot between the queen and duke of Anjou, John Stubs published a book called, 'The Discovery of a gaping gulph, whereinto England is like to fall by another French marriage,' containing a dissuasive against the marriage: and therein amongst other things chargeth, 'That this marriage hath sin in itself, and of itself only, for being against the law of God.' And in another place, 'That it opens all the ports of foreign enemies,' with several bad reflections upon the duke. This book was delivered by Stubs to Hugh Singleton, a stationer, to print, who caused it to be printed and published. They were both indicted for it in this court, and the indictment laid to be, with intent to hinder the lawful purpose of the queen and the duke to marry, and to animate and stir up the queen's subjects to rebellion, and to raise discord between the queen and her subjects, and to subvert the good government of the kingdom. Upon Not Guilty pleaded (for they had not the confidence to justify) they were found Guilty, and judgment given for cutting off their right hands upon the statute 1 Eliz. cap. 6. for libelling the queen. In this case the censuring of the queen's lawful purposes, in a more private matter than the administration of her regal office, by common subjects not called to advise, is a subversion of good government within the kingdom; and the publishing the effects and consequences thereof to be sinful and dangerous to the kingdom, is a libelling of the queen and her government within this statute. The censuring of the exercise of the king's lawful prorogation, and charging it with the interruption of public justice, is of a more dangerous nature. Every natural person convicted of this offence, is by the statute of 13 Car. 2. disabled for any public trust; the proceeding against the natural person could not be for want of proof, it being transacted in their council. In this process against the whole, they have confessed it with the aggravations laid. If the king pass not a bill which the city of London have a mind to, this rejection of such bill shall in print be published to all his subjects to be a denial of justice. If the king reprieve a malefactor, it shall be a delay or interruption of public justice. To pardon a malefactor shall be a denial of public justice of the kingdom. So that the tenure whereby the city of London hold their franchise, and all their liberties, will be quite changed and altered, without the aid of act of parliament. The city will no longer hold all their liberties from the crown 'quamdiu se bene gesserint,' which was their ancient tenure, reserved by the crown and the laws of the land upon their first erection, but will gain 'absolutum dominium.' And the king shall exercise no just prerogative, but at their good pleasure; otherwise they will blast him to his people, and aliene their affections from him. I have done with

the case. I have nothing more to offer. I have at large proved, that the corporation of London is a great franchise and liberty. I have proved that point of forfeiture, and their demeanors towards the crown: they stand in the same level with other cities and boroughs, which be forfeited and seized. I have presented to the court two superlative offences, both against their prince and their fellow subjects, as well as can be; wherein they have exceeded all other cities and boroughs, and themselves too in any former age. The manner of their pleading, and defence at the bar, argue the disease to be dangerous and infectious to other cities and boroughs, and of the nature of the king's evil incurable without the king's hands. I have this day brought them in judgment before the court, in order to their cure. Nothing remains for effecting of the cure, but the judgment of the court for seizure of the franchise of London into the king's hands; which I demand for the king.

Mr. Attorney General having taken up so much time, the court put off the hearing the counsel for the city till another day, when Mr. Pollexfen argued as follows:

ARGUMENT

OF MR. POLLEXFEN.

In this case, when I consider the greatness and consequence of it, that it affects the king, the parliament, the laws, the very government under which we have lived, this great city of London, and all other corporations and people of England, and their posterities, for ever, I cannot but be troubled, that I should be the man to whose lot it should fall to argue it; but that which comforts me is, that your lordship, and the court, upon whom the judgment of this great case depends, will help out my defects, and according to what is required in the great places you bear, take care and provide, that by your judgment the ancient government and laws of this kingdom receive no damage or alteration. The king's counsel have on their side only some general words out of old records of forfeitures and seisures of liberties which are of uncertain and doubtful sense; but there is not on their side produced any one precedent, judgment, or opinion to maintain the point in question, viz. That a corporation, or body politic, ever was determined, or dissolved or taken away for a forfeiture: no, not in the maddest of times, in the times of Edward the 2d, and Richard the 2d, when the tumults and disorders were so great, that they not only seized and took away the liberties and franchises, but the lives of princes, nobles, judges, lawyers, and all that stood in their way: in those times, though they have hunted and searched with all diligence, not one instance of a corporation taken away, or dissolved by a forfeiture, is cited. So that from hence I hope I may safely conclude that I argue in this case for the old and known laws, as they have been ever practised through all ages, and against that which never hath been practised or known; which is a great encouragement to me. The pleadings being very long, I shall only repeat so much of them as I use, when I come in order to speak of them.

I. The first thing proper to be spoken to is the information itself, and therein I make this question: Whether as to that part thereof, that chargeth the corporation with usurping upon themselves the being of a corporation, whether that be properly brought against the body politic, as this is, or ought to have been brought against the particular persons? I do agree, that as to the other things mentioned in the information, the having sheriffs, justices, &c, the information is properly brought against the corporation: and I do also agree, that it may be good as to those things, though bad and insufficient as to the charging the corporation with usurpation of their being, without lawful warrant or authority. And, that I may come singly to this question, I do put out all the other franchises in the information, and take only what concerns this point; and then the information, as to this point, chargeth, that the mayor, commonalty, and citizens of London, by the space of a month last past, before the information, did use, and claim to have and use, without any warrant or regal concession, within the city of London, the liberty and franchise following, viz. to be a body politic, *re, facto et nomine*, by name of mayor and commonalty, and citizens, and by that name to plead and be impleaded; which liberty, privilege, and franchise, the same mayor, commonalty, and citizens, upon the king, by the time aforesaid, have and yet do usurp. This is the substance of the information as to this point; and whether this information thus brought as to this matter be sufficient in the law, upon which a judgment can be given, or ought to have been brought against particular persons, is the question. I conceive it ought to have been brought against particular persons, and is insufficient as it is, and that no judgment can be given upon it, supposing the defendants had demurred, or pleaded nothing to it. To make out the insufficiencies, I desire to consider what it imports.

1. The very bringing the writ and exhibiting the information against the corporation, imports and admits the mayor, commonalty, and citizens, to be a body politic, capable to be sued and impleaded, 'respondere et responderi;' otherwise there is no defendant, no person in court, against whom the suit is brought. It is not enough, that the person sued be a person by supposition, or a pretended person, but none in reality. If a writ or information be brought against a baron and feme, this must admit, that they are baron and feme really and truly, and if there be any thing after in the writ or information, that shews, that they are not truly and really baron and feme, but that they do wrongfully and unduly take upon them to be baron and feme, when in truth they are not, this would be contrariant and repugnant, and abate

the writ or information. The like is supposed by the bringing the writ or information against the body politic; it supposeth and affirmeth them really and truly to be such, and the subsequent affirmation, that they usurped so to be, and are not so really, is contrariant and repugnant.

2. When in the information it is alledged, that the mayor, commonalty and citizens, the liberty, privilege, and franchise of being a body politic. *re, facto et nomine*, and to be sued and impleaded, upon the king have and yet do usurp, to usurp or do any act of necessity imports and admits a precedent existence of the person that doth usurp, or do the act to the act done. Particular persons may usurp, and take upon themselves, that which they have no right unto: the persons, that did the act, did before exist, and had a being. And when a corporation is said to usurp, it of necessity must be supposed to have a precedent being. The sense of usurpation in a Quo Warranto is the subject's taking upon him franchises without warrant.

My lord Coke saith, That usurpation in the common law hath two significations: Inst. 1. 277. b.

1.) The one, when a stranger presents to a benefice, and his clerk instituted and inducted, he gains the advowson by usurpation.

2.) The other, when any subject without lawful warrant doth use any royal franchises, he is said then to usurp upon the king.

So that an usurpation supposeth of necessity a subject or a person precedently *in esse*, that useth the franchise, or that doth usurp. That which is not *in esse*, that hath no existence, cannot use any franchise, cannot usurp. The very alledging that they usurp, doth admit of necessity an existence precedent in the corporation; such as can usurp, or act, and therefore this information is inconsistent with itself.

3. But another reason to prove, that it ought to be against particular persons, and cannot be against the body politic, is drawn from the judgment, that must be given upon this information, if judgment for the king. The judgment must have two things in it:

1.) To damn the corporation, 'Quod penitus 'extinguatur et excludatur' from being a corporation for the future; for being wrongfully usurped, it cannot be continued: A judgment to continue wrong and usurpation can never be a right judgment.

2.) A fine to the king, for the usurping it for the time past. This judgment may and ought to be given, where the information is against particular persons, for usurping upon themselves to be a corporation, and they shall be fined and imprisoned; but this cannot be where the information is against the body politic; for by the judgment of the body politic is extinguished and dissolved, and no fine can be imposed upon that which is not: So that hereby the king must lose his fine, which the particular persons usurping ought to pay, and the law is agreeable always to itself, and the means answerable to the end. I suppose no man will affirm, that where a suit or judgment is against a corporation, that the fine or execution should be against all, or any particular member.

For the precedents and authorities in this point,

(1.) I do agree, that there be precedents in the crown office of Quo Warrantos brought against corporations in such manner as this is brought, for usurping to be a corporation, and to claim divers other liberties.

Quo Warranto against the bailiffs and burgesses of Stratford, for claiming to be a corporation, and to have divers liberties and franchises; thereupon a plea put in, and a confession of their claim by the king's attorney, P. 2 El. r. 1.

The like against the corporation of Reading, the like plea and confession, the very next term after the information filed. M. 3 and 4 El. r. 4.

Against the corporation of Horsham, a plea and confession by the attorney. H. 14 Jac. r. 37.

The like against the corporation of Dover; but nothing done upon it besides plea put in. H. 19 Jac. r. 26.

The like against Bath, a claim put in, and confessed, H. 20 Jac.

The like against Brackley, and a *Noli prosequi*. H. 20 Jac. r. 58.

The like against Boston, a claim put in, and confessed. T. 3 C. 1. r. 22.

The like against New Sarum, imparlance, and nothing more upon it. T. 2 C. 1. r. 47.

The like against Bridgport, claim and confession. T. 6 Car. 1. r. 43.

The like against Biddeford, a claim and *Noli prosequi*. M. 2 C. 1. r. 36.

The like against Wycomb; they plead themselves a corporation by another name, and traverse the name in the information; nothing more on the roll. M. 8 C. 1. r. 42.

And it is probable, there may be more like these; but if of any authority, they are for me, and not against me.

1.) For that they all being for claiming other liberties, as well as to be a corporation, and being good and sufficient as to the other liberties and privileges, that the corporation claims; though insufficient for this of claiming to be a corporation, they must be proceeded upon, if the attorney pleaseth. But is any to be found where only the claiming to be a body politic, and nothing else? or if other things questioned, yet only proceeded in as to this particular of claiming to be a body politic, as in this case? That will be like.

2.) In all these nothing is done; a claim or plea put in, and that confessed, or *Non pros.* or not proceeded upon to judgment. Perhaps not proceeded in, because insufficient; and so are authorities for me: For there being so many of these, which are either *Non pros.* or not proceeded in, perhaps the reason might be, because insufficient in the law, as to the corporation, and so are authorities for me in this case. But one there is found.

Quo Warranto vers. bailiffs and burgesses of New Malton in Yorkshire; T. 6 Jac. r. 3, Quo Warranto they claim divers liberties, as courts, markets, and others, and amongst the rest to be a body politic. They put in a plea, and make their claim by prescription; issue is joined, and tried by Nisi Prius at York, and found against the corporation, and a judgment entered, 'Quod libertat' et franchesiæ prædict' 'in manus domini regis capiantur et seisiantur, 'et quod ballivi et burgenses capiant' ad satisfaciend' dom' reg' pro fine suo pro usurpation' libertat' et franchesiæ prædict.'

There is no mention of this case in any book or report, as far as I can learn; so that this passed *sub silentio*. Next, how can this judgment be good?

[1.] How can that be a right and lawful judgment, which shall be given for the continuing a thing, that is by the very judgment adjudged to be unlawfully usurped, and a fine for it? It is directly 'oppositum in objecto.'

[2.] How can the corporation be seized into the king's hands? 'Extinguatur et excludatur' is proper; the corporation cannot be in the king.

[3.] How could the bailiffs and burgesses be fined? When they are vanished and gone, there is no corporation in being; that which is laid upon a corporation cannot be levied upon the particular members.

I have made inquiry after this borough of New Malton: it is a small borough, within the manor of the ancestors of my lord Eure; it did anciently send burgesses to parliament, but from the time of king Ed. 1 to the beginning of the long parliament, 1640, it sent none then; upon petition a writ was ordered, and they then and ever since have chosen burgesses: my lord Eure being lord of the manor, and offended with them, did prosecute this 'Quo Warranto,' and they having neither lands, revenues, or estates, to defend themselves, he easily prevailed, they never in truth being incorporate, nor having any charter. But that which I give for answer to these precedents is,

1.] They are all, where not only the being of the corporation, but also divers other liberties were in question; so that the informations were good in part, and not worth the while to question whether good as to that part of their being a corporation. The fine upon them for usurping the other liberties, would have been more than they could bear or pay.

2.] That this is but one judgment, and in a case of a small borough, and that judgment, as entered, not agreeable, but inconsistent with the rules of law or reason. The body politick could not be seized into the king's hands; but whenever a judgment is given for the king, for liberty which is usurped, or extinct in the crown, the judgment must be 'quod extinguatur,' and that the person that claimed them 'de inceps Libertat' et Franchesiis prædict' 'nullatenus intromittat,' sed ab usu earund' 'amodo omnino cessat; quodque,' the person that used them, 'pro usurpacion' Libertat. et 'Franch. prædict' super Dominum Regem 'capiat' ad respondendum dict' Dom' Reg' 'Fine suo pro Usurpacione Libertat. et Franch. 'prædict.' That this is the form, C. En. 550. a. 537. 527. b.

3.] That this judgment of New Malton passed *sub silentio*; for there is no mention of it in any book, nor doth it appear that ever the question was moved or debated. And for precedents in matters of practice and process, they are of authority; but in point of law, unless they have been upon debate, are of little authority to prove what the law is. Rep. 4. 94. Slade's Case, L. 5. E. 4 110.

But on the contrary, all the precedents that are in any printed books of informations, were brought to question, Whether body politic, or not, are against particular persons by name:

Against Christopher Helden, and others, C. En. 527. Pal. 9. fo.

Quo Warranto against Cusack, and others, Rol. 2. r. 113. 115.

Quo Warranto against the Virginia company was brought against Nic' Farder, and others, Quo Warranto they claimed to be a corporation. Rol. 2. 455. Some of them pleaded insufficiently, upon which there was a demur, and a question, how the judgment should be entered? for that the master and chief of the company were left out of the Quo Warranto. By which it appears, that it ought to be brought against the master, and particular members by name.

Next, for the express authorities in this case, to prove it cannot be against the corporation, Rol. Rep. 15. is express, That if a Quo Warranto be brought to dissolve a corporation, the writ ought to be brought against the particular persons; for the writ supposeth, that it is no corporation.

The difference there taken, when the attorney general supposeth the defendant to be a corporation, otherwise when he questions them as inhabitants of a vill, then they ought to enable themselves, they must then shew themselves a corporation, also prove it.

My lord Hales in his common-place book, in Lincolns-Inn library, fol. 168. saith thus: 'Nota, sc. Quo Warranto soit port pur usurper 'de une Corporation serra port vers particular 'Persons, quia in disaffirmance del Corporation, et Judgment serra donne que serra ouste; mes si le Quo Warranto soit port pur Liberties claim. per Corporation, serra port vers la Corporation.' This is positive.

This, if it were only my lord Hale's judgment, were of no little authority; but I think it is a report taken upon the case of the Quo Warranto against Cusack and others. But Mr. Attorney finding, as I believe, all the precedents to be against him, (for in them all there are either *non Pros.* or no proceeding to judgment, the causes whereof, or at least some of them, probably might be the insufficiences of these informations) and finding also the authorities in print, which have been cited to be

all against him, and none for him, endeavoured to maintain the information as brought not against the corporation, but against the citizens or inhabitants of the city in their natural capacities; and to that purpose cited the case, C. En. 537, of a Quo Warranto against the inhabitants of a village. Quo Warranto they claimed to be a body politick; and argued, that a Quo Warranto lies against the Cives of such a city, or Burgenses, or tenants. This seems to be rather a sudden conceit, and altogether undigested, and not well considered. But in answer thereunto, and to prove, that this writ is brought against the defendants as a corporation, and cannot legally be taken in any other case; if a mayor and commonalty plead, that they are seized in fee, they need not say in right of their corporation, the name shews them to be a corporation, it need not be alledged. Leo. 1. 153. An action there brought by the guardians and fellowship of Weavers; the book saith, that they need not set themselves out to be incorporate, the name shews it; so of cities, saith the book, Hob. 211. So then, when the writ is brought against a mayor and commonalty, or mayor, commonalty and citizens, the law takes notice of them to be a corporation, and the writ against them as such; the name shews it. But against inhabitants of a village, a writ brought by that name, that cannot be taken to be other than inhabitants, the name so shews it; and in such case, some of the inhabitants, by name (viz.) A. and B. appear in person, in their own, and names of the rest of the inhabitants, and plead, and are defendants, Co. En. 537. So did they, as appears in that precedent. No appearance ever was of inhabitants in other manner. But in this case here are no persons that do appear by name, but the corporation appear, and make an attorney under their common seal. The corporation, and no particular persons, are the defendants before you, or else you have no defendants before you; for there is none appearing in person, here is no defendant, nor none against whom you can give judgment; but all the whole proceedings vain and against nobody. So that if we should admit, as Mr. Attorney argues, that this information is not brought against the corporation; then there can be no judgment for want of defendants appearing in their natural capacities; you must have it against the corporation, or nobody. A mayor cannot be but where there is a corporation; therefore this notion is impossible, as I conceive. So that if there were nothing else in the case, if the information be ill brought, they can have no judgment against us.

II. But admit, that the information as to this point be sufficient, then I proceed to consider the other parts of this case; the plea: that contains the defendant's title, (viz.) That she is a corporation time out of mind, and many confirmations by acts of parliament and charters. It is not denied, but that the title made by the plea is good.

But next the replication, that it contains,

1. An issue upon the prescription (viz.) That the citizens of London have not been time out mind a corporation by name of mayor, commonalty, and citizens, &c.

2. A pleading over, that the mayor, and commonalty, and citizens taking upon them (*assumentes super se*) to be a body politic, and to have power to make by-laws,

1.) 'Colore inde,' but for their private gain, et contra fiduciam per Dominum Regem et 'Leges hujus Regni' in them reposed, took upon them to raise money upon the king's subjects, by colour of an ordinance by them *de facto* made; and in prosecution of this usurped power, the mayor, commonalty, and citizens, in their common council assembled, published a law for levying money upon the king's subjects, that came to the markets within the city, 17 Septem. 26 Car. 2. (viz.) 'De 'qualibet Persona,' for every horse load of provisions brought into any public market within the city to be sold, 2*d.* a day; for every dorser of provision, 1*d.* a day; for every cart-load drawn with not more than three horses, 4*d.* a day; if with more, 6*d.* a day; that if any refused to pay, he should be amoved from his place in the market: that, by colour of this by-law, the mayor, and commonalty, and citizens have extorted great sums of money for their own private gain, amounting to five thousand pounds per annum.

2.) And farther, that whereas there was a session of parliament holden 21 Octob. 32 C. 2, and continued till the 10th of Jan. 82, and then by the king prorogued to the 20th of that instant January; the mayor, commonalty and citizens, Jan. 13, in their common council assembled, 'malitiose, advisate, et seditiose, 'absque legali Authoritate, in se assumpserunt 'ad consendum et judicandum dict' Dom' 'Regem nunc, et Prorogationem Parliamenti, by the king prorogued; and in the same common council, 'Vota et Suffragia sua dederunt et ordinaverunt,' that a petition 'sub nomine' the mayor, aldermen and commons of the city of London, in common council assembled, to the king should be exhibited: in which petition it was contained, that by that prorogation the prosecution of the public justice of this kingdom, and the making necessary provision for the preservation of the king, and his protestant subjects, had received interruption. And that the mayor, commonalty, and citizens, in the same common council did unlawfully, 'malitiose, advisate, et seditiose,' with intent that the same petition might be published and dispersed among the king's subjects, to induce in them an opinion, that the king had by that prorogation obstructed the public justice, and to incite hatred against the king's person and government, and to disturb the peace, did order that petition, containing the said scandalous matter, to be printed; and thereupon, to those ill ends and purposes, they caused it to be printed and published: by which the mayor, commonalty, and citizens, the aforesaid liberty and franchise of being a body politic *forisfecerunt*

and after, by the time in the information, have and yet do usurp it.

Before I come to the matter, I would speak to the pleading herein, and in the subsequent surrejoinder: and for the pleading in it, I think it is as singular and unprecedented as the matter of it is. This replication, supposing the matter had been the act of the body politic, and good and sufficient, yet as pleaded, is insufficient, and not warrantable by any law or practice ever known. It contains,

1. An issue, viz. no corporation time out of mind.

2. Two causes of forfeiture of the corporation, admitting they once were a corporation.

So that, though the point in question be but one, viz. Whether we are lawfully a corporation or no corporation, though the plea is single, that we are a corporation by prescription time out of mind; yet here, is to try this point,

1. An issue.

2. A double plea, alledging two causes to avoid it for a forfeiture.

This I conceive cannot legally be done, though in the king's case. I do agree, the king hath great prerogatives in pleadings; and as far as ever they have been allowed or enjoyed, let them be so still; but that the king can to the same matter both take issue, and also plead over at the same time, that I deny. It is most reasonable, that the law should be careful to preserve the king's rights; but on the other side, I think it is not reasonable, that the law should admit or allow as legal, any way of proceeding that should destroy or render the subject's right indefensible, be his right as good as it may be. If so be that Mr. Attorney may both take issue upon the fact, and also plead over, I would, by your leave, ask, how many issues, and how many pleas over, the king's attorney may have? Suppose the king bring a Quare impedit, or writ of right, or any other action, the defendant makes his title, which is usually done, by many grants and conveyances from one to another, to bring it to himself. May the king's attorney now take as many issues as facts issuable, plead as many pleas as he pleaseth, and all this 'simul et semel?' It is true, that in this case Mr. Attorney hath assigned only two breaches, or causes of forfeiture; but he might, if he had pleased, by the same reason, have assigned two hundred. If this may be, are we not all at Mr. Attorney's mercy? If this may not be, then how many pleas? Is it in law defined? *In favorem vitæ* a man may plead a special plea, and plead also Not Guilty, but not several special pleas; but that there is any such prerogative for Mr. Attorney, in suits betwixt the king and his subjects, I can find no instance or authority for it: for though it be true, as I have said, that the king hath great prerogatives in pleading, yet it is as true, that this is not boundless; but that if in the king's writs there be mistakes, his writ or his action misconceived, he shall be bound by it in like manner as subjects are or shall.

Plowd. Com. 85, a. Partridge against Strange, 206, a. and in the same book, in my lord Berkeley's case, it is expressly said, that though the king hath many prerogatives concerning his person, debts, and duties; yet the common law hath so admeasured his prerogative, that it shall not take away, or prejudice the inheritance of any.

The king hath a prerogative, that he may waive his demurrer, and take issue; or waive his issue, and demur upon the plea: but, saith the same book, fol. 236, he must do it the same term, not in any other term; for then he may do it *in infinitum*, without end, and the party hereby may lose his inheritance; and for that the common law will not suffer the king to have such a prerogative. These are the words of the book. And in the point, that this prerogative must be made use of the same term, and that the king's attorney cannot vary in another term, and waive his issue, is 13 E. 4, 8 Bro. Prer. 69, 28 Hen. 8, 2. So in making title to a Quare impedit, he at the end of the term waived his first title, and made another. But it is true also, that as to the point of waiving demurrers, and taking issue in another term, there is authority, that he may so do; Rex vers. Bagshaw, Cr. 1, 347. But whether it may be done or not in another term, is not material to our case: but the use I make of these cases is to prove, that the king's attorney should not have both together *simul et semel*, as in this case he hath done; he must waive one before he can have another plea. For those debates about his varying his plea, by waiving his issue and demurring, or waiving his demurrer, and taking issue, signify nothing, if he may in one plea, and at the same time take issue and demur, or plead over to the same matter or point, as is done in this case; therefore those books strongly prove, that the prerogative, that the king hath, is by waiving or relinquishing one, and choosing the other; and therefore not to have or use altogether and at once, as is done in this case.

The king shall be bound by one issue, he shall not have divers, 9 H. 4, 5. So that as this replication is at the same time *simul et semel* to the same matter, to take issue, that we were not a corporation time out of mind, and to plead two matters of fact for forfeiture, is the first attempt that ever was of this kind, and in its consequence confounding the right of the subject, and leaves him perhaps only but a colour of law, but most difficult, if not impossible by it to be defended, let his right be what it will, if issues and pleas without number may be by the king's attorney joined and pleaded, and the subject must answer. The very charge besides will undo the subject, and wrest him out of his estate by the law, that should preserve him. This point, if I mistake not, will deserve consideration, if it be new, and the first project (for so I beg leave to call it) of its kind; for I know no book or instance of the

like, unwarrantable by old laws and rules of pleading. The old laws and ways are good and safe: 'Eventos varios res nova semper 'habet.' Perhaps the consequence and mischiefs attending this way of joining issue, and at the same time pleading over as many pleas as Mr. Attorney pleaseth, are as great as any other in this case, and not less to be minded or regarded. As of the one side, great are the king's prerogatives, and most necessary to be preserved and maintained; so it cannot be denied, but that the law hath set limits and bounds, which must be kept and observed in pleading, which is the method and mean of preserving and determining rights, without which no man can be preserved by the law. But supposing that several causes of forfeitures may be assigned, yet they must be all facts done at the same time, or they confound one the other; for if the first fact was a forfeiture, thereby the corporation was determined, and at an end, and the subsequent could not be the act of the true lawful corporation; for that was forfeited, determined, and gone by the precedent forfeiture: and if so, that it was forfeited and gone by the precedent act, viz. the making the ordinance Septemb. 17. 26 Car. 2, then how could it act and forfeit itself six years after, in the year thirty-two? This seems impossible. But to avoid this, Mr. Attorney in his argument, doth hold, that though the act be a forfeiture, yet till there be a judgment, or something on record, to determine the corporation, (and in this case the judgment to be given shall do that work) till such judgment, the corporation remains: then taking it as Mr. Attorney will have it, and as the truth is, supposing a forfeiture, until that forfeiture appear on record, or that there be some office or inquisition that finds it, and that returned, and on record, were it of any estate in lands, tenements, hereditaments, or offices, it is not determined or vested in the king, but continues. This is quite contrary and contradictory to all that you have done, and the very foundation of this Quo Warranto; for if you admit, as then you do, that the forfeiture *ipso facto* did not determine, but that it must be this Quo Warranto, or judgment upon it, that must determine the corporation; and that the corporation, notwithstanding such act, was or is in being; then they have not usurped upon the king: they are the same corporation they were; they have the same power to act they had; they have the same warrant and right they had, only subject to a judgment against them, that may be given hereafter for a fact, already past: for since that an usurpation is a tortious and wrongful using a liberty or franchise upon the king, without lawful authority; then, supposing such an act of forfeiture doth not *ipso facto* determine or dissolve, but a judgment, or some other act of record must first be had before such dissolution; then till such judgment, or act of record, they are lawfully a corporation in being, and their lawful warrant remains, and they did not, nor could so long usurp their being, and then hereby is your own information destroyed and abated: for there you say, that they did by the space of a month, without any warrant, use and usurp the liberty to be a corporation. But hereby you grant, that it was not used unlawfully, nor usurped; but notwithstanding the forfeiture the corporation lawfully continued, unless there had been some judgment, or other act, on record, to determine it. This I rest upon as impossible to be avoided. Is it possible, that a corporation or body politic can at the same time be lawfully and rightfully such, and not lawfully and rightfully such? Can right and wrong be the same? Can the same thing rightfully be, or have its being, and at the same time not rightfully be or have its being? Can we possibly be at the same time, viz. the time mentioned in the information, a lawful corporation, and yet an usurped or unlawful corporation? Could we then have a lawful and rightful authority to be a corporation, and at the same time have no lawful or rightful authority to be so? These seem to be contradictions; and if so, are the most difficult of all things to be believed or imposed; therefore to be plain in this matter, either tell us, that we are yet till judgment a corporation or body politic lawfully and rightfully, or not. If you say we are, then as yet we are no unlawful corporation, nor have usurped to be one, as in your information and replication you have alledged. We have not then unlawfully taken upon us to be a corporation, and therefore cannot have judgment against us; or be fined for having or being that which we lawfully have or be, as you now admit we are; consequently you must go some other way, you have destroyed your own information, and can have no judgment upon it. But perhaps this concession of Mr. Attorney, that the old and lawful corporation and body politic is still in being, and shall so continue, till by judgment or matter on record determined, may only be some sudden thoughts; for not only the matter, but the whole proceedings in this suit, being at least unexperienced, and perhaps much out of practice, it might easily happen, that in an hasty proceeding, all things might not be thought on, nor all the objections nor inconveniencies foreseen, and perhaps the consequence of the position, that a miscarriage, or doing an unlawful act, should *ipso facto* forfeit the body politic or corporation, might make a man start, and cast about how to avoid it, and flying from one danger run into another. These are things ordinarily happening, and perhaps have in this case happened, and were the cause of this concession, that the old and lawful corporation is yet being, which is contrary to the whole frame and scope of both the information and replication, and probably never thought on or intended when the information or replication was made, being quite contrary and inconsistent with the frame and foundation of them both. If it be holden, according to this concession,

that the old and lawful corporation was not by the supposed acts of forfeiture dissolved and determined *ipso facto*, but remained and continued lawfully a corporation, and yet is so; then we have not usurped, but are a lawful corporation during the time in the information, and not as therein supposed by usurpation, and without lawful authority; and thereby the information confounded and abated.

But supposing, according to what the information and replication suppose, that the acts of forfeiture did *ipso facto* dissolve and determine the corporation; for they will at last, I doubt, come to that again: for this present thought, that it shall be forfeit, but not dissolved or determined till judgment, will be subject to almost all the same inconveniencies; for when judgment is given, the forfeiture must relate to the time of offence, and to avoid all mean acts, as in other cases it doth: but to pass this over.

III. Supposing the information good, the replication good, and the matters alledged for forfeiture to be as in the replication alledged: the next thing I pray leave to speak unto, is, Whether the matter alledged in the rejoinder be not sufficient to justify or excuse the two facts alledged for cause of forfeiture? I conceive they are. The pleadings here must first be stated.

1. As to the ordinance of by-laws for the toll in the markets. As to that, the defendants in their rejoinder have alledged, that the city of London is, and was always, the capital and most populous city of the kingdom; that there are and always have been great public markets within the said city; that the mayor, commonalty, and citizens are, and always have been seized of those markets in their demesne as of fee, and at their own proper charges provided market-places, stalls, standings, and other accommodations for persons coming to those markets, and overseers and officers for better regulation, and keeping good order, and cleansing the same; that for defraying those charges, they have, and always had and received, divers reasonable tolls, rates, or sums of money, of all persons to those markets coming, for stalls, standings, and other accommodations by them had, for exposing to sale their victuals and provisions in those markets; that the freemen of the city of London are numerous, above fifty thousand: that there hath been, time out of mind, a common council, consisting of the mayor, aldermen, and certain freemen annually elected, not exceeding the number of two hundred and fifty, called the Commons; that there is a custom within the city, that the common council make by-laws and ordinances for the better regulation and government of the public markets, and for the appointing convenient places and times when and where, within the city, the markets shall be kept, and for the assessing and reducing to certainty reasonable tolls, rates, or sums of money, to be paid by persons coming to the same markets, for their stalls, stations, and other accommodations by them had, for exposing to sale their victuals as often as, and when to them should be thought expedient, so as their ordinance be useful to the king and his people, consonant to reason, and not contrary to the laws of the land; that this custom is confined by Mag. Char. Stat. 1 E. 3. Stat. 7. R. 2. that after the burning and rebuilding London, and the alterations thereby made, controversies did arise within the city concerning the markets and tolls; that thereupon sir William Hooker, then mayor, and the aldermen, and commons in common council assembled, did make an ordinance, intituled, An act for the settlement and well-ordering the several public markets within the city: By which reciting, that whereas for accommodation of market people with stalls and necessaries for their standings, for cleansing and paving the same, for defraying incident charges about the same, reasonable rates had always been paid. To the end the rates to be paid might be ascertained, that the market people might know what to pay, and the officers what to take, to avoid extortion, it was ordered, there should be paid by the market-people for their stalls, standings, and accommodations in the markets, for every horse-load of provision under public shelter 2*d*. a day, for every dosser 1*d*. a day, for every cart-load drawn with not above three horses 3*d*. a day, with more horses, 4*d*. a day: and upon refusal to pay, to be removed: Then they aver, that these rates are reasonable; that they are all the rates that are paid by such market-people to the use of the city; that these rates they have received since the making these ordinances; that there is no other ordinance for raising moneys for such provisions exposed to sale in their markets in any manner made.

To this rejoinder Mr. Attorney hath surrejoined, and taken it by protestation. That the city were not seized of the markets, not at their own costs provided stalls and other accommodations: and that the rates by the ordinance appointed were not reasonable. For plea sets forth an act of parliament made 22 Car. 2. enacting, that to the end apt and convenient places within the city should be put out for buildings, and keeping the markets; and that the Royal-exchange, Old-bailey, and common gaols and prisons within the city, should be made more commodious; for the enabling the city to do these things, they should have a duty out of coals imported betwixt May 1670, and Mich. 1687, into the port of London, 12*d*. per chaldron; which duty they have accordingly received, amounting to a great sum; and notwithstanding that duty, without title or right, the defendants made the by-law, for their private gain, *absque hoc* that the mayor, and commonalty, and citizens, have time out of mind had, or accustomed to have, 'Tolneta, 'ratas, sive denariorum summas per ipsos ma-'jorem, Communitatem, ac Cives Civitatis 'prædict' superius supposit' fore per præfat' 'legem sive ordinationem prædict' assess' et in 'certitudinem reduct' prout per placitum su-'perius rejungend' supponitur.'

The defendants they rebut, and say, that they have always had reasonable tolls, rates, or sums of money of all persons coming to their markets to sell their provisions, for their stalls and accommodations: 'Et de hoc ponit se 'super patriam:' The attorney demurs. Upon his pleadings, the questions are, whether the matters alledged by the defendants, in justification of the ordinance, or by-law, be a good justification in law, or not? If it be, Mr. Attorney in his sur-rejoinder hath given no answer to it at all; he hath neither confessed it, nor denied it. The rejoinder saith, that the defendants are, and always have been seized of the markets in fee; that they at their charge provided market-places, stalls, standings, and officers for the accommodations of the markets, and cleansing them; that for defraying those charges, they have always had divers reasonable tolls and rates for standings, and other accommodations; that the common council have, as often as expedient, always made ordinances for regulating those markets, and for assessing and reducing to certainty reasonable tolls, rates, and sums of money to be paid by the market-people for their accommodations: that according to this custom, they made the ordinance and by-law. Mr. Attorney in his sur-rejoinder hath not denied any part of this; but offers a traverse to that which is no-where alledged or supposed. It is never pretended, that the city have had, time out of mind, the very tolls and sums of money for toll assessed by the ordinance. There is not a word in the rejoinder to that purpose, but to the contrary; (viz.) that they, in their rejoinder claim a power by ordinance of common council to assess and set the rates of these tolls and payments as often as and when to them shall seem expedient. It is admitted in the rejoinder, that these sums were not time out of mind, only they had power to set, assess, and ascertain, as often as expedient: therefore when Mr. Attorney traverseth our having, time out of mind, the tolls, rates, and sums of money by the ordinance assessed, and in 'certitud' reduct', this is plain, besides any thing claimed or pretended unto, if he had intended to traverse what we have alledged, that we have had time out of mind divers reasonable tolls and sums of money for stalls and accommodations: Or if he would have traversed the instance alledged for the common council assessing those tolls, as often as expedient, that was plain and easy to do; but that he hath not done: He hath only traversed whether the tolls, rates, and sums of money, by the ordinance assessed, and reduced into certainty, have been time out of mind. This is the proper sense of his traverse; but if doubtful in its sense, his traverse is nought for that cause; for dubious words make no issue for the jury to try, else men should be tricked and ensnared by doubtful words, to pervert right: so that if the matter alledged in the record be sufficient in law to justify the making this ordinance or by-law, then what is done therein by the act of common council is lawfully and rightfully done, and no forfeiture. I do agree, that for a lord of a market to prescribe to have a toll uncertain, and as often as expedient, to ascertain it, is no good prescription. But that is not our case; I do distinguish betwixt that and this case: where there is by custom, confirmed by acts of parliament, (for I shall shew that they are acts of parliament, notwithstanding what hath been objected against them) a power and authority vested in the lord mayor, aldermen, and common council, to regulate and order the people, trades, and markets in the city, and the places, and conveniences, and officers, from time to time, and consequently to regulate and ascertain the tolls or rates to be paid by the market-people, to prevent extortion and disorders; that such custom is legal. The chamberlain of London's case: an ordinance that no broad cloth shall be sold in the city, before it be brought to Blackwell-hall to be searched, and a penny for every cloth to be paid for hallage, under pain of forfeiting 6s 8*d*. a cloth, to be recovered in the city courts, Rep. 5, 69. Though objected that this was an imposition of payment of money upon the king's subjects, yet adjudged good, and a Procedendo granted.

An ordinance that no unfreeman shall use a trade in London, adjudged good, City of London's case, Rep. 8. fol. 1. A multitude of ordinances they have for regulating all manner of trades, and of rates and prices; and as much reason there is to object against them, as this ordinance, or the custom in this case: but the city of London have a government and power of making ordinances for governing and regulating trades, buying and selling within the city, placed in the common council, and confirmed by act of parliament; and therefore not like the case of any private lord of a market. But it is true, their ordinances must be unreasonable. The payments that are imposed by this ordinance, are only imposed upon those that are under shelter. It is reason a recompence should be paid; and there is no unreasonableness or injustice appears in the ordinance, but a reasonable recompence. But the custom or power of the common council is not denied, as I take it: for they have not denied the power to regulate and ascertain the tolls or sums of money alledged to be in the common council; if they had, that must have been tried: nor have they denied the rates set to be reasonable. So that I think, as to this matter, we have well-intitled ourselves, and justified our making our by-law, and taking the tolls or rates thereby appointed; and nothing in the sur-rejoinder against us to the contrary is objected.

But for confirming and making good our customs, in the plea, there are three acts of parliament pleaded:

1. Magna Charta.
2. Stat. 1. E. 3.
3. Stat. 7. R. 2.

The king's counsel have not denied Magna Charta to be a statute, but have denied the other two to be statutes, or acts of parliament; and the reasons given by them are:

Because not in print, nor roll of it to be found; or because nobody knows where to find it.

cond, suppose there were no roll to be found. Doth this after so long a time conclude there was none such; especially since Mr. Solicitor was pleased to acknowledge, that there are no parliament rolls of E. 3. till 4. E. 3. It is true, that almost all the parliament rolls of H. 3. E. 1. E. 2. and till 4 E. 3. are indeed lost. But besides, in those days public acts were not only entered upon the parliament rolls, but from thence transcribed, and sent under the great seal to be published by the sheriffs of the counties, in the cities and boroughs, and also by writ to the courts in Westminster hall, to be there entered and recorded, of which there are many found, especially in the Exchequer; and hence came the rule in law, that judges, *ex Officio*, are bound to take notice of general acts of parliament: but for private acts, they were put under the great seal, and the parties interested had the same to produce: but that these in this case should be questioned to be acts is strange.

But to prove them acts: As to the act, 1 E. 3.

1. We have pleaded it under the great seal of King E. 3. that made it with a 'profert hic in cur', and shewn it with our plea as we ought, and this is evidence sufficient of itself. If the same, produced under the great seal put to it when made, be not sufficient evidence to satisfy, what can be?

(2.) But in this case it is enrolled upon record, 'Inter placita coronæ penes commerarios 'in Scaccario;' it is enrolled there, Trin. 1. E. 3. r. 61, 62.

But perhaps it may be objected also, That this was no act of parliament, but only a grant or patent in parliament; because it is that the king 'de assensu Prælator' Comitu Baron' ac 'totius Communitat' regni in præsenti Parlia-'mento.'

I answer, that acts of parliament observe not any certain form. In the case of the earldom of Oxford expressly, Jones 103. that there was variety in penning acts of parliament in ancient time, 'Dominus Rex per Concilium fide-'lium subditor' suor' statuit,' and other forms there, are yet good acts. But that they were anciently in form of patents or grants in parliament, Magna Charta, C. 1. is in form of a charter or grant, The form of the act of parliament, 11 E. 3. Prince's Case, R. 8. fol. 8. for creating the prince of Wales, begins Edwardus Dei Gratia, &c. in form of patent, and is 'De communi assensu et consilio Prælator' 'Comitu, Baron' et aliorum de concilio nostro 'in præsenti Parliamento,' and adjudged a good act of parliament; and the authorities and reasons to prove it an act of parliament are fol. 18, 19, 20, so full, that it might be thought that this objection would never have been made: and that this is in the same form that all the rest of the acts of this very parliament of the 1 E. 3. mem. 17. are, appears by the patent roll of the same parliament. A charter granted

'apud Westm' to enable the city to apprehend felons in Southwark. An act in the same form, for annulling the conviction of treasons that was against Roger Mortimer, in the time of E. 2. Rot. Claus. 1. E. 3. An exemplification then entered of an act made in the same form in the same parliament, for the annulling the attainder of Thomas earl of Lancaster, attainted tempore E. 2. Rot. Pat. 2 E. 3. P. S. 1. M. 17, Divers other acts of parliament in the same form made 1 E. 3. for annulling divers other attainders that were *tempore* E. 2. So that as to this act of parliament 1 E. 3. I think the objections are answered, and that it is an act, as pleaded, Rot. Pat. 2 E. 3. P. S. 2. M. 11, Inst. 2. 527. 639.

And as to the other act 7 R. 2. that that is no act of parliament, only a prayer of the Commons, that there might be a patent granted to the city, confirming their liberties, 'licet usi 'vel abusi fuerint;' and the answer was, 'le Roy le veult.'

They object for reasons against that being an act of parliament,

First. That it wants the assent of the Lords.

Secondly, It is only a prayer of the Commons to have their liberties confirmed, and the king's answer 'Le Roy le veult,' but nothing done to confirm it.

As to the first objection, supposing it true that there is no mention made of the assent of the Lords, yet the act is a good act.

1. It appears to be in parliament 'ad instan-'tiam et requisitionem Communitat' Regni 'nostri in præsenti Parliamento.'

2. The answer in parliament, that is given by the king to the making all laws, is given to this, 'Le Roy le veult.'

3. And next, it is admitted to be upon the parliament Roll, 7 R. 2. Num. 27. I have before said, that acts of parliament are not in certain form; sometimes entered as charters or grants, sometimes as articles, sometimes and frequently as petitions; the books I have already cited proved it. But according to the course of parliaments, let it be in what form it will, let it begin in which House it will, yet it must go through both the Houses of parliament, before it can come to the king for his royal assent. If either House rejects or refuseth, there it ends, it comes not to the king; nor is the royal assent in these great operative words, 'Le Roy le veult,' in parliament given to any thing, but what the whole parliament have assented and agreed unto: so that this is an objection grounded upon a reason contrary to all the course of parliaments, which shews that the Lords assent was to it, though not mentioned. Selden's Mare Claus. 249. gives a full resolution herein: 'Certissimum est,' saith he, that according to custom no answer is given, either by the king, or in the king's name, to

any parliamentary bills, before that the bill, whether it be brought in first by the Lords, or by the Commons, hath passed both Houses, as it is known to all that are versed in the affairs and records of parliament. And in the prince's case before cited, there the act is said to be 'de 'Assensu et Consil' of the Lords, but doth not name the Commons; and this answers the other reason also, viz. That it should only be a prayer and petition also, to have a charter of confirmation granted: for since the forms are in manner of petitions, since the royal assent or words, 'Le Roy le veult,' is never put to any bills in parliament, but such as are thereby made and passed into laws, the giving the royal assent is sufficient in this case to prove it a law. But for further evidence, we have it under the great seal of king R. 2. thus penned: 'Ad instantiam et requisitionem Communit' Regni 'nostri Angl' in præsenti Parliamento nostro, 'pro majori Quiete et Pace inter Legeos nostros 'focendis, et pro bono publico de assensu 'Prælatorum, Dominor' Procerum, et Magnat' 'nobis in eodem Parliamento assistentium, &c.' So that hereby it is fully proved, and shewn, that though the assent of the Lords be not mentioned in the copy, yet that it was had, and under the great seal of R. 2. it so appears. We have also, in our books of the acts of that time in the city, the proclamation made upon the first promulging this act, in the time of sir Nicholas Brember, lord mayor, Lib. H. f. 169. a. and b. and therein it is also entered in the same words as before, under the great seal of R. 2. 'de assensu Prælator',' &c. Next our books and continual practice ever since. It is true, that in the 7 Hen. 6. fol. 1. when it is said, that the customs of London were confirmed by statute Quære, what statute! but it is not there made a Quære, whether this were a statute? Instit. 4. 250. Rep. 5. 63. Rep. 8. 162. all say, that the customs of London are confirmed by parliament, 7 R. 2. Justice Jones 233. hath it *verbatim* out of the parliament roll. The constant course of pleading the customs of London, is to plead a confirmation of them by this act of parliament: so that as to this point there is not any one book or opinion before this day, in favour of what is affirmed, that these are not acts of parliament; and our plea stands good in law, and the ordinance, and by law, and custom is good, and then no forfeiture thereby.

But suppose, and admit, that this by-law be the act of the corporation, and not good and sufficient in law, nor in law justifiable, *Quid sequitur?* Then it is void in law. Then if it be void in law, how can it make a forfeiture? Suppose a lessee for years, or for life, makes a feoffment, but it is not duly executed for want of livery and seisin, by which it is void in law, can this make a forfeiture of the estate of the lessee? Suppose a corporation 'Tenant pur autur vie' makes a feoffment which is void for want of livery duly made, will this forfeit their estate? A void act shall not destroy or forfeit a precedent estate. A parson, that hath a former benefice, accepts a second benefice incompatible, was instituted and inducted, but did not read the articles, his first benefice was not forfeit or void hereby, because by the statute the not reading his articles had made this institution and induction void. Dyer 377 b. So that then whether this by-law or ordinance were good and void in law, perhaps is not much material; it cannot make any forfeiture of the corporation, it can have no such effect; for if it be a good and lawful by-law, no forfeiture can be for doing a good and lawful act. If the ordinance be not warrantable by law, then it is void in law; if void in law, a void act can make no forfeiture.

But you received, say they, and exacted from the king's subjects sums of money by this ordinance.

I answer, suppose we did, and that we had no right to have this money; if an officer, by colour of his office, receive more than is his due, it is extortion, and a crime punishable: But if a person, that is no officer, take money that is not due, or more than is his due, the parties injured have their remedies by action; but this is no crime for which any forfeiture or penalty is incurred by the person that so takes or receives the money. Suppose a lord of a manor exact or take greater fines or sums of money from his copyholders or tenants than he ought, they have their remedies by actions against those that receive; so if a corporation receive or take money supposed to be due, but in truth is not, how can this forfeit any thing?

But you took upon you, say they, a power and authority to tax the king's people, and to take and receive the money so taxed.

I answer, This is but the same thing, only put into greater words. It is still but the making an unlawful by-law, and thereby appointing money to be paid which ought not, or more than should be; and as to the turning of it, or expressing it in stately words, of taking upon you, or usurping authority to impose upon, and tax the king's people; whosoever doth any act or thing, he takes upon him, and doth also execute the power and authority of doing that act or thing, which is comprehended in the thing done. The making a by-law or ordinance, whereby more is ordered to be paid than ought; or monies appointed to be paid where none is due, is still all the fact and thing done; and if that make no forfeiture of the corporation, or crime punishable by indictment or information, except only as the statute 19 H. 7. c. 7. which I shall hereafter mention, hath appointed for forfeiture of 40*s.* the taking or usurping the power to do it, cannot be more, or effect more, than the doing the thing which comprehends it.

2. As to the other cause alledged in the replication for forfeiture, the petition, printing and publishing it; in the replication it is alledged, That the parliament the 10th of January was prorogued to the 20th of January; that the 13th of January the mayor, commonalty, and citizens of London, in their common

council assembled, 'malitiose, advisate et seditiose,' took upon them 'ad judicand' et censend'' the king and the prorogation of the parliament by the king so made; and that the mayor and commonalty, and citizens of London, so in the said common council assembled, did give their votes and order that a petition, in the name of the mayor, alderman, and commons of the city of London, in common council assembled, should be exhibited to the king: In which petition it was contained, that by that prorogation the prosecution of the public justice of the kingdom, and the making necessary provisions for the preservation of the king, and his protestant subjects, had received interruption; and that the mayor, commonalty, and citizens of London, in common council, as aforesaid, assembled, maliciously and seditiously, to the intent the same should be dispersed among the king's subjects, and to cause an opinion that the king obstructed the public justice, and to stir up hatred and dislike against the king's person and government, did order the said petition to be printed; and afterwards they did print it, and caused it to be published.

The defendants in their rejoinder to this breach set forth and alledge, That there was a plot against the life of the king, the government, and the protestant religion; and set forth all the proceedings upon it, the attainders and impeachments of the lords in the Tower in parliament depending, the proclamation declaring the dangers by this plot, that they could not otherwise in human reason be prevented, but by the blessing of God upon the consultations and endeavours of that great council the parliament, and commanding a general fast to be kept in London the 22d of December, and that it was kept accordingly; the proceedings in the parliament towards the trial of the lords, and preparing bills to be enacted into laws, for preservation of the king and his subjects against these plots and conspiracies; that divers of the citizens, loyal subjects, being much affrighted, and troubled in their minds, with the apprehension of these dangers, did exhibit their petition to sir Patience Ward, then lord mayor, and the aldermen, and the commons in common council then assembled, containing their fears and apprehensions and expectations from the king and that parliament; did petition, that the common council would petition for the sitting of that parliament, at that time prorogued. And thereupon the mayor and aldermen, (naming them) and commons in common council assembled from their hearts truly loyal to the king, and for the satisfaction of the citizens, who had exhibited that petition, and of intent to preserve the person of the king, and his government, did give their votes, and order a petition should be exhibited to the king in the name of the mayor, aldermen, and commons in common council assembled, and set forth the petition in the name of the mayor, aldermen, and commons in common council assembled *in hæc verba*: Wherein among other things it is contained, That they were extremely surprised at the late prorogation whereby the prosecution of the public justice of the kingdom, and the making provisions necessary for preserving the king's person, and his Protestant subjects, received interruption. And did farther agree and order that that petition, after it had been presented, should be printed, which was so ordered with intent, that false reports concerning the petition might be prevented; the enemies of the king and the conspirators, from proceeding in the conspiracy, deterred, the troubles in the minds of the citizens alleviated, and the citizens know what had been done upon their petition; that the petition was delivered to the king, and afterwards printed; that this is the same petition and printing in the replication mentioned *absq; hoc*, that any petition of or concerning the prorogation of the parliament was made, ordered, published, or printed in any other manner than they have alledged, as the Attorney General supposeth. To this part of the rejoinder Mr. Attorney hath demurred generally by the demurrer, the fact alledged in the replication is admitted to be true, and it is true that there are no words, that are written or spoken, but are subject to various constructions: But I take it, that no words, whether written or spoken, ought to be taken in an ill sense, if they may reasonably be taken in a better; 'Nemo præsumitur esse malus;' and therefore the words must stand as they are penned: And having first expressed their fears, and next their hopes, from the king and parliament's proceedings in trial of those that were impeached, and making laws for their security, and how they were surprised at the prorogation; then they say, That by that prorogation, the prosecution of the public justice of this kingdom, and the making necessary provisions for the preservation of the king and his Protestant subjects, had received interruption. It is mentioned only as a consequence of the prorogation, it is not said or expressed, that the king did interrupt; for I think there is great difference betwixt the one sort of expression and the other. An ill consequence may attend a good, and commendable, and most necessary act; but no consequences can make an ill act good; and therefore the expressing the consequence doth not necessarily condemn or declare the act to be an ill act. Suppose, that in the time of the great plague a man had had a suit in Westminster-hall, wherein all his estate had been concerned, and had said or writ, that by the adjournment of the terms by the king, the proceedings of the courts of justice in his suit had received an interruption, had these words been punishable? The adjournment was then the most necessary and commendable act that could be for the preservation of the king's subjects in that raging pestilence; and the act itself being so good and necessary, though there were such consequence as to that particular suit, the writing or saying, that it had such a consequence, such an interruption, did not, I conceive, condemn

judge, declare or express the act to be ill. Suppose a man had had a bill depending in that parliament, to be enacted for the enabling him to sell his land to pay his debts, to free him from a gaol: Or, suppose that some one of the lords impeached in that parliament had made a petition for the sitting of the parliament, and had therein expressed as a reason and ground of his petition, the like words as in this petition: What would the court have judged of it? Are not the cases much the same? If they are, there will be no distinction of persons in judgment; I am sure there ought not. Perhaps when this petition was made, there might be too much heat in the minds of men; and it is true that heat increaseth heat, and fire kindles fire; it is time for all sorts to grow cool and temperate, and to weigh and consider; we are, or should be, considering men? This petition was made *nemine contradicente*, and undoubtedly among such a number as the common council, there must be men of variety of tempers and dispositions: But for the greatest number of the aldermen, and common council, think of them; we know the men, many of them; can we imagine, that they had either the least ill thought or meaning towards the king, his person or government, in this petition, or the printing it? And as for the printing it, that, my lord, stands upon the same reasons and grounds: For if there be nothing ill or unlawful in it contained, then the printing and publishing of that which contains nothing ill or unlawful, is not, as I conceive, ill or unlawful. Printing is but a more expeditious way of writing, and is good or bad as the matter printed is good or bad. The defendants in their rejoinder have set forth their whole case, the reasons and grounds of what the common council did, and the manner and intent of their doing it; all which fact cannot be denied to be true, but is now confessed by the demurrer. It hath not, nor can be said, but it is well pleaded, and might have been traversed and denied if not true: But it is confessed by the demurrer to be true, and therefore that must be taken to be the fact, and not as alledged in the replication, and then so taken, I submit it to your judgment.

3. But the next thing considerable is, Whether supposing and admitting that if done by the body politic, it hath been a miscarriage or a crime? Whether not being done by the body politic, nor under the common seal, but by common council, whether thereby the being of the corporation shall be forfeit.

A common council in corporations is generally a select number of the body corporate, constituted to advise and assist the corporation in their ordinary affairs and business. There is no certain rule nor measure of their power wherein all the common councils agree. In some corporations the common council have greater authority, in some less, according to the several authorities by their respective charters, where the corporations are by charters; or by custom or usage, where the corporations are by prescription: But in all they are a subservient number of men, constituted and authorised for particular ends and purposes: And in this case I think the court can take notice of the common council no otherwise than upon the record they appear to be. The replication doth not say what they are, but would go in the dark, by intention and presumption, the best way and method to arbitrary determination. The rejoinder saith, that the citizens and freemen are a great number, 50,000, and more. That there hath been time out of mind a common council, consisting of the mayor and aldermen for the time being, and of certain freemen, not exceeding 250, annually elected to serve as common council men, and are called the common council of the city; that time out of mind there hath been a custom, that the mayor, aldermen, and such citizens, so elected to be of the common council, according to custom, have been accustomed to make by-laws and ordinances, for the better regulation of the public markets, for appointing times and places, and assessing and reducing into certainty reasonable tolls, rates, and sums of money, payable for stalls and standings in the market: For any thing appears upon the record, this is all they have power to do: *non constat* to the court, that they have any other power or authority over lands, estates, or any thing else. Next, if this which in the rejoinder is alledged, of the being and power, be true, and so admitted, then what they did in making the ordinance, was done by good and lawful power and authority, and then can be no offence: But if to make the ordinance be an offence, and an unlawful act, you deny the custom to be good, and say, the custom is void, and against law, and for that reason the ordinance illegal. Then *non constat*, that they had any power at all to do any thing, and then a common council to advise without power to do any act; and if so, how can a parcel or part of a corporation, not authorised to do any act, do an act that shall forfeit? Suppose a particular company, as the mercers, had done this, could this be a forfeiture? But if to avoid this you will say, that the court shall take notice of the common council of London, to have the management of the business of the corporation belonging to them; this I think the court cannot do, and I cannot see how possibly they can, as a court, judicially take notice hereof. Suppose our question had been concerning another corporation, could the court then, as a court, judicially have taken notice of the power or authority of their common council? Mr. Solicitor in his argument held, that there was no difference betwixt London and another corporation, except that London was the biggest. Then put the case of any other corporation, could the court judicially have taken notice of their power or interest, without having it specially set forth? Is it possible the court can, since they differ one from the other, as much as their charters of constitutions do differ, of which

there are hardly to be found two in England that do agree in their powers? If it had been of another corporation, of necessity the constitution of the common council must have been set forth. If you are upon a by-law, made by any other than the body politic itself, must not the power and authority of those that made it be shewn, and set forth in pleading, in any case where there is occasion to use it? How otherwise could the court judge or determine of it? So that taking the law to be as the other side saith, that London differs not from any other corporation; it is no where alledged in the pleading, that they have power to make by-laws, for the ordering and governing the city, or that they can bind all the corporation in sale or disposition of their lands, or have the power of the common seal: Therefore when the king's counsel argue from these powers, their power of forfeiting, they argue quite out of the record; they have no where alledged or pleaded what they are, or what power they have, as they should have done, if they had so intended. So as to this particular, here is nothing before the court, nothing upon record, to shew how or which way the body politic should be concerned in these acts of about 250 of their members, called the common council. Wheresoever any by-laws or ordinances are pleaded, the power to make these by-laws or ordinances is pleaded, and so are all particular and derived authorities, whenever occasion to plead them, and necessary they should be so: For it is fact, that the other side may and ought to be at liberty to deny it, if he see cause; and therefore if they will have it, that the common council have abused some power or authority they have, thereby to forfeit the corporation, they ought to have shewn it; to say that notice shall be taken or it shall be intended or presumed, is in truth a presumption upon the court, as if the court should take notice of, intend, or presume, what the king's counsel would have, which the court cannot, nor will do, more in this than in other cases. But supposing the court will take more notice of London than any other corporation, and will take notice of the common council there, and of their power and authority; and I will suppose, as the other side do, that they have the power of making by-laws, of leasing, granting, and managing the city lands and revenues, and of sealing with the common seal, and that this they have by custom; then surely, say the other side, they have the power of surrendering and forfeiting the corporation. If I should answer, surely and without doubt they have not, this would not argue they have not; but the argument should come of the other side, to prove they have; they have not, nor can produce any case or opinion to prove it; and the very thought, that they could, is so new, that I believe none can be found like it. But let us consider the nature of this thing a little particularly: Though general discourses are most easy and florid, yet perhaps a particular inquiry may best discover. Admit, that they have the power the other side say they have; yet they are not the corporation, but a part constituted for these particular ends and purposes, for which they are impowered. Corporations had their creations by charter; that gives them their being, and the form, method, and power of action. Suppose, that the first charter of incorporation that was granted to London did grant, that the citizens should be incorporate, and a body politic, by the name of mayor, and commonalty, and citizens: that there should be a mayor, so many aldermen, and so many of the citizens annually elected, that should be a common council; and that they should have power to make by-laws, to demise or grant their lands, under the common seal, in the name of the corporation. If they do any act not within their commission, is not that void? Suppose a grant made to the common council, would not that be void? Suppose a grant made by the common council, in the name of common council under seal, or in the name of the corporation, but not under common seal, is not all this void? This I only instance, to shew that their charter and authority is their power and warrant they are to act by: Did ever any man hear of, or see a charter giving the common council power to surrender the corporation? Or was it ever thought of before these days? If then no such power by the charter be given, if they cannot do it without power given them, shew me their power, or else I think I may conclude, sure they cannot surrender the corporation without power. But the common council in London, that is by custom, and their power is by custom. Then if the question be, what is their power? It is answered, what they have used and accustomed to do, that they may do; what they have not used or accustomed to do, that they cannot do; for if custom and usage be the authority, that authority can go no farther than their custom and usage goes. Then put the question, have the common council used to surrender or forfeit the charter? Nobody can say it. What reason then is there for any man to say they can do it? It is probable, that the common council in London had first their institution from some by-law or ordinance, though now not to be produced, but consumed by time. But be it that, or any other imagined commencement, can it be imagined, that those that gave them their original authority, gave them power to surrender the corporation or forfeit it? Suppose that the power given them did authorise them not only to make by-laws and ordinances for the good order and government of the corporation, to grant or demise their lands and revenues, but had some general words in it to act and manage the matters of the corporation: Is it not against all sense to suppose, that that which is deputed and constituted for the well ordering and managing of the corporation, should have power to surrender it? Then as the council of the other side argue, that because they may surrender, they may forfeit. By the same reason, I hope

I may argue, if they cannot surrender or dispose of the corporation, they cannot forfeit. Next, those acts of the common council are not done neither in the name, nor as the acts of the corporation, nor under any seal; but do import in themselves only to be the acts of the common council; The ordinance, that is made by the mayor, aldermen, and commons, in common council assembled. The petition is the petition of the lord mayor, aldermen, and commons, in council assembled: Their leases or grants are in the names of the corporation, and under the common seal; and the common council only ministerial to the corporation in ordering, managing, and disposing all for the benefit and advantage of the corporation, to avoid the inconveniency of assembling the numerous body. But that any thing, that hath but a ministerial power, for the service and benefit of their principal, should have power to dispose of, sell, convey, or surrender, and destroy their principal, is no consequence in law or reason. No deputy, assistant, or bailiff, hath such power; if he exceed his authority, his act is void. Is it not so with all authorities and derived powers? What they do beyond their authority cannot bind those from whom they derive it. It cannot be the act of the corporation; for a corporation cannot make a petition, no more than they can make a deed, or subscribe a writing, except under the common seal. Corporations cannot make a lease at will, license a man to enter upon their lands, or do any like act, but under their common seal; nor can they commit a trespass or disseisin but by command precedent, or assent subsequent, under their common seal. How then can this be their act? There is nothing in it that imports it should be theirs, nor ever intended to be theirs; it is not done by them, nor in their names, but by the common council, and in the name of the common council. If we may take notice of what is out of the record, we know that they have in London a greater assembly than the common council, viz. the common hall, wherein the common council are no more than others. Can the petition of the mayor, or mayor and aldermen, in their names, be taken to be the act of the corporation? If that cannot be, why should the petition of the common council in their own names be any other than their own petition, as their ordinance and by-law are theirs, and not the corporation's, 12 H. 7. 25, 26. 9 E. 4. 39.

The case of corporations takes notice of their power, as common councils, to exclude the commonalty, and the rest of the corporation. The act allows the common council's ordering petitions. But where is it to be found, that it was ever said or thought on before, that they could forfeit or dissolve the corporation? Rep. 4. 77. 13 C. 2. cap. 5.

4. But supposing all that I have said against me; and supposing the acts of the common council to be the acts of the corporation, and supposing those acts, viz. the making the ordinance and petition, not justifiable or excusable; then the great point will be, whether they or either of them are such miscarriages or offences in law, for which the charter, that is, the very being of the corporation, shall be forfeit? This I call the great point; for I think it to be as great in consequence as ever any at this bar, as if Magna Charta were at stake? for in my apprehension, not only London, but all the corporations of England, and the government of England, will be deeply concerned in the question. For let us but consider what a vast part of England is concerned in the corporations of England.

(1.) Ecclesiastical, or mixt, as archbishops, bishops, dean and chapters, parsons, vicars, universities, colleges, hospitals of all sorts.

(2.) All the cities and considerable towns and boroughs in England.

(3.) The very frame of our government is concerned; for one of the estates of the kingdom, viz. The Commons in Parliament, consists of knights, citizens, and burgesses; the citizens and burgesses are usually chosen by them that are free of the respective cities and corporations; and where not chosen by them, yet the elections are generally under their power and influence, and the return made by them.

Perhaps also a peerage is a sort of corporation. Perhaps the world itself, at least this little world, will no longer be able to subsist in health than the due order and just temperament of the several parts and powers therein are preserved, and contain themselves within their own bounds. The taking away or infeebling any principal part brings a lameness and deformity, pain and disorder upon, and at length confounds the whole. The laws answer their ends, whereof the principal is the preservation of the government, which preserves the laws, they cannot subsist one without the other; therefore whatsoever it is that tends to the subversion, or leaving at will and pleasure, that which is so considerable in our government as corporations are, ought to be thoroughly considered.

The better to examine and consider this great point: in the first place, the reasons given on the other side are,

First, That if corporations be not forfeitable for their miscarriages, they will attempt and do extravagant acts, raise sedition or rebellion, and there will be no adequate punishment to their miscarriages.

In answer to this reason, I say, that there is no illegal act that they can attempt or commit, but that they are under the same severities and corrections of law, as any other the king's subjects, not incorporate, are. Though it be true, that the corporation itself is only a body politic, an invisible body, yet the members of it, they are visible. If they as members of that corporation commit or do any unlawful act, they are punishable for it in their own private capacities: if they make any ordinance or by-law to raise money unlawfully upon any of their members or others, the by-law or or-

dinance is void: if they receive or collect any money by it, the receivers and collectors are to answer it, they are to be sued as any other subject. Suppose a lord of a manor or market make an unlawful order to collect or take money from his tenants or copyholders, or unreasonable tolls in his markets; this order is void in law, and those that collect or receive any money by it are answerable for it, and the parties grieved have their proper actions and remedies, and perhaps the markets, or at least the tolls may be seized, or forfeit for this miscarriage. This is the provision that by law is made against such exactions; and this is just, and adequate, and reasonable. And if a corporation made such ordinance, by-law, or order, and thereby there is the same receipt or exaction, the subject hath the same remedy, and there is the same forfeiture of toll or market, as in case of any natural person, or lord of a manor; and the provisions by law made are just, and reasonable, and adequate, in this case of the corporation, as of the other. The like for any offence that can be committed, it must be done by particular members, and they must answer for it. And this is no new opinion; 21 E. 4. 14, is express, that a mayor, and commonalty, or other body politic, cannot commit treason, although all the commonalty do commit treason; every of them is a traitor in his own person. I might cite other authorities to this purpose, but they have been already cited by Mr. Recorder in his argument; and though the counsel for the king would make these books to be but some slight opinions, yet unless they could shew some authority, book or case to the contrary, their despising or little valuing what they can find no answer for, will not render the authority and constant opinions of our books of less esteem than they ought to be. It is no excuse, if they do an unlawful act, that they are members of a corporation, or did it as a corporation. Nobody can say this will excuse them; so that, notwithstanding their being a corporation, they are as subject to the law, be the offence treason, sedition, or any other crime or offence, as any other the king's subjects are; every particular member, that acted or committed that offence, is answerable to the law for it. The particular members that commit the unlawful act, and all that act under their authority, are subject to the same law as all other the king's subjects. And therefore this reason, that else there will be no punishment upon them adequate to the offence, and consequently a mischief and inconvenience, is but a shadow, and nothing proportionable to the mischiefs and inconveniencies attending the position of a forfeiture of the other side. But consider the injustice that would be of the other side, if this should be so: we know assemblies determine their acts by the major vote, and great struggling there is, as we too frequently see in their debates and resolutions, and carried by majority of one or two votes, sometimes by surprizes and undue management, sometimes by fear and terror: suppose an evil act so carried or managed, is it reason that all the whole corporation should be thereby forfeit; and thereby all other men, to whom they owe any debts, must lose them, and the many interests and livelihoods depending upon the corporation, the customs, courts, offices, and privileges belonging to it, endless to enumerate, shall all be undone and destroyed?

Secondly, The next reason that hath been given is, that it is a general rule in law, that the abusing or misusing of a franchise is a forfeiture of the franchise.

I answer, this is true in the sense that the books do say it; for if a man misuse or abuse a particular franchise, he shall forfeit that particular franchise; but he shall not forfeit any other, except it be depending upon, and incident to it. And the cases cited prove nothing farther: that when a man hath divers franchises not depending one upon another, and misuseth one franchise, he shall not thereby forfeit the rest, but only that which he misuseth, 22 Ass. p. 34, Br. Fran. 34. And therefore the cases cited, where the abbot of Crowland, and the abbot of St. Albans, had franchises of custodies of gaols; one would not be at the cost of a commission of gaol-delivery, the other did detain in prison after legal discharge, and fees paid, 8 H. 4, 18 Rep. 9, 96, b. 24 E. 4, b. Inst. 2, 43. This was a misuser of those franchises and forfeitures. So also perhaps if there be a franchise that hath incidents to it; as pypowders to a fair, pillory to a leet: an abuser of the incident, as the Court of Pypowders, or the not having a pillory, may forfeit the market or the leet. If the lord of a market take outrageous toll, he shall forfeit the market, Stat. West. 1, cap. 31, Inst. 2, 219. But doth this prove, that if a corporation have fairs, markets, gaols, or leets, and misuseth any of them, that the body politic, the corporation, shall be forfeit? If this be so, the abbots, they being corporations, in the cases of the abbots of St. Albans and Crowland, should have forfeited not only the liberties of having gaols, but the very corporations or bodies politic, of being abbots; a conceit never yet imagined. Can you say the city of London is either dependent or incident to the markets; or on the contrary, that the markets are so incident or dependant upon the corporation, that they cannot be one without the other? Can this be said? If this cannot be said with reason, how can then the taking these tolls, admit they were outrageous, and a forfeiture of the market, forfeit the corporation? The making the ordinance, supposing they made it, is but the mean by which they took it. Your books only prove the abuse of a franchise, a forfeiture of that franchise, or incidents to it, and no other: but the inference in this case is not the forfeiture of that particular franchise, but of the being of the corporation that owned the franchise; which is a plain *non sequitur*, unless you say the corporation is incident to the market. Arguments

from general rules are the most fallible, especially in law; and that this is such, I hope most plainly to shew in the distinguishing the different nature of franchises; which I shall do presently, only taking in my way their next reason that they offer, and answer both together; which is,

Thirdly, That a corporation is a franchise; that it commenceth by grant, and therefore is forfeitable and surrenderable, as other franchises are; and if they be surrenderable, then also are they forfeitable.

I do agree, that franchise is a large word, it is of the like sense of liberty or privilege. Therefore in Quo Warranto, franchises, liberties, and privileges, seem to be of the same sense. To be a subject born, and to have liberty and privilege of a freeman, and no villain, is a great franchise; and therefore in law, when a villain is made free, we say he is infranchised, he hath the liberty, and privilege of being a freeman. An alien, he is made denizen by letters patents; a person attainted is pardoned by letters patents, and a restitution in blood granted, and made a new creature. By these grants the alien and the person restored have such franchises, liberties, and privileges granted them, that though before they were not capable to take, hold, or enjoy, or act as natural-born subjects or freemen; yet hereby they have such capacity granted. Next, I think it will be granted, that this franchise liberty, privilege, or capacity, is not surrenderable or forfeitable, except only in cases of treason or felony, where they forfeit their lives; by these instances this is proved that it is no true position, that whatsoever is grantable is surrenderable; and if surrenderable, forfeitable; which is one of the reasons given by the king's counsel, why a corporation is forfeitable; for these franchises or privileges are by grant, and yet not surrenderable or forfeitable; and this also shews, that arguments general, and from general rules, are most fallible, and fit only to take weak apprehensions. But next, consider what it is to be a body politic or corporation. A body politic is framed and constituted in similitude or likeness of a natural body, with capacity to take, hold, and enjoy, an act as a natural body, and can no more surrender or forfeit his being, while the members of that body are subsisting, than a natural can while alive. It is only a capacity framed and created in a multitude to be and act as one person; they are incorporate and made one body politic, that have power, and capacity, or franchise, of acting, taking, holding, and granting; this is their franchise, admit it so, but differs from others. Franchises and liberties of all other natures are estates and inheritances grantable and conveyable from one to another as other estates are; this is no such thing, grantable, or transferable: other franchises and liberties affect the king's subjects, and are privileges claimed, wherein the king and the rest of his subjects, not claiming the franchise, are more concerned than in this of being a body politic; for other franchises either convey some profit from the king, as felons goods, waifs, estrays, wrecks, or the like; or affect his subjects, as courts, gaols, returns of writs, fairs, markets, and the like; but this of being a body politic is only a capacity to be a person capable of having and holding what may be granted unto it, and of granting and acting as a natural body, and affects the king, or other his subjects, no otherwise, than giving capacity to take, hold, and enjoy what they can get, as other persons capacitated may. Other franchises, liberties, and privileges are distinct and separate estates, and if any one be forfeit, as it may for misuser, the rest are not; except incidents and appurtenances. But if the being of a corporation be forfeited, all their estates, lands, goods and chattels are gone at once: so that though you admit and call this a liberty or franchise, it is nothing like in its nature to those things generally known and understood by the name of franchises or liberties; and general sayings are generally to be understood of such things as are generally so taken and called. If then there be such great and apparent difference betwixt this of the being a body politic, supposing it being, in a general and large sense, a franchise, liberty, or privilege, and other particular franchises, admitting that which is said, that the misuser of a franchise is a forfeiture, holds generally true, yet it is not in every particular true; where there is such apparent difference and reason to distinguish, as betwixt the being of a corporation or a body politic, which is only a capacity, and other particular franchises, which are estates; there is also apparent reason to distinguish betwixt one and the other, they being so much differing one from the other in nature and reality. But next, that this was never taken in law to be such a franchise, liberty or privilege, as was comprehended under the general meaning of franchise or liberty: by Stat. of Glost' 6 E. 1. Inst. 2. 278. Writs were to go to all sheriffs forty days before the Eire, of general summons for all to come in at the Eire to claim their privileges; and the second day of the sitting of the justices in Eire a proclamation made to the same purpose. In the comment upon that statute it appears, Inst. 2. 281, 282, that if the party did not appear, his franchises were seized into the king's hands, *nomine districtionis*; and if not replevied, sitting the Eire, they were forfeit or lost for ever. If the party did appear, and did not claim, then they were lost for ever. In all the proceedings in Eire there is no such thing can be found, that the corporations did come in and make claims to their being corporations or bodies politic, or that ever any were seized, if it be seizable, into the king's hands, or was forfeit for that claiming. Fulcher and Heyward's C. Palm. 491. It appears, that the dean and chapter, there surrendered their charter and all their manors, lands, possessions, privileges, franchises, and herditaments, spiritual and temporal, and this with intent to surrender, that there might be a new corpo-

ration erected; as is recited in the letters patents of new erection. In this case, Rep. 3 75. And, 2. 120. Jones 161. resolved, that by this surrender the old corporation was not surrendered. This judgment doth conclude, and must be given, either because by the word franchise, and the other general words, the franchise of being a corporation was not comprehended; or if the word is sufficient, and did comprise it, that it could not by law be surrendered. This I think sufficiently shews, that corporations were in law, as persons natural are, and in like manner claimed; and that the being a body politic, or corporation, was not to be claimed, comprised, or meant within the general word franchises, no more than the liberty or franchise of denizen, or manumission. Next no instance can be given of any seizure of any corporation, or body politic, for any forfeiture: seizure of their liberties, or putting officers upon them, is quite another thing, as I shall shew presently: as that these general sayings in law books, that misuser of a franchise forfeits the franchise, neither in law or reason extends to the being of a body politic or corporation, but it is applicable only to particular franchises of other natures; and the other reason, that that which is grantable is forfeitable, is as fallacious, as before appears.

3. As for the records cited to prove, that the corporation or body politic may be forfeited, I will state those that are most effective, and do them right therein.

Johannes Dennis, mayor of Sandwich, P. 9. E. 1. and three more, were attached to answer 'Domino Regi de placito transgr' et unde Robertus de Stokho,' sheriff of Kent, 'qui sequitur pro ipso Rege,' complains, that he had sent his bailiffs (naming them) to make execution of the king's writ, 'in Villa de Stanore, quæ est Baronia domini Regis,' and that the defendants, with swords drawn, took away the king's writ, and trod it under their feet, and would not suffer it to be executed; 'unde dicit quod deterioratus est, et damnum habet ad Valentiam' 2000 marks. The mayor appears, and pleads to the jurisdiction, that he ought not to answer this matter, except in the court of Shipway. The sheriff replies, that Stanore is the king's barony, belonging to the barony of St Austins, and relies upon a record before justices in Eire, where an amerciament upon that Ville was formerly set. The mayor refuseth to plead over. Then a day is given over, then it is entered thus: 'Posteaq; coram Domino Rege, et ejus Concil', quia Barones de l' Cinq; Ports, nec aliqui alii in Regno nostro possint clamare talem libertatem, quod non responderent Domino Regi de contemptu sibi fact', ubi Dominus Rex eas adjornare voluerit; et quia prædict' Barones non protulerunt aliquas Chartas a Regibus concessas, in quibus non fuit excepta Regia Dignitas, consideratum est quod respondeant; et quia le Defendants' would not answer any otherwhere than in Shipway, 'consideratum est quod habeantur in defensionem, pro convictis de prædict' Transgr' et Contempt'. Et quia' the said John Dennis is convicted of the said offence, and the fact of the mayor, in those things, which touch the commonalty, is the fact of the commonalty, 'consideratum est quod Communitas de Sandwich amittat Libertatem suam, &c.' Then follows 'Postea, in præsentia' of the bishop of Bath and Wells, then Chancellor, and others, 'cum Assensu Regis, an agreement betwixt the abbot of St. Austins, the men of Stanore and Sandwich, de omnibus contentionibus.' And then goes a long agreement betwixt the abbot and the men of Sandwich and Stanore, concerning their jurisdictions and courts. 'Et si aliqua pars contra concordantiam illam ire vel facere, alia pars habeat suam recuperare per breve Domini Regis de Judicio exeunte de isto Recordo. Et pro hac prædict' homines vadiant prædict' Abbati 100 marks, which the abbot remits for '10 doliis Vini, pretii 30 marks,' to be paid at the feast of St. John the Baptist. This is the record at large; and for the extract in the collections at Lincoln's-Inn, whether it be of this record, or any execution that went out upon it, *non constat*: but that I think it could not be upon this record; for the record is not 30 marks *annuatim*, as the abstract is, and the entry of the *videtur* at the conclusion, 'quod Judicium extendit contra Barones quinque Portuum, et eorum Libertates, ut mihi videtur,' that is not my lord Hales's note, nor doth it appear whose it was. Out of this record how can a man infer, that a corporation shall be forfeit for the miscarriage of the mayor or officer? How doth it appear from hence, that they should lose or forfeit their being a corporation? By *amittat Libertatem* all that is meant thereby is their liberty in Stanore, or the liberty they claimed to be impleaded in the court of Shipway; and the note in the extract, 'videtur quod Judicium extendit versus Barones,' must be, I think, taken to be as to their liberty in Stanore, or to be sued only in the court of Shipway. I have taken the more notice of this record, because it hath countenance of a judicial proceeding; but as to all the other records cited,

A writ to the sheriff of Gloucester, reciting, that the king, for injuries and contempts done by the mayor and commonalty of Bristol, the liberty of that ville by Bartholomew de Baddlesmere, Custos of that ville, into his hands had seized. 6 E. 2. R. Cl. m. 5. The writ commands the sheriff, that the Custos should have the execution of writs as the mayor and bailiffs used to have. And in the times of Henry the Third, Edward the First, Edward the Second, and Richard the Second, there were frequent seizures of the office of mayor; and the kings did put in a Custos in the place of a mayor, or made a mayor, and these are called seizures of liberties.

King Henry the Third put in a Custos over London, which continued till the 54th of his reign, and then was taken off, and the city restored to its election. 49 H. 3.

Edward the first put in a Custos, and continued so to do till the 24th year of his reign, and then was taken off. 15 E. 1.

The 14th of Edward the Second a seizure of the office of mayor by Henry de Staunton, and his fellows, justices in Eire in the Tower, and mayors put in by the king till the 20th of Edward the Second, and then restored: but for that of Richard the Second, give me leave to digress, and give you the state of it out of the city registers, which are more full than these cited.

A writ from the king to the mayor, sheriffs, and aldermen, commanding them to come with twenty-four principal citizens, before the king and his council at Nottingham, 'in 'crastino Sancti Johannis Baptist tunc prox 'fut.' and to bring sufficient authority from the commonalty to answer such things as should be objected. 16 R. 2. July 22. Lib. H. fol. 269. b. City Reg. They appeared, and had a letter of attorney, 'ubi pro diversis defectionibus 'in Commissione sua sub communi Sigillo, et 'aliis de causis,' the mayor and sheriffs were discharged of their offices, and committed 'diversis Prisonis;' and afterwards, the first of July, sir Edward Dallingrigg, made Custos by the king, came to the Guildhall, and his commission being read, he was sworn before the aldermen, 'secundum quod Majores ante jurare 'solebant;' the king also made the sheriffs, and they were also sworn. This is also entered in the City Register, Lib. H. fol. 270. b.

It appears that the king first swore the Custos, and the sheriffs, to be true to him, and also turned out the aldermen. And that the proceedings were before the Duke of Gloucester, and other lords, by a commission to inquire of all defaults in the mayor and sheriffs, in the well-governing of the city, awarded upon the statute made by the king's grandfather; and that they were convicted by their own confession, and thereupon the liberty of the city seized.

The Pardon and Restitution entered, and thereby it is recited, that the proceedings were upon the statute, and the judgment was, that for the first offence they should forfeit 1,000 marks; for the second 2,000 marks; and for the third offence, that the liberty should be seized 19 Sept. 16. R. 2. Lib. H. fol. 272. a. *ubi supra.*

The Statute 28 E. 3. cap. 10. enacted, That the mayor, sheriffs, and aldermen of London, which have the governance of the same, shall cause the errors, defaults, and misprisions in and about the same, to be corrected and redressed from time to time, upon pain, that is to say, to forfeit to the king for the first default, 1,000 marks; for the second default, 2,000 marks; and for the third default, the franchises and liberties of the city shall be seized into the king's hands. And that the trial of these defaults shall be by inquests of foreign countries, and the pains levied upon the mayor, sheriffs, and aldermen. Upon this Statute were the proceedings of R. 2. grounded.

The other side have likewise much relied upon another seizure made of the liberties of the city of Cambridge.

A great riot committed by the town upon the university, heard in parliament by way of petition, and form of articles exhibited by the scholars against the mayor and bailiffs. Upon reading of which it was demanded of them, What they could say, why their liberties should not be seized? After many shifts they submitted themselves to the king's mercy. The king thereupon, by common consent in parliament, seized the same liberties into his hands, as aforesaid, and then granted divers liberties to the universities, and certain liberties the king granted to the said mayor and bailiffs, and increased their former. These are the most substantial; it would be too tedious to repeat all, for there have been in those days, but not since many like seizures of liberties, as these; only general, but nothing particular to our purpose, and though not cited, I shall also mention those in Crook. 5 R. 2. Rot. Par. N. 45. Inst. 4. 228.

Certiorari to the mayor of Fith; they disobeyed the writ, and gave scurvy words Cr. 1. 252. Tyndal's Case; and thereupon Mr. Noy cited two cases of seizures of liberties. The bishop of Durham had contemned the king's process, and imprisoned the messenger. An information exhibited against him, the offence proved; and adjudged he should pay a fine, 'et quod capiatur,' and should lose his liberties for his time; because 'justum est quod in eo 'quod peccat in eo puniatur.' 33 E. 1. Rot. 101. Another 'in Banco Com',' a prohibition awarded to the bishop of Norwich; and he excommunicated the party that brought the writ; 21 E. 3. Rot. 46. the party brought his action adjudged against the bishop, that his temporalities should be seized till he absolved the party, and satisfied the king for his contempt, and that the party should recover 10,000*l.* damages. I answer to them,

(1.) That they were all above 300 years ago except that of 16 R. 2. which is above 290, and no such thing ever was done since; what stress or weight can be given to such proceedings? To what rules of law, since known or practised, can we bring these proceedings? Are they now legal precedents for the like things to be done. The writs out of the old records for the ship money, and the knighthood-money, had as good records to warrant them, and much more plain to the purpose than these. The precedents of Edward the 2nd and Richard the 2nd, either of their lives, or of their deaths, or of the lives or deaths of some of the judges of those days, ought, as I conceive, to be no examples. And for H. 3. E. 1. E. 2. and R. 2. and those times, they were times of great troubles and disorders; and what was then done is no rule or precedent for this court, or any other court of justice to go by, unless by latter times allowed or approved. No law-book or report of any judicial proceedings, either of E. 2. or of E. 3. or any latter book

of law, that I have yet heard of, or met with, (and I doubt not but if there had been any, the king's council would have made use of them) hath ever given so much credit or countenance to these proceedings, as to take any notice of them. To make use of old records or precedents, the grounds or reasons whereof cannot now be known, to subvert any law or government established, is neither advisable nor commendable. But for further answer to them:

(2.) As to that of 16 R. 2, that you see is grounded upon the statute 28 E. 3, c. 10, and can signify nothing to the present purpose; for there, according to that statute, they condemn the mayor, sheriffs, and aldermen, upon their confession, that they had misgoverned the city. The mayor and sheriffs being committed to prison, and this done before dukes and earls, by special commission to that purpose appointed, and convicted by their confession, for the first, second, third offence, all at once, is this of good authority in law? And for the others, that of E. 2, was before justices in Eire at the Tower, the office of mayoralty seized into the king's hands, and replevied from year to year. And that seizure that was made by king E. 1, for what reasons or grounds, or by what sort of proceedings, doth not appear, all that doth appear of it is, that *de facto* Custodes and Mayors were put upon the city, but *quo jure*, who can tell? We know these times were times of trouble, in the barons wars. The barons, Simon Mountford, earl of Leicester, being their general, fought a battle with the king at Lewes, and took the king and prince Edward the first, both prisoners, 48 H. 3. The barons differing among themselves, and the earl of Gloucester joined with the prince, who got out of prison, another battle was fought at Evesham, and the great earl Mountford slain, 49 H. 3, and then at Winchester by parliament all his party, and the liberties of the city of London seized; and in such times as these, and which followed in E. 1, E. 2, and R. 2, it is not to be marvelled if there were many seizures and custodes put on the city; it is more a marvel they were not destroyed. The statutes made in these times shew not only the disorders, but that the liberties were greatly infringed, or else there would not have been statutes to confirm them; whether the infringing or seizing were the cause or effect, is hard to know; but just before in these times there were undoubtedly many extravagant acts of all sorts, which produced Magna Charta, made the 9 H. 3, for confirming of the liberties and privileges not only of London, but of all other towns; and after these times, in the three reigns of the three succeeding kings, how many other statutes for confirming the liberties and privileges of the cities and towns were made, 1 H. 4, cap. 15? The penalties and forfeitures imposed by the statute 28 E. 3, cap. 10, upon the city of London, put into the same condition with other cities and boroughs, as to penalties and seizures. A statute confirming to all the cities and boroughs the liberties and franchises, which they by [illegible] confirmation [illegible] viz. 1 H. 4, [illegible] firmed in like manner by 7 H. 4, [illegible] confirmed in like manner by 9 H. [illegible] Again confirmed by statute of 2 H. [illegible] By which it appears what a sense [illegible] they had of the seizures that had been [illegible] liberties and privileges, that they never thought them sufficiently confirmed; but they were sufficiently confirmed; for from the time [illegible] R. 2, to this day, we do not find any [illegible] of any liberties or franchises, or Custos made put upon them. That which was in those days of violence done, shew them the [illegible] but are no precedents for the best. [illegible]

Supposing and admitting these [illegible] these times of good authority, and [illegible] precedents as can be, they are so far [illegible] ing against me, that I hope to make it [illegible] plainly to appear, that they are strong [illegible] plain authorities and evidence against them, and for me. It is ordinary in disputing and arguing to lose the point disputed or argued. That I may not commit so great an error, [illegible] may evince and make plain what I have affirmed, give me leave to look back to the information and replication, and from thence to make the points that we argue, single, clear, and open. The information that saith, that we usurped upon the king to be a corporation and body politic, but in truth are none. The bar sets forth the title to be a corporation, by prescription, time out of mind. The replication, that endeavours to avoid the bar, by allowing that we were once a corporation lawfully; but that by our miscarriages we have forfeited our being a corporation, and thereby became none, and after that usurped to be one. So that, that which the other side maintains, is, that by our mis-feasances we have committed a forfeiture of our old lawful and rightful corporation. This I deny; the affirmation is upon them to prove, and they producing no record [illegible] passes any such forfeiture of a corporation, but only records generally saying, that the liberties should be forfeited or seized, the question is, what the meaning is of these old records of forfeiting and seizing liberties? Mr. Attorney was pleased to take it, and so did Mr. Solicitor, as I think, that forfeiting and seizing were much one. I shall not dispute that; but whether in any of those records the corporation or body politic were by these words taken to be forfeited? Mr. Attorney was so careful to avoid the consequences of a forfeiture of a corporation, which are so great and destructive, that he would not by a judgment in Quo Warranto against a corporation have the corporation determined, no more than he would by the forfeiture *ipso facto* have it determined, but that there should be some seizure into the king's hands; but what that is, or how to be understood, I cannot imagine. For if the corporation be not to be dissolved and determined, in whom should it rest or remain after such forfeitures, or during such seizure? Shall it after forfeiture remain in the

same persons that it was in? Shall it subsist, live, and act as before? or shall it be in *limbo patrum*, or, in *nubibus*? Is a corporation transferrable to any other person or persons? Can a corporation be conveyed or transferred? That is impossible; and so it appears in the dean and chapter of Norwich case, and Fulcher and Heyward, and 1 Inst. in the case of the Homage Ancestral before cited. That a corporation is not transferrable from one body of men to another; therefore the king cannot possibly have it, nor can he grant it. Ay, but saith Mr. Attorney, it shall be seized, and in the king's hands; what is meant by these words? How can it be in the king's hands, if not transferrable? Next, what shall the king do with it, shall he grant it to others? No, that is impossible; by the cases cited, it so appears the king may make a new, but he cannot grant an old corporation, because not transferrable. Then if he cannot grant, if it be not transferrable, if a corporation or body politic be by law framed in similitude of a natural body, then it is no more transferable than a natural body is. The body politic cannot be taken out of the hands of the persons incorporate. From hence then, if this be so, it will follow of necessity, that the corporation, if it cannot be transferred to the king, or by the king's grant, out of the persons in whom it is, to others, it must remain where it is, or be dissolved. Next, that which I shall shew is,

That by the words forfeiting and seizing liberties in those old records, it cannot be meant forfeiting and seizing a corporation or body politic; they still continued. But that which is the true sense of these words, forfeiting and seizing liberties in those records was, if the abuse or misuse were of a particular franchise, as of courts, prisons, markets, or the like, the king had them forfeited to him. If the abuse were by a corporation, they acted by their active parts, by their mayors, bailiffs, sheriffs, coroners, or the like; the king seized these offices, turned the corporation officers out, and put others in their places. This was the course in the Eyres, where these seizures in those days usually were: But for seizing corporations as forfeit, there hath been no instance of it in any time; but the contrary is most evident. For the corporations, notwithstanding the supposed forfeitures or seizures, remained still in being; and this is evident even to sense. The seizures, that have been mentioned, have been of London, Bristol, Gloucester, Cambridge, and Cinque-ports, Ipswich, and Winchester.

I offer to your consideration, whether these cities of London and Bristol, Gloucester, Cambridge, and also the Cinque-ports, ever since, have not continually in all pleadings, claims, and titles, made themselves a title by prescription? Are they not by prescription to this day? Do they not claim their markets, tolls, and all their privileges by prescription? Do not the acts of parliament that immediately follow these seizures made by H. 4, H. 5, H. 6, in the times succeeding, all confirm their privileges? Not a word of granting new privileges, but confirming the old; which shews plainly, that in those days the corporations were not thought or imagined to be determined or dissolved. By these seizures, or supposed forfeitures, the enjoyment or possession, for the space of 300 years, is evidence sufficient of their remaining and being bodies politic by prescription, which they could not be if they were forfeited, as pretended. For by forfeiture they must mean losing their corporation, or being divested; no other sense can be, or ever was, of forfeiture. Could they forfeit them, and yet keep them? Could they lose them, and yet have them? If they could not, then it is plain, that since they always have had them, they never forfeited or lost them. But for farther evidence hereof, I shall make it most plainly to appear, that during the very times of these seizures the corporations remained and acted as corporations; and that at that time it was never thought or imagined, that during the seizures the corporations were forfeit; all that was done was, that the election of their mayor, or of their sheriff, was *de facto* taken from them, and either a Custos, or a mayor, by the king put over them, and continued, till those kings displeasures were over, and then they chose their own officers again: But no thought then of forfeiting the corporation. By the city books, as well as records, this is most evident. The putting a Custos by king E. 1, continued for the space of 11 years, from the 15 E. 1, to the 26 E. 1, and then they chose their mayor again. By the city books it appears that their court of hustings all along continued, as at other times, aldermen all along. Lib. A. fol. 50. 51, 135.

Radulphus de Sandwyco Custos Civitat' London, Henricus le Walleys, and others, aldermen, (naming them) 'et universalis Com'munitas ejusdem Civitatis,' make a conveyance of a house to John de Bangwell, 48 E. 1.

The court of aldermen holden before the Custos and aldermen, 18 E. 1. Lib. A. fol. 110.

With the king's remembrancer in the Exchequer, 'Cives London venerunt coram Ba'ronibus, et presentaverunt Johannem de 'Cantuar' et Willielmum de Betoyne ad re'spondend' pro Civitat' prædict' et Com' Mid'dlesex, de his quæ ad Officium Vicecomitis 'pertinent, et ad hoc faciend' præstiterunt Sa'cramentum,' 16 E. 1, Ro. 1.

Ibidem. The presentment and swearing two other sheriffs, 18 E. 1, Ro. 1.

Ibidem. The like, 21 E. 1, Ro. 3.

Ibidem. The like, 23 E. 3, Ro. 3.

'[illegible] le Arthur attachiatus fuit ad respond' 'Communitat' Civitat' London' de placito,' for that he, being no freeman, merchandized in the city, 31 E. 1, Lib. C. fol. 19, b.

Another like suit against an un-freeman, Lib. C. fol. 7, b.

A Writ of Right in the Hustings, brought by the corporation, 'Communitas Civitat' Lon'don per Radulphum Peacock Attornatum

'suum petit versus Hugonem Episcopum de 'Bedlam unum Messuagium, &c.' 22 E. 1.

All the aldermen, and twelve citizens, were called before the king and his council, and the king restored them the election of their mayor, and they chose Henry de Galeys mayor. And on Monday following comes the king's writ, whereby the king, for good services, 'reddi- 'dimus et restituimus Civibus London Civi- 'tatem, una cum Majoritate et libertatibus suis, 'quas certis de causis dudum capi fecimus in 'manum nostram.' So that hereby it most evidently appears, the corporation was not forfeit, lost, or dissolved, only a Custos put over them, which acted in the place of mayor; and when removed, they chose their mayor again, 26 E. 1, Lib. B fol 38.

The liberties not forfeit, only seized into the king's hands; so saith the writ 'dudum capi 'fecimus in manum nostram.' The record of Cambridge I have looked upon; it plainly appears in it, that the corporation was not forfeited and dissolved, as you suppose: for it appears, that when they submitted to the king to do with their franchises what he pleased; yet it was *salvo* to the mayor and bailiffs, their response to all other matters. And afterwards, at the same time, the king grants to the same mayor and bailiffs divers liberties; by which it appears, that the corporation was not forfeit, but still in being, notwithstanding the seizure and forfeiture.

The seizure that was by king Edward the Second was in no sort any forfeiture or determination of their corporation; but either under a Custos, or under a mayor put in by the king.

The Custos, aldermen, and commonalty, appeared, and turned out some of their aldermen. Lib. B fol 11, b.

They chose and swore their sheriffs, and by this time they had a mayor again; but the office of mayoralty, granted them by the king. Lib D. fol. 6.

The king grants to Nicolas de Farringdon the office of mayor, 'quamdiu nobis placuerit.' 16 E 2, Lib E fol. 146.

They had a writ restoring to them the office of their mayor again, 20 E. 2.

Then for the seizure of 16 R. 2, that continued but from the 22d of July until the 19th of September following; and the form, or colour of law that they had for that, was the statute of 28 E. 3, and the Custos put in sworn at Guildhall, and took the oath of the mayor, as appears in the book which I cited; where it is mentioned to be upon that statute, fol. 269, b 16 R. 2.

But for farther evidence; in the [illegible] remembrancer's office in the exchequer, [illegible] E. 3. Rot. 2 'in Bago de Quo Warranto in In- 'nere Northampton et Bedford, Quo War- 'ranto versus Villam de Bedford;' in that record are these things: first, that the village of Bedford had not at the last preceding Eire made claim of divers liberties, and thereupon in that Eire adjudged, 'quod omnes Liber- 'tates non clamat' capt' fuissent in manus [illegible] but the [illegible] the corporation [illegible] the king, [illegible] and admitted [illegible] but then it [illegible] that the mayor and the [illegible] judgment, and [illegible] men for [illegible] committed out of the jurisdiction; and thereupon 'Consideratum est, quod prædict' Li- 'bertas de Infangthefe et Officia Major' Ballivorum, et Coronatorum ejusdem Villæ capiantur in manu Domini Regis.' Sed quia 'cætera Libertates et consuetud' Villæ [illegible] 'absque Ministris pro communi [illegible] 'nisi ibidem nequeunt conservari, [illegible] 'plus Johannem de Tound Custos, [illegible] Wymound and Richardum [illegible] and Nicholas Astwood and William [illegible] coroners, who were all sworn to execute [illegible] offices, and to answer the king the [illegible]. Hereby it appears, that the course was not to forfeit or dissolve the corporation: they [illegible] were so unreasonable; for hereby all their lands and goods, and all the debts owing to them, or to them, would all be lost: all they did was, they put in officers to preserve the corporations. So that I think there is nothing more plain, that though the liberties were seized, and that officers, Custos, or mayors were put upon them; yet the corporations, or bodies politic, or their liberties, were not forfeit or determined. If they had been either forfeited or determined, could the writs of restitution have set them up again? The old could never be restored or set up again, but by act of parliament; they might have had new charters, and have been made new corporations; but the old could never have been restored, if once forfeited, as now imagined. So that the point betwixt us is, Whether the records of E. 1, E. 2, and R. 2, of forfeitures and seizures of liberties, supposing the causes or offences for which they were seized were very great and provoking, as in all probability they were, do prove that thereby the corporations were forfeit, dissolved, or determined? It appears they were not forfeit. You can never avoid it. If abusing the franchise of liberty of being a corporation be a forfeiture, as you affirm, and that they were seized for being forfeit; then the offences that were committed by these corporations in those princes' times, were forfeitures, and consequently the seizures dissolved the corporations. They could not forfeit and lose their corporations, and yet keep them; and that they still had them, [illegible] evident by the records [illegible] shewing that they acted [illegible] their corporations under those seizures, only a Custos instead of a mayor, all other things the same; that they have in all ages ever since been allowed to be corporations by prescription, never denied or questioned; that the acts of parliament immediately following, confirming their privileges, never questioned their having them. Never any thoughts of making void any forfeitures by these acts, or any new

grants, but always pleaded by prescription. These things plainly shew, that the offences committed in those times did not forfeit the corporation; and all that dark authority they have out of these records is directly against them, proves only that these abuses gave only cause of seizure of some offices, but no forfeiture of the corporation, that still continued.

Having thus answered these old records, and shewn that they are of authority for me against them; and since it hath been stirred in this case, whether a corporation or body politic be surrenderable or not, and insisted upon, by the other side, that it is, and from thence an argument drawn to prove, that if surrenderable, it is forfeitable: whether it be surrenderable, or not, perhaps is also doubtful, so that I think a man cannot argue from it any thing. First, I am sure there is no great reason why it should be; for since that men that are of the corporation take, upon their coming to be made free, an oath to preserve the rights, liberties, and privileges of it; and since the active members are intrusted for all the other members that elect and choose them, and also for their successors; I cannot see how a man can satisfy himself in so doing.

Sir James Bagg's case, Rep. 11, 98, they forfeit their freedom by doing contrary to their oath and trust. If every freeman by his oath and trust be obliged to seek the benefit of the corporation, to surrender is against the oath. The law seems to have a care of preserving corporations; and therefore provides, that the taking any new charter, though there be many alterations in offices and names, yet doth not surrender the old. But were it of any other franchise, the taking anew of the same thing is a surrender of the old.

Dean and chapter of Norwich's case, Rep. 3, 73.

Fulcher and Heyward's case seems a strong case to prove it not surrenderable, Jones 260. And though the bishop did not in that case join in the surrender, that cannot hinder; because the bishop is no part of the corporation, and therefore cannot hinder them to surrender if they will.

A vill incorporate by the name of bailiffs, 4 H. 26, 22, b. The king *de novo* incorporates them by the name of sheriffs: Are their privileges that they before had, gone? No, *Dieu defend*, saith the book. But this being not my question, I intend not to debate it thoroughly, but to keep to the point of a forfeiture of a body politic or corporation, and farther to examine the reasonableness and justice of this doctrine of forfeiture, and see how adequate and just it is; for that is the thing, I perceive, desired.

First, Their position is, That a corporation, or being of a body politic, is a liberty or franchise; and if abused or misused, is forfeited, determined, and dissolved.

That I may a little understand this position and consider of abuse and misuse, of the extents and consequences of it: By abuse or misuse, every act that a corporation doth, that is not justifiable by law, is, as I take it, an abuser or misuser. If a corporation receive any money that is not due to them, if it be by virtue of any by-law, that is a forfeiture, though it be but a groat. What if they by their common seal command their servant to enter into such lands, or distrain such a man's cattle for rent not due; is not this a taking upon them to oppress the king's subjects, and to extort from them their lands or moneys where not due? This is a misuser. A body politic, as I have said, is but a person created in resemblance of a natural person, to have a capacity to take, hold, and enjoy to particular ends and purposes. And hold or enjoy is not possible, without acting; and all that act must of necessity be subjected to errors sometimes, in their actions, as natural persons are. And must it be so penal to them, that every error, misuser, or abuser, must be a forfeiture? Can it be reasonable or just in law, that this can be? Laws are made for preservation, not for destruction; if every abuser or misuser forfeit, be it a small transgression, is it either reasonable or probable, that any law shall punish it with destruction of the body? The greatest offence, be it treason or rebellion, or the least illegal act, offence, or misdemeanour, must have the same measure of punishment by this rule; and the law then doth not distinguish. If a natural body, or person, hath a market, and orders his servants to take such tolls, and he takes them; what would this crime be besides forfeiture of his market? Why should a corporation then, not only in such case, or for any offence or miscarriage to the value of a penny, forfeit and lose, as in the case of high treason, his life or being, lands, goods, and all? This cannot be agreeable to any rules or reason of our law; and therefore I take it, it cannot be the law. The next thing I design to insist upon is,

Secondly, The mischiefs and inconveniencies that must attend this doctrine or law of forfeiting and surrendering, if the law be so.

Let us then consider, whether this at one stroke do not make all the corporations in England, of all sorts, forfeit at once, and perhaps many years since. Is there any corporation in England that hath not offended or transgressed? All manner of corporations fall under this rule. If they have transgressed or done any such act as makes forfeiture (as every miscarriage, for any thing I can see to the contrary, doth) whether the corporation be *ipso facto* dissolved by the offence committed, or the judgment which must relate to the [illegible] to avoid all mean acts done by the cor[illegible]; all that they have done since such miscarriage, they have done without right; and all that they think they have a title to as a corporation, they are mistaken in, they have none. Perhaps if a parliament should be called, those forfeited corporations can lawfully send no burgesses. I do not know whether I am mistaken, or not, I only offer this to consideration amongst others: As (give me leave

to venture a little farther upon these considerations of surrenders and forfeitures of corporations) can a bishop, dean and chapter, prebendary, parson, &c., surrender his corporation or body politic? If they can, most of them, perhaps, are of the foundation of the crown, and had their lands from thence. We have many statutes made to restrain their alienations: Those of queen Elizabeth did not extend to hinder their alienation to the crown; but perhaps, out of hope of preferment, they aliened to the crown, till the statute of 1 Jacobi, cap. 3, took away that power also of conveying to the crown: Can these forfeit the corporations? Perhaps we are sinners all, or at least, as the balance at some time or other may be holden may be found too light: We are upon a point that goes to posterity; fear and favour, what may it do, and what may it not do? If they may surrender or forfeit, what effects may this have upon the whole ecclesiastical estate? If this had been known in the days of king Henry the Eighth, perhaps there would have been no great need of acts of parliament to make him head of the church, or to have dissolved the monasteries. Suppose that colleges, hospitals, and other corporations founded for charity, can surrender or forfeit; the present masters and fellows, and the heirs of the donors, may truck; what effect may this have upon them? what ways may they find out? Also cities and boroughs; what divisions and contentions hath it already produced, some for surrendering, others for defending, what animosities are about it? The end of the law is to preserve the peace and quiet. Divisions and dissentions frequently end in the destruction of both parties. The citizens and burgesses are, I think, three parts of four of the House of Commons. It is considerable what effects this may have in parliaments, our laws and posterity perhaps not a little concerned herein; and if so, surely this is a great case. But if only the city of London, give me leave to see what the ill consequences and mischiefs will be. Arguments from mischiefs and inconveniences are forcible arguments in law: So saith Littleton, and my lord Coke upon Littleton. And men must be desperate and sensual, that despise future mischiefs and inconveniences. And many other places there cited, Inst. 1, 11, 60.

1. All their lands will be gone, and revert to the donors, and their heirs. By dissolutions of corporations all their privileges are gone, and their lands revert to their donors, or lords, of whom they were holden. Jones 190, F. N. B. 33, k. Inst. 113, b.

2. All their markets, tolls, and duties, that they claim by prescription; whereby the government and the honour of the city, the public halls, gates, prisons, bridges, and other edifices are in a great measure maintained.

3. All the debts owing to the city, and all their personal estate, by the death or dissolution of the corporation, will be gone; but who shall have them? Perhaps 'non definitur in jure.'

4. All the liberties, and customary privileges, that the freemen of the city, their wives and children, claim, viz. to have customary shares in their husbands or fathers estates; to be exempt from tolls in other towns, ports, and markets; to exclude foreigners and unfreemen from using their trades in London, and many others.

5. All the acts of parliament that give particular powers and authorities to the lord mayor and aldermen, or common council, or corporation, respecting either the government or justice of the city: as about ministers, and payment of their dues, buildings, paving of streets, sewers, insurance office, and many others.

6. What shall become of the orphans, and all the moneys and debts the city owes, and all the charities in the city? We have seen the city burnt, and may remember what a swarm were unhived thereby; but we never yet saw it dissolved, nor are the consequences measurable. And though it please his majesty, upon the dissolution of this, to grant a new charter, yet it will be impossible any of these things can be preserved; Their lands, estates, debts, privileges, customs, are all personal, and annexed to the corporation, and must live and die with it; the said acts of parliament are all fixed to this corporation, and so are the charities, and cannot, as I conceive, be ever transferred to any other to be new created. A new corporation can be in no succession or privity with the old. If a body politic be once dissolved, though a new one be founded of the same name, that can have no succession to the old, nor come in privity to it: Therefore it is, that in the dean and chapter of Norwich's case, and in Fulcher and Heyward's case, the preservation of the old corporation is insisted on. Inst. 1. 102. b. If every abuser committed by a corporation be a forfeiture, determination, or dissolution, is there any one in England not forfeited and dissolved? Abuse is a word of a wonderful large sense: When the law speaks of a franchise abused or misused, it is applicable to a particular franchise, as to a market, court, or the like; and if that franchise be misued, or abused, in oppression or misuse, contrary to the ends of it, some certainty there is in it: But the abuse of a corporation extends to all its acts, and all estates of the corporation: and all the privileges of all the particular persons, and all that are concerned in them are sufferers for every abuse, or misuse, or mis-act, or trespass, how small soever. Who can tell in the actions of a person what may be taken to be ill or illegally done, or an abuse? Who will trust a corporation, if its duration and existence be so fickle and infirm, that every abuser or misuser shall forfeit it? There will be no need of officers to be amoved, thereby to determine this corporation at will and pleasure, this position contains enough to do all. These great consequences, attending this doctrine of forfeiture, are reasons to prove the law otherwise.

But saith Mr. Attorney, (if I understand him) we do not intend to destroy the corpo-

ration, though we say in our pleading, that you have forfeited your old corporation, that you have, without any lawful authority, usurped upon the king, and pray in our replication, that 'de Libertate, Privilegio, et Franchesia illa' (viz. the being a corporation) 'abiudicantur et 'excludentur.' These are but words of form, we only will lay the king's hands gently upon it, and seize it; but the corporation shall not be destroyed or dissolved.

I answer, this is wonderful, and a great compliment to the city, as I take it; let us not flatter or deceive one another. We are not now in the irregular days in the records mentioned, nor in such sort of proceedings as in those distracted times. Let us not go by blind conjectures out of old records, and bring in unknown ways. We are now in a Quo Warranto, which as Mr. Attorney truly saith, is in the nature of a writ of right; and a writ of right is the highest writ that is in the law; and the judgment therein, and in this Quo Warranto must be conclusive to all parties. If given against the defendants, it must conclude them for ever, and dissolve their corporation; and if given against the king, he shall never hereafter bring it in question for any cause precedent Rep. 9. 28. Inst. 2 282. 195. Coke's Entries 527. D. hath a precedent of it. 'Consideratum est, 'quod the defendant de et in Libertatibus, 'Privilegiis, et Franchesiis præd. in Informa- 'tion' prædict' specificat' nullo modo se intro- 'mittat, sed ab iisdem penitus excludatur.' The like against Ferrers, and the Virginia company, and many others may be found, M. 21. Jac. 1. r. 9. The court cannot alter the judgment, it will be erroneous if they do. And to talk of a judgment of a seizure, what is the meaning of it, or such judgment? Is it final or not final? The court must give a final judgment, that the party, if he think fit, may have his writ of error. The court will not take any of your old records to go by, if any such are to be found, that would warrant any other judgment. Therefore a seizure, without such a judgment, that determines the corporation, cannot be any way brought to pass, as I believe, nor can I understand in whom, by your seizure, you would have the old corporation to subsist. Transferred from the persons, in whom it now subsists, I think is impossible, but dissolved by your judgment it may be: And I hope your lordship will not be induced by singular unwarrantable things, that a judgment should be given, that shall neither dissolve the corporation, nor continue it, that shall neither be for plaintiff or defendant, that shall leave the corporation neither alive nor dead, but *in transitu*, *or limbo patrum*: A judgment, 'quod capiantur,' or 'quod Libertates et Franchesiæ prædict, 'seisiantur in manus Domini Regis.' Was there ever any the like? What shall be understood by it? Shall we be afterwards a corporation? Shall our magistrates continue? Shall we have our lands, markets, tolls, customs, or franchises, or not? Or shall we be none, and yet not dissolved? I must confess, I am confounded in these notions.

Next, as to the authorities in law for me:

1. I take it to be a great authority for me, that there is no precedent or judgment, or book-case produced or found, that ever a corporation was forfeited. It lies upon the other side to produce it, or shew it; and no doubt they would, if there had been any, but there is none by the authorities they cite; you may easily perceive, any sort would not be omitted.

3. The nature of a corporation, as our books do describe it, shews it not forfeitable. I take it plain out of the case of Sutton's Hospital, and the other books there cited. Rep. 10. 32. b 21 E. 4. 72. A corporation aggregate is invisible, immortal, and rests only in intendment and consideration of law, cannot commit treason or felony, be out-lawed, excommunicate, hath no soul, cannot appear in person, cannot do fealty, cannot be imprisoned, nor subject to imbecility or death. Br. Corp. 24. 34. They cannot commit any actual trespass or disseisin, except under their common seal, by command precedent, or assent subsequent: When our books say, that they are a body politic, and rest or have their being in intendment or consideration of law thereby is meant, that they are by law enabled to act to particular ends and intents answerable to their ends and creations. Their ends or creations are only to be subservient to the public good, and government, and preservation of the city or town incorporate, and of the members thereof. And if there be any act done by the members, that are the active part of such corporation, to any other intent, end, or purpose, this is not the act of the corporation, but of the particular members, and they only are answerable for it. And as to particular offences and miscarriages in this case alledged, it cannot be denied, but that the particular members are answerable for it; and if they, then according to all books, they ought not to be doubly chargeable or answerable in both capacities. And the argument cited out of Bagg's case, of a freeman convict of perjury; and thereupon disfranchised, doth not prove, that they shall be punished in a double capacity; for the corporation is not thereby punished, but preserved. The being of a body politic is only a capacity, and in resemblance of a natural body, and no more forfeitable than a natural body. It is seizing and forfeiting of liberties, that we meet with, that is such as are generally spoken of; as markets, courts, jurisdictions, and the like: And in the old records, by seizing the liberties of a corporation is meant the taking from them their officers, and putting in others upon them for a time. But a forfeiting, dissolving, and determining the body politic, never was yet done or known, nor, as reasonable to believe, ever entered in any man's thoughts till now; for I have already shewn, that offences and miscarriages, that were committed by the corporations in those troublesome times of E. 1, E. 2, and R. 2, for which their liberties were seized, were not forfeitures and determinations of those corporations; they

all remain corporations by prescription to this day: And I have also taken notice, that the acts of parliament, that were made in the succeeding kings reigns, of H. 4, H. 5, and H. 6, are only acts of confirmation to the cities and boroughs of their liberties and privileges. From that time till within these three years, I believe it never entered into any man's thoughts, that a corporation was forfeitable; for further proof whereof divers other statutes, and the whole series of matter is argument.

The statute 15 Hen. 6, cap. 6, that provides against abuses and exactions made by societies incorporate, by their by-laws and ordinances, and appoints a forfeiture of 10*l.*, and of their power to make by-laws: To what end should this be, if the corporations themselves were forfeited, or thought so to be?

The statute of 19 H. 7, cap. 7, recites the statute of H. 6, and the exactions and abuses by fellowships, by their by-laws and ordinances; and appoints a penalty of 40*l.*, if they exact money by an unlawful and unwarrantable by-law, not examined and signed by the chancellor and chief justice.

The statute of 12 H. 7, c. 6, sets forth grievous exactions by the fellowship of merchant adventurers by their by-laws, and imposeth a penalty for the future.

The statute 22 H. 8, 4. 28 H. 8, 5, shew like exactions by corporations upon apprentices by their ordinances and by-laws, provides remedy, and enacts penalty. If in those times it had been thought or imagined, that a corporation had been forfeitable, every of these offences forfeited it, what need farther remedy? In the case of Hoddy and Weehouse, of excessive toll by the town of Northamptom, Moore 474. 39 Eliz. In the Quo Warranto against a corporation, though the question was concerning their taking toll, and whether they had forfeited their market, or only their toll; no thought of forfeiting their corporation was ever mentioned. So that I think I may conclude with the tumultuous times of Edw. 1. Edw. 2, and Richard 2, what was then done, doth plainly shew the corporations were not forfeit or dissolved: That by all the acts of parliament, and proceedings in almost all the reigns of any length or duration, from that time to this very case, the opinions and thoughts of men were otherwise; as by the statutes and transactions appear: Not one opinion, book, or authority, produced, or to be found. The great concern not only of this great city, but of all other cities, towns, and corporations, ecclesiastical and temporal, all depend upon it. And which is more than all, the very government by law established will be in great danger of alteration by it.

I have argued long, and tried your lordship's patience; the weight and length of the case, and rareness of the matter, there never having been the like before in any age, will, I hope, excuse me. But besides the whole frame and foundation, that the other side have laid, being all built upon general undigested notions, as I take it, viz. that abuser or misuser of liberties forfeits them, without distinguishing betwixt one thing and another; that the words forfeiting and seizing liberties, found in old records, should be authorities to prove forfeiting corporations or beings of the body politic, though no such thing then, or at any time since, till very [illegible] was ever thought on or imagined: I [illegible] necessary for me to open and set forth [illegible]se general notions, and to explain, and distinguish [illegible] which, I hope, I have done, that it [illegible] appear what the sense of them is, how far they agre with law and justice, and how far not. And if, in the doing hereof, or in the setting out the repugnant or inconsistent matters or opinions arising in this case, to maintain this Quo Warranto, I have expressed myself in any other manner than became me, I humbly beg pardon for it; and that it may not reflect upon the cause, nor prejudice it.

Upon the whole matter, if this information brought against the body politic for usurping to be a body politic, ought to have been brought against the particular persons; if it be repugnant or contradictory, that a corporation can usurp to be a corporation; that a body politic or being can usurp to be a body politic or being before it had a being, or to be that same body politic or being, which it was when it did usurp; if forfeiting a franchise, or liberty, or other estate, cannot determine or vest that franchise or estate in the king, till the forfeiture appear on record; then the old corporation supposed to be forfeited, if it were so, did notwithstanding, and yet doth continue in being, there being no record to determine it; and consequently that which is pretended a new one by usurpation, is impossible. If by seizure into the king's hands (as pretended) the continuance of the corporation be intended, how inconsistent is it with law or justice to continue any thing in the king, that is wrongfully usurped, and the parties to be punished, fined, and committed for usurping. If Mr. Attorney's replication, taking issue upon our prescription to be a corporation, and going over, and alledging several distinct causes of forfeitures, cannot by law be maintained, and in the example doth introduce a way to bring all men's estates subject to Mr. Attorney's will and pleasure, (for, let any man's right be as good as can be, it will be scarce possible to defend it, if such pleadings as in his replication be allowable by law) then be the matter in law as much against us as possible, yet Mr. Attorney can have no judgment for him upon this information. Next, supposing the information all good in law; yet, if the judgments, records, and authority, that have been cited by them for seizures, do plainly shew, that seizures and forfeitures are very different in their natures; that the corporations all continued notwithstanding the seizures; and the seizure was only the king's putting in mayors and officers to act in them, instead of others elected or constituted by the corporation, and they remain corporations, by prescription to this day, and

never were forfeited, dissolved or determined by such seizures, if the general authorities in books, that the misusing or abusing a franchise be truly applicable to franchises, (that are estates and interests grantable or conveyable from man to man) and never yet applied of such a thing as is rather a capacity or being than a franchise; if there be no case, or precedent, or opinion to be found for it, if, on the contrary, the particular cases cited prove, that where the corporation have by misusing forfeited particular franchises they do not forfeit their corporations; if there be scarce any corporation in England that have not at some time or other done something they should not, or omitted to do something they should and thereby forfeited their corporation, and consequently all are usurpers, and their corporate acts since done all void; if the corporation here hath done nothing, but that the mayor, aldermen, and common council, are only delegates, deputies or ministers of the corporation for particular purposes; if servants, deputies, or delegates do that which they have no authority to do, they must answer for it in their own persons; but their masters, or those that deputed or delegated them for another purpose, they are innocent, they shall not suffer by it, though no acts of parliament had been in the case; if the acts of parliament against seizing the liberties of the city, for or by reason of any misusage of their officers or ministers, extend to these acts of the mayor, aldermen, and common council; if so be that these acts were the acts of the corporation; yet, with submission, if they have shewn a good and legal right, by their custom and title, to make by-laws for regulating and settling the markets and tolls, and that which they have done be as pleaded, reasonable, and that there was reasonable ground at that time for their petition, which they have set forth; if all these particulars that I have now summed up be against me, then judgment must be against me, though I know not what that judgment can be. But if any one of these particulars, thus repeated be for me, and against Mr. Attorney, then Mr. Attorney can have no judgment against the city, but judgment must be for them, which I humbly pray.*

* The conclusion of Mr. Pollexfen's Argument, and what afterwards passed in court upon this case, is thus given in the All Souls' MS. mentioned in a Note in p. 823.

My lord, I cannot well tell what it is Mr. Attorney would have, I have considered as well as I am able, and I beg his pardon if I do not rightly take things. He would not have a judgment upon this corporation to dissolve it, that is a kind of indecent word, he would have something or other that should do the work, and he calls it a seizure. Pray let us then consider and understand, if we can, what he means by this. Would he have it to be forfeited, and would he have it not to remain a corporation, and yet would he not have it dissolved? what would he have? My lord, a seizure, without such a judgment as will determine the corporation is no way to be brought to pass, as I believe, nor can I understand in whom, by your seizure, you would have the corporation subsist, I think, transferred from the persons in whom it now subsists to others, is as altogether impossible, as that a man that is in his natural capacity can transfer that capacity. And this is, I apprehend, strikes at all that has been said by way of argument, but dissolved by your judgment that it may be, but God forbid that it ever should.

My lord, we do all agree it, that this is of that nature, that in itself so differs from other franchises, that it is neither grantable, nor transferrable, nor removable from one to another, it is as the person of a man. Then let us bethink ourselves what Mr. Attorney would have and speaks for: does he intend the corporation should remain in being still? If it shall, how long shall it remain? The judgment must be final some way or other, because the party may have remedy, and, if he see cause, bring a writ of error, if he have a mind to it; but the judgment must be final, and if it must be final, if it doth not determine, where shall it set the corporation? Shall it leave it where it found it? No, Mr. Attorney won't endure that; why then let him tell us where he would have it. If it must continue, is it transferrable? No, for if the king make another corporation to-day of the same name, it cannot succeed to the old one as you see before.

Can it be in the king? Can the king act in it? No man can say that neither. So that I do not understand, I must confess, what it is Mr. Attorney would have. If he would have it to be dissolved, that must be, I think, by your judgment; if you do give judgment against us, then there is an end of it, and the consequences are not fit to be mentioned; they are better understood by the little that has been said, than further enlarged on. But that Mr. Attorney is against, he would not have that by any means, and we shall neither be in heaven nor in hell, but in purgatory, I know not where else he would have us.

My lord, I must confess I know that I am in a great case, and if in this last expression I have spoken any thing more lightly, or otherwise than I should have done, I beg your pardon.

Lord Chief Justice. No, no, by no means, you have taken a great deal of pains truly.

Mr. *Pollexfen.* My lord, I have opened this matter as freely and as plainly as I can: all the things that stands betwixt us and these old records, and what the meaning is of seizing and forfeiting liberties. If it be the forfeiting,

THE next term, viz. Trinit. 35 Car. 2. (Chief Justice Saunders dying the day of the judgment given, or the next day after) Mr. justice Jones, justice Raymond, and justice

Withens, being in court, justice Jones pronounced the judgment of the court, and justice Raymond and justice Withens affirmed, that chief justice Saunders was of the same opinion with them, and that they all agreed, 1. That a corporation aggregate might be seized: That the statute 28 E. 3, cap. 10, is express, that the franchises and liberties of the city, upon such defaults, should be taken into the king's hands. And that bodies politic may

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of the corporations, there is not one of those corporations in England at this day, which there is no one will undertake to affirm. It is impossible that these should be continued the old corporations when they were dissolved and determined. And it is impossible, in our case that this corporation should be in being, and yet usurped, and if so be, it be already forfeited and we have usurped, it is no reason to continue it then. For if a parcel of men do usurp to continue a corporation that is in law dissolved, that were unreasonable, so that what Mr. Attorney would have at the end of this suit, I cannot well tell, for if you pray judgment against us that the corporation should be dissolved that may be done, and the consequences are what I have told you: If you pray any thing else against us, that can never be upon record. Therefore in this case, what I have to do is, but humbly to leave it to the consideration of the court as a thing of the greatest consequence I ever had to do in, and that ever came into judgment here, and upon the whole I pray that either Mr. Attorney may enter a Nolle Prosequi, or else that there may be judgment entered for the defendants.

Mr *Attorney General.* And I pray your judgment for the king, and I will take care to enter such a judgment as I will stand by for law.

Lord Chief Justice. Truly I think as much has been said in it as is possible for the case to bear, even to every little minute thing on the one side and on the other, and a great deal of pains has been taken by both. Mr. Attorney, I suppose you do not desire for the king any more argument, nor they neither that are for the defendants.

Mr. *Pollexfen.* My lord, there are other counsel for the city, and if your lordship please to hear them it is very likely there is more to be said by them than I have done.

Mr. Justice *Jones.* Indeed I do not think that, Mr. Pollexfen, that more can be said than has been.

Lord Chief Justice. But this is one thing, Mr. Pollexfen, that I would say to you upon your argument, what a grievous thing would it be, if so be, the being of a corporation might be forfeited or dissolved, because say you, it is possible that all the corporations in England may be dissolved because they may have committed such things that may be forfeitures. We must put the scales equal on both sides. Let us then consider on the other side, whether, if so be that it should be taken for law, that a corporation is indissoluble or cannot be dissolved for any crime whatsoever, then those two things do not follow;—First, you will shut out the king's Quo Warranto, let him have what reason he can for it, or let them do what they will: And in the next place, you have set up so many independent commonwealths. For if a corporation may do nothing amiss whatsoever, what else does follow, for now I am not upon the point whether this corporation has done any act that is amiss, but considering your argument in general, when you make it a thing of such ill consequence that a corporation should be forfeited by any crime; but I say now, to put in the other scale the mischiefs that would follow, if so be by law a corporation might not be dissolved for one fault or another But let them do what they would, it should still remain a corporation. Then it is plain, they are so many commonwealths independent upon the king, and the king's Quo Warranto is quite shut out, that is mighty considerable. For a man to make an argument and to say it would be very mischievous, inconvenient, or worse to the city of London, if a judgment should be given against it, is not to govern us, and for ought that I see, Mr. Pollexfen, you have argued yourself, and that very strongly, that if judgment be given for the king in this case, it must be no other than that they be ousted of their franchise.

Mr. *Pollexfen.* Sure enough, my lord, it can be no otherwise.

Lord Chief Justice. Now you say there would be a mighty great inconvenience and mischief, and we cannot tell what may come of it, if this judgment be given against London and its corporation; surely we are not to be guided altogether by what is convenient or what is not convenient; what we are to look at principally is what the law is, for that way the law goes, we must go; and we presume and know that the law is wiser than we are, and that the way that the law has settled has the least inconvenience in it. But I could wish with all my heart that it might not come to that. I do believe no body here wishes this case should come to judgment, but certainly for those things they must not stand in our way; we must consider the right of the case according to law, and deliver our opinions. For your precedents of all sides we do, that is, I do, and all my brothers desire, we have them to peruse; and pray let us have them on both sides. We cannot say any more at present, though it is pretty hard upon my brother Withins, for he has heard but one argument.

Mr. *Pollexfen.* If it be your pleasure, we will argue it again for the city.

Mr. Justice *Raymond.* You have had the advantage of arguing last; it is not desired by the king's counsel.

Mr. *Pollexfen.* I submit it to you; it is a great case, and a case that is singular; but every day will bring more like it.

Mr. *Recorder.* I confess there are a great

offend, and be pardoned, appears by the general article of pardon, 12 Car. 2, whereby corporations are pardoned all crimes and offences. And the act for regulating corporations, 13 Car. 2, which provides that no corporation shall be avoided for any thing by them misdone or omitted to be done, shews also that their charters may be avoided for things by them misdone, or omitted to be done.

° 2. That exacting and taking money by the pretended by-law, was extortion, and a forfeiture of the franchise of being a corporation.

many expressions of aggravation used in the replication, but am sure no instance can be shewn of a case of the like nature.

Mr. *Attorney General.* If ever you can shew me that the city of London has done such extravagant ill things, I will undertake to shew you a precedent for it.

Mr. *Recorder.* In the time of the late rebellion, were there not ill things enough done then?

Mr. *Attorney General.* None, considering the circumstances, like those that have been lately done.

Mr. Justice *Jones.* For my part, I desire as great light in this case as I can possibly have, before I give my opinion.

Mr. *Attorney General.* Will your lordship be pleased to appoint some time for your judgment?

Lord Chief Justice. That is too hard for us to do now.

Mr. *Attorney General.* I propose it only to your lordship to take your own time, when you please.

Lord Chief Justice. Mr. Attorney, if you move us some time towards the end of the Term, possibly we may say somewhat more, or it may be not; we are not sure: it is a busy time, and we have a great many things to consider of.

Mr. Justice *Jones.* Certainly no man can think that when we have so much business, we can apply our thoughts to consider of such a weighty business as this is.

Mr. Justice *Raymond.* There are a great many precedents to be looked into, and we cannot study in Term time.

Mr. Justice *Jones.* The consequences of the case are of that nature, that truly, without great consideration, I cannot give judgment.

Mr. Justice *Withins.* It has been very well argued truly on both sides.

Lord Chief Justice. Certainly, all that can be said has been said, and the truth of it is, you that are of the defendants' side have taken as many exceptions to the information as there are lines, if not words. So that if I can by my notes recollect but one half of them, I shall think I go a great way; for you have let nothing go by that lay in your way.

Martis, 12mo Junii, 1683.

in Banco Regis:

DOMINUS REX *v.* CIVITATEM LONDON.

Mr. Justice *Jones.* Mr. Attorney General, will you move any thing?

Mr. *Attorney General.* My lord, last term you were pleased to appoint this day to give judgment in the Quo Warranto, I humbly pray your judgment in it.

Mr. Justice *Jones.* Mr. Attorney General hath exhibited an Information in this court against the mayor, commonalty, and citizens of London, and there by charges them for usurping upon the king without any warrant or royal grant, for the space of a month or more before the exhibiting the information, divers liberties and franchises within the city of London, namely to be of themselves a body corporate and politic by the name of mayor, commonalty and citizens of the city of London, and by that name to plead and be impleaded with several other liberties, which because not now expressly in judgment before us, I shall not mention.

To this the defendants plead that the city of London is and was, time out of mind, an ancient city, and that the citizens of that city are, and for the time aforesaid have been a body corporate in deed and name, by the name of the mayor, commonalty and citizens of the city of London, and by virtue of that name, for all that time have impleaded and been impleaded. Then they plead the confirmation of their liberties by Magna Charta and other charters of several kings, and amongst others of his majesty that now is, and conclude by that warrant they claim and have used for all the time in the information, that liberty and franchise to be a body politic by that name, and then traverse that they have usurped or do usurp, that franchise upon the king, during the time in the information.

To this Mr. Attorney taking by protestation that the citizens of London were not a corporation time out of mind, by the name of the mayor, commonalty, and citizens of the city of London, traverses it, and for plea says, that the mayor, commonalty, and citizens, assuming upon themselves to be a body politic, and to have power to assemble themselves to make by-laws and ordinances not contrary to the laws of the kingdom, for the better governing the city and the citizens, and the keeping the king's peace therein, did upon pretext thereof, but indeed respecting their own private gain and profit, and contrary to the trust reposed in a body politic, assume an unlawful power to levy money of the king's subjects to their own use, and in prosecution and execution of that illegal and unjust power, they did make and publish a law to levy money of the king's subjects, as well foreign as others, resorting to the public markets within the city with their provisions, charging them with the payment of several particular rates and sums of money mentioned, to be imposed upon all comers to the markets with provisions to be sold, whether they sell or not sell, and upon refusal to pay, to be put out of the market. That by pretext of this law, they have for their own private

3. That the Petition was scandalous and libellous, and the making it and publishing it a forfeiture.

4. That the act of the common council was the act of the corporation.

5. That the matter set forth in the record did not excuse or avoid those forfeitures set forth in the replication.

6. That the information was well founded.

And gave Judgment, That the franchise should be seized into the King's hands, but the entry thereof respited till the king's pleasure

here, exacted and levied yearly 5,000*l.* of the king's subjects and converted the same to their own use, and this is alledged to be in subversion of the good government of the city, to the oppressing and impoverishing of the king's subjects coming to the markets, to the raising of the prices of necessary provisions, and the disinheriting of the king and his crown, and contrary to the trust reposed in them as a body politic. Mr. Attorney further charges,—That whereas the king the 10th of January, in the 32nd year of his reign, had prorogued the parliament then sitting to the 20th of the same January, being but ten days, that the mayor, commonalty and citizens of the city of London in common council assembled, the 13th of the same January, unlawfully, maliciously, advisedly, and seditiously took upon them to censure the king and the prorogation of parliament so made by him, that they ordered a petition to be presented to the king, containing this malicious, seditious, scandalous matter; that by the said prorogation of the parliament the prosecution of the public justice of this kingdom, and the making provision necessary for the preservation of the king's person and of his Protestant subjects received an interruption; that the mayor, commonalty, and citizens so assembled, in common council, maliciously, advisedly, seditiously and to the intent that the said petition might be published and dispersed among the king's subjects to induce them into an opinion that the king, by his prorogation of the parliament had obstructed the public justice, and to incite the people to a hatred of the king's person and the government established, and to disturb the peace of the kingdom; they did ordain the said petition should be printed, and afterwards did cause it to be printed, that it might be published and dispersed, to alienate and turn the people's affections to the king and his government. And this Mr. Attorney alledges to be done in contempt and scandal of the king and his government, and for raising sedition and disturbance of the peace in the kingdom, and concludes that for these crimes the mayor, commonalty, and citizens of the city of London have forfeited the liberty and franchise of being a body politic, and yet since have usurped the franchise upon the king.

To this the mayor, commonalty and citizens by rejoinder say: first, as to the by-laws, and taxes thereon levied, that time out of mind they have had public markets in the city, that time out of mind they have used to provide places where those markets shall be kept, and stalls and other accommodations for persons coming to the markets to sell provisions, and surveyors and officers for the regulation of the markets and the people coming thither; and for defraying of those charges, they have had and used to have reasonable tolls, rates, and sums of money of all persons so coming to the markets for stalls and such accommodations for the selling of provisions. That time out of mind there has been a common council consisting of the mayor and aldermen of the city and of certain freemen not exceeding 250 annually elected and called the commons; that by customs within the city time out of mind, the said common council have made and used to make by-laws for the regulation and government of the markets and appointing place and time for them, and for assessing and reducing to certainty the tolls and rates to be paid by persons coming to the markets for such accommodations there, so as such laws should not be contrary to the laws of the land. That this custom is confirmed by Magna Charta 1 E. 3, 7 R. 2. That after the burning of the city, and the alterations thereby, divers controversies and questions did arise about the markets and the tolls; that they did make the ordinance by which the rates and tolls charged in the replication were ordered to be paid. And then they say those rates were reasonable to be received, and those were all the sums that were received, and that there is no ordinance for raising money in any other manner, made. As to the other breach assigned, that is, the petition, the mayor, commonalty, and citizens say in their rejoinder; there was a plot against the life of the king and the Protestant religion, and they set forth all the proceedings upon it, the several attainders and impeachments, of the lords in the Tower, in parliament depending, the king's proclamation declaring the dangers of the Plot, the proceedings for the trial of the lords, and divers bills for the preservation of the king's person and the Protestant religion begun and depending in that parliament, the affrightment of the people, a petition from some of them, and that thereupon the mayor, aldermen, and common council, in common council voted a *Petition to be presented* to the king *in the* name of the mayor, aldermen and common council, which they set forth *in hæc verba*, and afterwards caused it to be printed; and this they say was to allay the fears and troubles of the citizens, that is the said Petition in the replication mentioned, and they deny any other.

To this there is a demurrer joined as also there is to the other; after that Mr. Attorney has shewed that the markets are not at their charge, but are by act of parliament maintained by the public charge, by an imposition upon coals, and so the whole arrests upon a demurrer upon those pleadings.

was known in it. Justice Raymond and justice Withins declare, that they were of the same opinion in *omnibus*.

And accordingly, after entry made by Mr. Attorney, That as to the issue joined to be tried by the country; as to the claiming to have and constitute sheriffs; as to the having the mayor and aldermen to be justices of the peace, and to hold sessions, 'quod ipse pro Domino 'Rege ulterius non vult prosequi;' Judgment is entered. [See the Latin Pleadings at the end of the Case].

This case has been twice very solemnly and elaborately argued, and on both sides as much said as, in my opinion, can be: it now stands for the judgment of this Court by an order of the last term.

I did not imagine till very lately that it would have been my part to have delivered the judgment of the Court, presuming my lord chief justice, whose proper province it was, might have been here to have done it himself. But his indisposition has cast it upon me unexpectedly. In the arguments of this case, there are many book-cases besides precedents and other authorities in ancient records which were cited on both sides. I have carefully perused the book cases and authorities most of them, in the copies of them, but some, which I esteem of the greatest weight, upon view of the records of themselves. I have seen also and diligently perused such extracts out of the city books and other records as on that side were thought fit to be shewn unto me, and I have observed a perfect accord betwixt copies of those things which were delivered on both sides, by which I conclude that all the copies I have seen on either side were faithfully transcribed.

Upon great considerations of the arguments on both sides, and the most mature deliberation I could make, I came to a resolution in my own thoughts touching this great case in question; I presume my brethren here have taken equal pains severally and apart for the settling their judgments in this important case. But for our mutual assistance to each other, we have had several conferences amongst ourselves, and likewise with my Lord Chief Justice Saunders, whom we all attended very lately; and we are all unanimously agreed in one and the same opinion in this whole matter, which, because in that little time allotted to me for this business I have not been able to digest into a formal argument; I shall therefore briefly deliver the resolution of us all upon all, or the most material points debated in the arguments of this case.

First, Then as to the great preliminary point, Whether a corporation aggregate such as the city is, may be forfeited or seized into the king's hands. We are of opinion that it may, upon breach of that condition which the law annexes to it, which is a trust for the good government of the king's subjects committed by the king to the corporation, and therefore an abuse of that trust and condition thereupon may be a just cause of forfeiture or seizure. And this seems evident beyond all contradiction, upon the point of seizure into the king's hands by the statute of 28 E. 3, cap 10. By which for the third default of the good government of the mayors, sheriffs and aldermen, the franchises of the city is to be seized into the king's hands.

And as to a forfeiture, it seems to me plain, by the general act of oblivion, by which all bodies corporate and politic as well as persons natural are pardoned, and as they are not impeccable and without fault, so likewise are they not freed from a being liable to forfeiture for those faults, in that they come within the benefit of the act of oblivion. It is likewise plain by the very act, for regulating corporations, whereby it is particularly provided that for any act or thing done or omitted before that time, no corporation should be avoided, which plainly intimates and infers that a corporation might be avoided, for some act done or thing committed by it. And if the law should be otherwise it would erect as many independent republics in the kingdom as there are corporations aggregate, which, how fatal that might prove to the crown and the government now established, every man may easily conceive.

To the 2nd point, we are of opinion, That the assuming a power by the mayor, commonalty and citizens of London, to make by-laws to levy money upon the subject, and the levying vast sums of money thereby, is a great oppression upon the people; and consequently a breach of that trust in law, which is reposed in a body politic for the welfare of the people, and so a just cause of forfeiture.

Thirdly: We are of opinion, that the charge touching the ordering, exhibiting, and printing the Petition, so scandalous to the king and government, so dangerously [illegible] to the seduction of his subjects, [illegible] a dislike and hatred of his person and government, and so evidently tending to sedition thereby and rebellion, is another just cause of forfeiture.

Fourthly: We are of opinion; that these acts are the acts of the corporation, being so alledged by the replication, and not sufficiently answered by the rejoinder.

Fifthly: We are of opinion, that nothing in the rejoinder does either so justify the by-law for levying money and the levying money thereupon; or so excuse the ordering exhibiting and printing that scandalous petition, that they do not still remain sufficient causes of seizure into the king's hands.

Sixthly: We are of opinion, That the information as it is exhibited is well founded. And

Lastly: That upon this whole record, both for the matter and substance of it, and the form of pleading, judgment ought to be given, and it is the judgment of this Court: That the franchise and liberty of London be taken into the king's hands.

Mr. *Attorney General.* Mr. Justice Jones,

The humble PETITION of the LORD MAYOR, ALDERMEN, and COMMONS of the CITY of LONDON, in Common Council assembled, as it was presented to his Majesty in Council at Windsor, upon Monday the 18th of June, 1683. Together with the Lord-Keeper (NORTH'S) SPEECH. [Published by his Majesty's Special Command.*

To the King's most Excellent Majesty: The humble PETITION of the Lord Mayor, Aldermen, and Commons of the City of London, in Common-Council assembled:

Sheweth; That your petitioners are heartily and most unfeignedly sorry for the misgovernment of this your City, of late years, whereby the citizens have fallen under your majesty's displeasure; which occasioned a Quo Warranto to be brought against them; upon which judgment hath been pronounced for the seizure of their liberties and franchises into your majesty's hands.

That your petitioners are deeply sensible of, and thankfully acknowledge the great favour of this opportunity of application to your royal grace, vouchsafed them by means of your majesty's not *requiring* judgment to be immediately entered thereupon.

And now, considering this our distressed condition, we humbly cast ourselves at your royal feet; imploring your princely compassion and grace to be extended to this your ancient city; most humbly begging your majesty's pardon for all our offences.

And we do, in the name of ourselves, and all the citizens, humbly tender, and pray your majesty to accept the most solemn promises and assurances of constant loyalty and obedience to your majesty, your heirs and successers, and of our regular and dutiful administration of your government of this city, for the future: wherein we submit ourselves to your majesty's good pleasure; and humbly beg your majesty's commands and directions, which we will with all humility and thankfulness obey.

And your petitioners shall ever pray.

After the reading of which Petition, the lord mayor, aldermen, and citizens were commanded to withdraw; and being again called in, the lord-keeper (North) spake to them, as followeth:

My Lord Mayor; I am, by the king's command, to tell you, That he hath considered the

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I beg this favour of the Court, that the clerk may not enter judgment, till I have attended to know the further pleasure of the king about it.

Mr Justice *Jones*. Take notice, Mr. Astrey: Upon Mr. Attorney's desire that Judgment be not entered till the king's further pleasure be known.

. . . was perfectly of that opin[illegible] all the points, as had been told you; and we concurred with him in every one of them upon the reasons that have been given. And it is the opinion of the whole Court."

Mr. Leach, in his edition of Shower's Reports, has given at the end of sir Bartholomew's Report of this Case, vol. 2, p. 263, some account of what has been said of the effect of this judgment, and as to the judgment being recorded.

Bishop Kennett, 3 Compl. Hist. (2nd ed.) 399, says, "June 12, the Court of King's-Bench, in the absence of the Lord Chief-Justice, gave judgment for the king upon the Quo Warranto, that the franchises and liberties of the city of London be seized into the king's hands. But judge Jones was pleased to say, That by the king's special command, judgment should not be entered till his majesty's pleasure were further known. This was generally looked upon to make the citizens resign their own liberties, instead of being condemned to a deprivation of them. On Monday the 18th of June, a Petition of the lord-mayor, aldermen and commons, was presented to his majesty in council, confessing themselves most heartily and unfeignedly sorry for the misgovernment of the city of late years, whereby the citizens had fallen under his majesty's displeasure, and judgment had been pronounced against them, acknowledging the great favour of his majesty's not requiring judgment to be immediately entered thereupon; and considering this their distressed condition, they humbly cast themselves at his royal feet, imploring his princely compassion and grace to be extended to this his ancient city, most humbly begging his majesty's pardon for all their offences, and promising to submit themselves to his majesty's good *pleasure*. After the reading this petition, the lord-mayor, aldermen and citizens were commanded to withdraw: and being again called in, the Lord-Keeper, in a speech told them, That his majesty would still show the city all the favour they could reasonably desire; and though he had obtained judgment in a Quo Warranto, it was not his intention to prejudice them in their properties or customs. That the city had not been well advised, to defer their application to his majesty thus long, even till the Court had pronounced judgment: it might have been done with much better grace, if it had been more early. However, his majesty would not reject their suit, if they agreed upon the particulars the king did now require of them: for (says

humble Petition of the city of London, where so many of the present magistrates, and other eminent citizens, are of undoubted loyalty and affection to his service: that for their sakes, his majesty will shew the city all the favour they can reasonably desi...

It was very long before his majesty took resolutions to question their charter: it was not

he) his majesty requires your submission to these regulations:

"'1. That no lord-mayor, sheriff, recorder, common-serjeant, town-clerk, or coroner of the city of London, or steward of the borough of Southwark, shall be capable of, or admitted to the exercise of their respective offices, before his majesty shall have approved them under his sign-manual.

"'2. That if his majesty shall disapprove the choice of any person to be lord-mayor, and signify the same under his sign-manual to the lord-mayor, or, in default of a lord-mayor, to the recorder, or senior alderman; the citizens shall within one week proceed to a new choice: and if his majesty shall in like manner disapprove the second choice, his majesty may, if he please, nominate a person to be lord-mayor for the ensuing year.

"'3. If his majesty shall, in like manner, disapprove the persons chosen to be sheriffs, or either of them; his majesty may appoint persons to be sheriffs for the ensuing year, by his commission, if he so please.

"The Lord-Keeper told them, That these regulations being made, his majesty would not only pardon this prosecution, but confirm their charter in such manner as may be consistent with them: concluding thus; My lord-mayor, the term draws toward an end, and Midsummer-day is at hand, when some of the officers use to be chosen, whereof his majesty will reserve the approbation; therefore, it is his majesty's pleasure, that you return to the city, and consult the common-council, that he may speedily know your resolutions hereupon, and accordingly give his directions. That you may see the king is in earnest, and the matter is not capable of delay, I am commanded to let you know, he hath given order to his attorney-general to enter up judgment on Saturday next, unless you prevent it by your compliance in all these particulars. A common-council was held at their return, to consider of these proposals; and the question being put, Whether they should assent, and submit to his majesty's order of regulations? It was carried in the affirmative, by a majority of 18 voices: and this submission was presented to his majesty on the 21st of June."

The following extracts from the London Gazettes exhibit some particulars of the conduct respecting corporations, to which King James had recourse in apprehension of the landing of the prince of Orange. See also his conduct towards Magdalen-College, in the Report in this Collection of the Proceedings against that society, A. D. 1687.

No. 2388.—London Gazette, from Thursday October 4th, to Monday October 8th, 1688.

"London, Oct. 6th.—His majesty has been pleased graciously to restore to this city all their ancient franchises and privileges, as fully as they enjoyed them, before the late judgment upon the Quo Warranto; the right honourable the Lord Chancellor of England did them the honour to bring down this day, the instrument of restitution and confirmation under the great seal of England, for that purpose: And sir John Chapman thereby constituted lord mayor, until the feast of St Simon and Jude (the time of the mayor's entering, according to the ancient custom upon his office,) was sworn in the Guildhall, with the usual solemnity, in the presence of a very great number of citizens who testified their joy and satisfaction, in this his majesty's grace and favour to them, by their loud and continued acclamations. The same day the aldermen (now in being) that were at the time of the said judgment took their former places; and the vacancies will be supplied by the election of the citizens, according to the ancient custom of the city.

To the King's most Excellent Majesty.

"We, your majesty's loyal and dutiful subjects, the lord mayor, aldermen and sheriffs of your city of London, humbly return our most hearty thanks to your majesty, for the great grace and favour shewn to the citizens of this city, in restoring to them their ancient liberties and franchises, and we beg leave to assure your majesty, that we shall, with all duty and faithfulness, cheartfully and readily, to the utmost hazard of our lives and fortunes, discharge the trust reposed in us by your majesty, according to the avowed principles of the church of England, in defence of your majesty and the established government."

"To the King's most Excellent Majesty. The humble Address of your Majesty's Commissioners of the Lieutenancy of the City of London.

"We cannot but with enlarged hearts return your majesty, our most sincere and humble acknowledgements of your peculiar care and acts of bounty, and mercy towards this your ancient and famous city of London, who amidst the many and more important affairs, that might, at this juncture, employ and take up your royal thoughts, have not yet left us without a security, but, by this your majesty's commission, have put our preservation into our own hands, by suffering us to constitute of our own body such officers, as, we hope and doubt not, will prove most zealous for the safety and honour of your majesty, and the defence of ourselves and families. We must confess our lives and fortunes are but a mean sacrifice to such transcendent goodness; But

the seditious discourses of the coffee-houses; the treasonable pamphlets, and libels daily published, and dispersed thence into all parts of the kingdom; the outrageous tumults in the streets; nor the affronts to his courts of justice, could provoke him to it.

His majesty had patience until disorders were grown to that height, that nothing less seemed

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we do assure your majesty of our cheerful offering of both against all your majesty's enemies who shall disturb your peace upon any pretence whatsoever.

Gazette.—From Monday, Oct. 15, to Thursday, Oct. 18, 1688.

By the King:

A PROCLAMATION, for restoring Corporations to their ancient Charters, Liberties, Rights and Franchises.

"*James R.* Whereas we are informed that several deeds of surrender, which have been lately made by several corporations and bodies corporate, of and in our cities and towns within our kingdom of England and dominion of Wales, of their charters, franchises, and privileges, are not yet recorded or inrolled: And that upon the proceedings and rules for judgment, which have lately been had upon the Quo Warrantos or Informations in nature of a Quo Warranto, judgments are not yet entered upon record. Whereupon, notwithstanding new charters have been granted in the reign of our late dear brother, and in our reign: Which said deeds (being not inrolled or recorded) do not amount unto, or in law make any surrender of the charters, franchises or liberties therein mentioned: And such of the said corporations or bodies politic, against which rules for judgments have been made, in the life-time of our late dear brother, or since, in our court of King's-bench (but no judgments entered upon record) are not discorporate or dissolved; And that it is in our power to leave such corporations in the same estate and condition they were in, and to discharge all further proceedings and effects that may be of such rules for judgment and deeds of surrender: We do hereby publish and declare, That upon due search and examination made, We have satisfaction that the deeds of surrender made by the corporations and bodies politic of the said cities and towns, except the corporations following: (that is to say) Thetford, Nottingham, Bridgwater, Ludlow, Bewdley, Beverley, Tewkesbury, Exeter, Doncaster, Colchester, Winchester, Launceston, Lisderd, Plimpton, Tregoney, Plymouth, Dunwich, St. Ives, Fowy, East Looe, Camelford, West Looe, Tintegall, Penryn, Truro, Bodmyn, Hadleigh, Lestwithell and Saltash, are not enrolled or recorded in any of our courts: And that though rules for judgments have passed upon informations in nature of a Quo Warranto against the corporations, and bodies politic, of several cities and towns in our said kingdom and dominion; yet no judgments have been or are entered upon record, upon any such informations, except against the city of London, Chester, Calne, St. Ives, Pool, York, Thaxted, Llangour, and Malmsbury: And we of our mere grace and favour, being resolved to restore and put all our cities, towns and boroughs in England and Wales, and also our town of Berwick upon Tweed, into the same state and condition they were and was, in our late dear brother's reign, before any deed of surrender was made of their charters or franchises, or proceedings against them or the corporations or bodies politic, in or of the said cities, towns, or boroughs upon any Quo Warranto, or informations in the nature of a Quo Warranto had.—We do hereby, therefore, publish, declare, direct and require, That the said corporations and bodies politic and corporate of all the said cities, towns and boroughs, whose deeds of surrender are not enrolled nor judgments entered against them as aforesaid; and the mayors, bailiffs, sheriffs, aldermen, common-council-men, assistants, recorders, town clerks, magistrates, ministers, officers, freemen, and all and every others the members of or in every of them respectively upon the publication of this our proclamation, take on them and proceed to act as a corporation or body politic, and where places are vacant by death, or otherwise, to make elections, constitute and fill up the same (notwithstanding the usual days and times of elections by the ancient charters and constitutions shall happen to be past) and to do, execute and perform all, and every matter and thing, as they lawfully might and ought to have done, if no such deeds of surrender, rules for judgment, or other proceedings upon any such Quo Warranto or Informations had been had or made.—And for the better effecting our said intention, we have by order made by us in council, and under our sign manual; And we do also by this our proclamation made with the advice of our said council, discharge, remove and dismiss all and every person and persons of and from all offices and places of mayors, bailiffs, sheriffs, aldermen, common-council-men, assistants, recorder, town clerk, and all and every office, and place, which they, or any of them have or claim only by charter patent or grant from our dear brother, or from ourself, since the dates of the respective deeds of surrender or rules for judgment; except such corporations whose deeds of surrender are enrolled or against whom judgment is entered; and that all and every such person, and persons deliver up into the hands and custody of the said persons hereby appointed and intended to act and execute the said offices and places, all and every the charters, records, books, evidences and matters concerning the said respective corporations. And we do hereby further publish and declare, that we have caused all and every the said deeds of surrender, which can be found, to be delivered and put into the hands of our Attorney General to

to be designed, than a ruin to the government both of church and state; for the factious party were not content with the practice of these insolencies, but endeavoured to have them publicly countenanced by the magistrates: and for that end, in all elections they stickled to chuse the most disaffected into offices of the greatest trust in the government; and carried them-

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be by him cancelled and returned to the corporations and bodies politic of the respective cities and towns whom they concern; and have also given to our said Attorney authority, and do hereby warrant and command him, not only not to proceed or enter judgment upon the said Quo Warranto or Informations in nature of a Quo Warranto, or any of them, but to enter upon the respective records, Noli Prosequi's and legal discharges thereof: And we do hereby publish and declare our further grace and favours to the said cities, corporations and boroughs, at any time hereafter, by any further act to grant, confirm, or restore unto them all their charters, liberties, franchises and privileges that at the respective times of such deeds of surrender, or rules for judgment made or given, they held or enjoyed. And in order to the perfecting our said gracious intentions, we do hereby likewise publish and declare our royal will and pleasure as for and concerning the restoring to such of our cities, corporations, and boroughs within our said kingdom and dominion, which have made deeds of surrender, or have had judgments given against them, which surrenders are entered of record, That our Chancellor, Attorney General, and Solicitor General, without fees to any officer or officers whatsoever, upon application to them made, shall, and they are hereby required to prepare and pass charters, instruments, grants and letters patents for the incorporating, regranting, confirming and restoring to all and every the said cities, corporations and boroughs, their respective charters, liberties, rights, franchises and privileges, and for restoring the respective mayors, bailiffs, recorders, sheriffs, town clerks, aldermen, common council men, assistants, officers, magistrates, ministers, and freemen, as were of such cities, corporations or borough at the time of such deeds of surrender, or judgments respectively given or had, and for the putting them into the same state, condition and plight they were in at the times of such deeps of surrender or judgments made or given. And whereas divers boroughs, which were not heretofore corporations, have since the year 1679, had charters of incorporation granted and passed unto them; We hereby further express and declare our royal pleasure, to determine and annul the said last mentioned charters and corporations; And to that end, we have in pursuance to the power reserved in the said charters, by our order in council, and under our sign manual, removed and discharged; And we do also by this our Proclamation, remove and discharge all and every person of or in the said last mentioned corporations, of and from all offices and places of mayors, bailiffs, recorders, sheriffs, aldermen, common council-men, assistants, and of and from all and every other office and place, from which we have power reserved by the said charters respectively, to remove or discharge them: And we do hereby promise and declare, that we will do and consent to all such acts, matters and things, as shall be necessary to render these our gracious intentions and purposes effectual, it being our gracious intention to call a parliament as soon as the general disturbance of our kingdom by the intended invasion, will admit thereof.

Given at our Court at Whitehall, the 17th day of October, 1688. In the Fourth year of our Reign. *

At the Court at Whitehall, October 17th, 1688. Present The King's most Excellent Majesty and the Lords of his most Honourable Privy Council.

Whereas in the charters, patents or grants, made to several cities, boroughs and towns corporate, a power is reserved to his majesty by his order in council, to remove, displace, and discharge the mayors, sheriffs, recorders, town clerks, aldermen, common council-men, assistants, officers, magistrates, ministers, freemen, and other members of the same: His majesty is this day in council pleased to order, and it is hereby ordered accordingly, that all mayors, sheriffs, recorders, town clerks, aldermen, common council-men, assistants, officers, magistrates, ministers, freemen, and other members of the said respective cities, boroughs and towns corporate, which have or claim such offices or places by charter, patent or grant from the late king of blessed memory, or from his majesty since the year 1679 (except such cities and towns in his majesty's proclamation named, whose deeds of surrender are inrolled, or against whom judgments in Quo Warranto are entered, be removed, displaced and discharged, in pursuance of the power reserved as aforesaid; And they and every of them are hereby removed, displaced and discharged accordingly. JOHN NICHOLAS.

J. R. Whereas on the charters, patents or grants made to several cities, boroughs and towns corporate, a power is reserved to us, to remove, displace and discharge by order, under our signet and sign manual, the mayors, sheriffs, recorders, town clerks, aldermen, common-council-men, assistants, officers, magistrates, ministers, freemen and other members of the same; We do accordingly hereby remove, displace and discharge all mayors, sheriffs, recorders, town-clerks, aldermen, common-council-men, assistants, officers, magis-

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* Concerning the operation in law, of this proclamation, see the case of Newling *v.* Francis, (Pasch. 29 G. 3.) 3 Term. Rep. 189.

selves with that heat and violence, that it was a terror to all sober and discreet citizens: and the city was so unhappily divided into parties, that there was no likelihood it could return to good order, so long as the factious retained any hopes of procuring the election of magistrates of their own party for their impunity.

It was high time to put a stop to this growing evil. This made it necessary for his majesty to enquire into their abuse of franchises, that it might be in his power to make a regulation, sufficient to restore the city to its former good government.

It was not for punishment, but merely for the good of the city, that he took this course.

And now the king hath obtained judgment in a Quo Warranto, it is not his intention to prejudice them, either in their properties, or customs. Nay, lest the entering a judgment upon record might have consequences fatal to them, his majesty was so tender of them that he caused Mr. Attorney to forbear the same at present, that the city might have some time to consider their own condition.

My Lord; I must needs say, the city hath not been well advised, to defer their application to his majesty thus long, even till the court hath pronounced judgment: it had been done with a much better grace, if it had been more early.

His majesty's affection to the city is too great to reject their suit for that cause.

But for that reason you will have the less time to deliberate upon the particulars the king doth require of you.

And indeed there will be little need of deliberation; for his majesty hath resolved to make the alterations as few and as easy as may be, consistent with the good government of the

trates, ministers, freemen, and other members of our said respective cities, boroughs, and towns corporate, which have or claim such offices or places by charter, patent or grant, from the late king our most dear brother of ever blessed memory, or from us since the year 1679 (except such cities and towns in our proclamation named, whose deeds of surrender are inrolled, or against whom judgments in Quo Warranto are entered) and they and every of them are hereby removed, displaced and discharged accordingly, in pursuance of the power reserved to us as aforesaid. Whereof all persons concerned are hereby required to take notice.

Given at our Court at Whitehall the 17th day of October 1688, in the fourth year of our reign. By his majesty's command,

SUNDERLAND P.

For the reflections to which these restitutions gave rise at the time at which they were made, see a passage which is extracted from Narcissus Luttrell's 'Brief historical Relation,' and inserted in a Note to the report of the proceedings against Magdalen College, A. D. 1687, in this Collection.

city, and peace of the kingdom. They are these:

His majesty requires your submission to these regulations:

That no lord mayor, sheriff, recorder, common serjeant, town clerk, or coroner of the city of London, or steward of the borough of Southwark shall be capable of, or be admitted to the exercise of their respective offices, before his majesty shall have approved them under his sign manual.

That if his majesty shall disapprove the choice of any person to be lord mayor, and signify the same under his sign manual, to the lord mayor, or, in default of a lord mayor to the recorder, or senior alderman, the citizens shall, within one week proceed to a new choice. And if his majesty shall in like manner, disapprove the second choice, his majesty may, if he so please, nominate a person to be lord mayor for the ensuing year.

If his majesty shall in like manner disapprove the persons chosen to be sheriffs, or either of them, his majesty may appoint persons to be sheriffs for the ensuing year, by his commission if he so please.

Nevertheless, the Elections of these Officers may be according to the ancient usage of the city, with these restrictions:

The lord mayor, and court of aldermen, may, with leave of his majesty, displace any alderman, recorder, common serjeant, town-clerk, coroner of the said city, and steward of the said borough.

Upon the election of any alderman, if any of the persons that shall be presented to the court of aldermen by the ward shall be judged unfit, upon such declaration by the said court, the ward shall proceed to the choice of other persons in the room of such or so many of them as are so disapproved: and if the said court shall disapprove such second choice they may appoint any others in their room.

The justices of the peace to be by the king's commission, which his majesty will grant according to the usual method; unless upon extraordinary occasions, when his majesty shall think it necessary for his service.

These matters are to be settled in such a manner as shall be approved by his majesty's attorney and solicitor general, and counsel learned in the law.

My Lord Mayor; These regulations being made, his majesty will not only pardon this prosecution, but confirm your charter in such manner as may be consistent with them.

The city ought to look upon this as a great condescension on his majesty's part; it being in the nature of a reservation of a small part of what is already in his power, by the judgment: and of those things which will conduce as much to their own good and quiet, as to his service.

If the city should look upon it with another eye, and neglect a speedy compliance; yet his majesty hath done his part, and demonstrated his affection to the city, by giving them this opportunity.

And if there shall be any heavy consequence of this judgment, which it will behove you well to consider, the fault will lie at their doors, in whose power it now is, to bring this affair to a happy conclusion.

My Lord Mayor; The term draws towards an end, and Midsummer-day is at hand, when some of the officers are to be chosen, whereof his majesty will reserve the approbation; therefore it is his majesty's pleasure, that you return to the city, and consult the common-council, that he may speedily know your resolutions th[illegible]n, and accordingly give his directions.

That [illegible]ou may see the king is in earnest, and the [illegible] is not capable of delay, I am commanded [illegible] you know, he hath given order to his Attorney General to enter up judgment on Satu[illegible] next, unless you prevent it by your con[illegible] at the [illegible].

But [illegible] dying, judgment entered

The [illegible] th[illegible] of the kingdom deprived [illegible] Cha[illegible] d Magistrates, till the year [illegible], whe[illegible] king James, terrified at the news of the prince [illegible] f Orange's intended invasion, thought fit to [illegible] the 6th, and ordered lord [illegible] ancellor Jefferies to carry it back himself; whe[illegible]pon sir George Treby was restored to his pl[illegible] of Record[illegible] and the rest of the Magistra[illegible] ording to the ancient constitution of the city

Postscript.

The question concerning the surrender of the corporations, or bodies politic, not being directly in the case, but in the arguments on both sides insisted on, it may not be unnecessary to state that point, and [illegible] at hath been in the debates or argu[illegible] alle[illegible]d on either side, that the easier [illegible] g-ment may be made o[illegible] it. By surr[illegible] in this question is, by both sides, meant and [illegible]tended some deed or instrument in writin[illegible] whereby a body corporate or politic can surrender and dissolve it [illegible] is agreed that a body politic ma[illegible] be dis[illegible]ved, either by the death of the persons in[illegible] rate, or the [illegible] fuser to act, nominate, [illegible] effects as ministers, so as there remain not sufficient authorized or enabled by their charter or constitution, to preserve their being. This is admitted to be a cesser, or dissolution of the corporation, and such a sort of yielding up, or surrender, is admitted possible. But whether by any deed or instrument in writing it can be done, that is the question intended. For the surrender, it hath been alleged,

1. That the being of a body politic is a [illegible] berty, privilege, and franchise, that had its commencement by the king's charter, or by prescription, which supposes a charter; and if it have its beginning and creation by charter, which is the king's deed that grants it; by deed again it may be regranted and surrendered: and it is a maxim in law, 'Unumquodque dissolvi potest eod' modo quo ligatur.' And instances in fairs, markets, leets, and such-like franchises, granted by charter, which, say they, may be surrendered by deed, or regrant.

2. That it is necessary that it should be dissolvible by surrender. Perhaps a town may come to decay, and not be able to defray the charge that the support and maintenance of the corporation may require; for every one sees that ornaments and officers must be, and these cannot be bought or maintained without estates: and poor men are not able, without ruin to their families, to bear the magistracies and offices; and therefore it is necessary there should be a power in them to surrender.

3. That the books and cases in law do prove, that a corporation, or body politic, may surrender itself, and thereby be dissolved.

Dy. 273. There the case is thus stated: The deanry of the cathedral church of Wells was dissolved by the surrender of Fitz-Williams, *tempore* H. 8. And the prebend of Cur[illegible], in th[illegible] same church, was also surrendered by Goo[illegible], prebendary there, 1 E. 6. And in th[illegible] year the [illegible]solution of the deanry was confirmed, [illegible] deanry extinct by act of parliament, [illegible] new dean erected and cre[illegible] to which new deanry, the lands and possessions [illegible] the old were annexed, amongst [illegible] pos[illegible]sions, and the nomination of the [illegible] successors given by that act to the kin[illegible]; and that he should have the same power in 'Choro et Capitulo,' as the old dean had: saving to all strangers, other than the bishop of Bath and Wells, the old dean, and the old prebendary, and their successors. In this case it is admitted, and taken for granted, that the de[illegible]ry, and also the prebend, were surrendered

Dy. 284. There the archbishop of Dublin had two ch[illegible], viz. the dean and chapter of St. Pat[illegible], and the dean and chapter of Christ Church, and both these used to confirm the bishop's leases. The dean and chapter of St. Patrick, by deed under their common seal, gave and surrendered all their church, houses, lands and possessions to the king, without licence or consent of their bishop, being their ordinary, and patron of the most part of the prebends. After this surrender their church was used as the common hall, for the four courts in the Term there; and a lease is made by the archbishop, confirmed by the dean and chapter of Christ Church only; and whether the successor of the archbishop were bound by this lease was the question. The judges in Ireland were divided in opinion, and thereupon the case was sent over for the opinion of the judges here: and the opinions and resolutions of five justices, viz. Catlyn, Dyer, Saunders,

* The operation of the acceptance by other corporations, of the proclamation of king James the Second in this same year (4 Jac. 2) for their restoration, with the full enjoyment of their respective ancient franchises and privileges, is discussed in the case of Newling *v.* Francis, 3 Term Rep. 189.

Welsh, and Carus, certified to the lord deputy of Ireland, under their hands, were, 'Quod non fuit aliud capitulum in esse tempore confirmationes dimission' praed' nisi Christ-Church tantum, quia Corporatio et Capitulum Sancti Patrick fuit per donum et sursum red-dition' Decani et Capituli praed' legitime dissolutum absque consensu Archiepiscopi.'

Jones 168. The opinion of Justice Jones there, that a corporation may be dissolved by an act proper, viz. by resignation.

On the other side, it hath been answered,

1. Admitting it to be true, that to be a body politic, is a liberty, privilege, and franchise, created by charter, which is the king's deed; yet it doth not follow, that it may be surrendered by deed: for the charters that incorporate the citizens, or inhabitants of such a city, town or place, and make them a body capable of taking and having lands, goods, or chattels, to sue and to be sued, and to have a common seal, and to act according to the powers, ends and purposes, in their charters contained, only give them a capacity for those ends. The liberty, privilege and franchise that they have, goes no farther. They cannot transfer this privilege, or franchise to any other persons. These are only personal franchises or capacities, fixed in the persons to whom they are granted, like to patents of denization granted to aliens, whereby a capacity is granted to have, hold, and act, as a natural-born subject; grants of enfranchising a villain; these are grants that cannot be surrendered; these are franchises and capacities like this; these are exceptions to the general rule, 'unumquodque dissolvitur eodem modo,' &c. so also of fairs, markets, courts, &c. they are created by charter, they may be granted over, or granted to the king, but if they be re-granted to the king, they are not extinct, but remain in the king.

Abbot of Strata Marcella's case, Rep. 9. 25. b. shows the difference thus: when the king grants franchises, that were in the crown before the grant, as *bona felonum*, deodands, wreck, &c. and these come again to the crown, they are merged in the crown, and the king is seized of them *jure coronae*; but when a privilege, liberty, franchise or jurisdiction, was at first erected or ordained by the king, there, by the coming of it again to the crown, they are not extinct; and instanceth in fairs, markets, hundreds, leets, *et similia*. They are not dissolved or gone, for thereby subjects would be prejudiced: for if the court should be so granted, and thereby dissolved, the subjects judgments and suits in those courts would be all lost. These are other exceptions to that general rule, 'unumquodque,' &c.

2. That the reason given for the surrenders of corporations from the poverty that may happen, for the conveniency of some corporation, is answerable; for that doth not very frequently happen: but when it doth happen, if they are weary of it, they may let it alone, and not act, or choose officers; it will cease of itself, they need not be at the charge or trouble of a surrender: but on the other side, the inconveniencies are very great, and are some of them before specified. The establishment of the church is all in corporations, bishops, deans, chapters prebends, parsons, vicars; if these be surrenderable, as by the cases cited without consent of bishops (a prebend is, as to his being, but as a parson, or a vicar) the universities, colleges, hospitals, all the cities, considerable towns, trades, and mysteries, are corporations; if these be surrenderable, it affects our old government.

3. As for the books and authorities, Dy. 273, the dissolution of the corporation thereby surrendered is only mentioned in putting the case, it is not debated nor was it material in the case: for the act of parliament there settled the new dean and chapter; and the prebendary, and the matter of the case ariseth upon the deprivation of Dean Goodman, and the appeal, and reversion of that sentence, there is not as much as any opinion in the case concerning the dissolution or surrender, whether good or bad. But what may reasonably be inferred from that case is, that the surrender or dissolution thereby was not good in law; for if it had, what needed the having an act of parliament to secure against the old dean and prebendary? which yet appears in the case was had.

And, Co. Rep. 3. 75. b. in the case of the dean and chapter of Norwich, this case of Dyer is cited, and there it is expressly said, that that surrender was not thought good, till confirmed by act of parliament.

And as for the other case, Dyer 282. of the surrender of the dean and chapter of St. Patrick, the opinion of the judges there given is, by all the judges, 3 Car. 1, in the case of Hayward and Fulcher, in Jones 168, denied to be law, and said to be a private resolution. So that these two cases in Dyer having been by those latter authorities denied, remain no authorities. And as for the other authority, viz. The opinion of justice Jones, 168, that a corporation may be dissolved by a proper act, viz. by resignation, that is true, taken in the sense he speaks it: it is spoken of a dean and chapter resigning to the ordinary, viz. the dean resigning his place of dean, and the prebendaries of the chapter resigning their prebends to the ordinary, whereby their churches and prebends became void, and to be supplied by the respective patron, collating or presenting, as in cases of resignation, by any parson or vicar to his ordinary. But this is nothing of a surrender of the body politic to the king, and thereby dissolving the corporation, and destroying all supply, by new presentments or collations. And this appears by the very words of Justice Jones there; for when he saith, they may be dissolved by a proper act, viz. by resignation; the next words are, or by death of the whole corporation, and the king being patron, it is in his election whether he will collate *de novo*, or not, and till he collates the corporation is in suspense; but if the bishop be patron, then the bishop upon the resigna-

tion, hath power to collate, and thereby to continue the corporation: so that it is very plain, that the resignation he speaks of is, not meant for any surrender to the king, or any thing that determines the corporation, except the patron will not collate, and thereby suffer the corporation to cease; but on the contrary, that a corporation cannot be dissolved by any surrender.

The suppression and dissolution of the abbeys, priories and monasteries, by H. 8, was no dissolution of their bodies politic. Br. Extinguishment, 75. Br. Corporation, 78. Davies, Rep. 1. Moore's Rep. 282. Though their houses and all the possessions were gone, and the persons either discharged of their orders, *or sent into other houses;* yet resolved, that the corporations remained. And it can scarce be imagined, but in some of those cases it would have been practised, or at least something said about surrendering their body politic, if it had been then thought surrenderable. But the case of the dean and chapter of Norwich, Rep. 3. 41 Eliz. before cited, and the case of Hayward and Fulcher before mentioned in 3 Car. 1. Jones, 168. Palm. Rep. 500, 501. Anders. 2. 120. have been cited as judgments against surrenders by all the judges of the king's-bench. The case was, that the dean and chapter of Norwich, 3 Junii, 1. E. 6, surrendered to the king their cathedral church, and all their manors, lands, tenements, hereditaments, franchises, and liberties, spiritual and temporal, by whatsoever names they are known, or which they have or ought to have in the right of their church. And by the case 41 Eliz. Co. Rep. 3. 74, and the opinion of all the judges of the King's-bench, 3 Car. 1, adjudged, that this was no surrender of the corporation.

They object, That the words of the surrender do not shew any intent to surrender the corporation, but only the possessions.

I answer, the being of a corporation is a franchise, or liberty; and there is an express surrender of all franchises and liberties, spiritual and temporal, by what name soever known, which they have in the right of their church and this was a spiritual franchise, which they had in right of their church.

Next, this surrender was made with intent to dissolve the corporation, and to have a new one erected: this appears by the new charter of erection made in November following; which recites the surrender made to that intent. It is not any where in the many arguments of that case alledged that there wanted words in the surrender to do it, which would have been, if that had been the ground of their judgment.

In the case cited out of Dyer 282, there the words of the surrender were, that they *surrendered their church, houses, lands, and* possessions, which are not half so large and ample words as in this surrender are contained; and the other side cite that as an authority, to prove a corporation surrendered, and admit the words there sufficient, and deny them to be sufficient here, though much more large, express, and general. The arguing there in Palmer 501, that it is against the nature and constitution of corporations, that by the words put in their charters, by their very constitution, are to have perpetual succession, 'perpetuis 'Temporibus duratur,' and which by their oaths they are sworn to preserve, or they should be *felo de se.* And the express words of the judges reported in these books shew their opinion, that the corporation could not be surrendered, Jones 168. Dodderidge Justice, there saith, that the dean and chapter cannot surrender their corporation. Palm. 501. Whitlock Inst. there saith, for that the dean and chapter are counsel to the bishop instituted to that person, they cannot dissolve themselves; for the public corporation is the soul to the body, that cannot be granted or severed; though the king can create a corporation, he cannot dissolve it. And Jones Inst. there 502, saith, that the dean and chapter were counsel to the bishop, and cannot destroy themselves; if they could, great inconvenience thereby will ensue to the church.

REX *versus* MAJOR' *et* COMMUN' *et* CIV' *civitatis* LONDINI.

An INFORMATION in nature of a QUO WARRANTO.

Paschæ, 34 Car. 2. B. R.

London, ss. Memorand', Quod Robertus Sawyer Miles, Attorn' Domini Regis nunc general', qui pro eodem Domino Rege in hac parte sequitur, in propria persona sua ven' hic in curia Dicti Domini Regis, coram ipso Rege apud Westm', die Lunæ prox' post quinden' Sancti Martini ult' præterit', et pro eodem Domino Rege protulit hic in cur' dicti Domini Regis, coram ipso Rege tunc et ibidem, quand' Information' versus Majorem et Communitat' ac Cives civitat' London; quæ quidem Informatio sequitur in hæc verba: *ss.*

ss. Memorandum, Quod Robertus Sawyer Miles, Attorn' Dom' Regis nunc generalis, qui pro eodem Dom' Rege in hac parte sequitur, in propria persona sua ven' hic in cur' dict' Dom' Regis, coram ipso Rege apud Westm', die Lunæ prox' post quinden' S. Martini isto eodem termino, et pro eodem Dom' Rege dat cur' hic intelligi et informari, Quod Major et Communitas, ac Cives civitat' London' præd', per spacium unius mensis jam ult' elaps' et amplius, usi fuerunt, et adhuc utuntur, ac clamant habere et uti, absque aliquo warranto, sive regali concessione, infra civitat' London præd', et libertat' et precinct' ejusdem civitat', diversis libertat', privileg', et franchis' sequen', videl', Fore de seipsis unum corpus corporat' et politicum in re, facto, et nomine, per nomen

Majoris et Communitat' ac Civium civitat' London', ac per idem nomen placitare et implacitari, respondere et responderi, ac etiam habere Vicecomit' civitat' et com' civitat' London', et nominare et eligere ex seipsis duas personas fore Vicecomit' civitat' præd' et com' ejusd' civitat', ac ill' sic nominat' et elect' præficere et constituere Vic' civit' præd' et com' ejusdem civitat', ad execution' et retorn' omnium brevium, billarum, et preceptorum Dom' Regis pro administratione et executione justic' infra civit' præd' et com' ejusdem civit' exequend', faciend', ac ad faciend' et exequend' omnia et singula al' infra civit' præd', et com' ejusdem civit', quæ ad officium Vic' faciend' pertinent; ac etiam habere Vic' com' Middlesex, et nominare, eligere et constituere ex seipsis Vic' com' Middlesex, pro eodem com' ut Vicecomes inde deservitur, ac omnia brevia, billas, et præcepta Dom' Regis infra com' Middlesex' præd' pro administratione et executione justic' ibid' exequend', et retorn' inde faciend', absque aliqua commissione, sive aliquibus literis patentibus a Dom' Rege inde obtent', sive obtinend'. Ac etiam quod Major et Aldermanni ejusdem civit' fuerunt Justic' Dom' Regis ad pacem infra civit' præd' conservand', ac ad sessiones paces et placita coronæ infra eandem civit' tenend', ac ad omnes felon', riot', et conventic' illicit' infra civit' præd' inquirend', audiend', et terminand' authoritate ipsorum propria, absque aliqua commissione, sive al' authoritate a Dom' Rege in ea parte concess' sive obtent'. De quibus quidem omnibus et singulis libertat', privileg', et franchis' iidem Major et Communitas, ac Cives civit' London præd', per totum tempus supradictum super dictum Dom' Regem nunc usurpaverunt et adhuc usurpant, in dict' Dom' Regis nunc contempt', prærogativæ suæ regiæ grave dampnum et præjudicium. Unde idem Attorn' dict' Dom' Regis nunc general', pro eodem Dom' Rege pet' advisament' cur' hic in præmiss', et debit' leges process' versus præfat' Major' et Communitat', ac Cives civit' London præd', in hac parte fieri ad respondend' dict' Dom' Regi, Quo Warranto clamant haberi, uti, et gaudere, libertat', privileg', et franchis' supradict', &c. Per quod præceptum fuit Vicecomitibus London, quod venire fac' eos ad respondend', &c.

Et modo, scilicet die Lunæ prox' post crastinum Ascens' Dom', isto eodem termino, coram Dom' Rege apud Westm', ven' prædicti Major et communitas, ac Cives civitatis London', per Benedictum Brown Attornat' suum, et habito auditu information' præd', querunt, se colore ejusdem informationis graviter fore vexat' et inquietat', et hoc minus juste; quia protestando quod informatio præd', materiaq' in eadem content' min' suffic' in lege exist', ad quam quidem informat' ipsi necesse non habent, nec per legem terræ tenent' aliquo modo respondere: Pro placito tamen, quoad libertat' privileg', et franchis' sequen' (viz.) ipsos Major' et Communitat', ac Cives civit' London fore de se ipsis unum corpus corporat' et politic' in re, facto, et nomine, per nomen Majoris et Communitat' ac Civium civitat' London ac per idem nomen placitare et implacitari respondere, ac responderi, in informat' præd' superius specificat', iidem Major et Communitas, ac Cives Civit' London dicunt, quod dict' Dom' Rex nunc ipsos occasione inde impetere seu occasionare non debet, quia dicunt, quod præd' civit' London est, et a tempore cujus contrar' memoria homin' non exist', fuit antiqua civitas; quodque Cives ejusdem Civit' sunt, et a præd' tempore cujus contrar' memor' homin' non exist', fuerunt un' corpus corporat' et politic' in re, facto, et nomine, per nomen Majoris et Communitat' ac Civium civitat' London, ac per idem nomen per tot' tempus illud placitaver' et implacitat' fuerunt, responder' et respons' fuerunt, et placitare et implacitari, respondere ac responderi a toto tempore supradicto usi fuerunt, et consuever'. Quodque in Magna Charta de libertat' Angl', in Parliament' Domin' Henrici quandam Regis Angl' tertii, apud Westm' in comitat' Midd', anno regni sui non tent', edit' et provis', continent', quod civitas London' habeat omnes libertat' suas antiquas et consuetud' suas; et idem Major et Communitas, ac Cives civit' London ulterius dicunt, quod Domin' Edwardus quondam Rex Angl' tertius in parliamento suo apud Westm' in Comit' Midd', anno regni sui primo tent' per quandam chartam suam, de consensu prælator', Comit', Baron', ac totius Communitat' regni sui in eodem parliament' sic apud Westm' præd' convocat' existen', ac authoritat' ejusdem parliament', confirmavit tunc Civibus civit' London præd' libertat' subsequen' (int' alia), habend' sibi et successoribus suis in perpetuum imprimis recitando, Quod cum in Magna Charta de libertat' Angl' contineat, quod civit' London habeat omn' libertat' suas antiquas et consuetud' suas; et quod iidem Cives tempore confection' dictæ chartæ, ac temporibus sancti Edwardi Regis et Confessoris, et Willielmi Conquestoris, et al' progenitor' dict' Regis Edwardi tertii, divers libertat' et consuetud' tam per chartas ipsor' progenitor' suor', quam sine chartis ex antiqua consuetud' habuissent, voluit et concessit idem Rex Edwardus tertius, pro se et hæredibus suis, per chartam illam, authoritat' præd' quod iidem Cives haberent libertat' suas secund' form' Magn' Chartæ supradict', et quod pro aliqua personali transgr', vel judicio personali alicujus ministri ejusdem civit' non caperent' libertat' civit' ill' in manus ejusdem Regis Edwardi tertii, vel hæred' suor', sed hujusmodi minister, prout qualitas transgress' requireret, puniret' prout per eandem chartam geren' dat' apud Westm' præd' sexto die Martii, anno regni dict' Regis Edwardi tertii primo superadict', sub magno sigillo suo Angl' sigillat, hic in cur' prolat' (inter alia) plenius apparet. Et iidem Major et Communitas, ac Cives civit' London ulterius dicunt, Quod ad instant' et requisit' Communitat' regni Angl' in parliamento Dom' Richardi nuper Regis Angl' secundo post Conquest', apud Westm' præd' anno regni sui septimo tent', assemblat' pro majore quiete et pace inter ligeos ejusdem nuper Regis fovend

et pro bono publico, omnes consuetud', libertat' privileg', et franch' civit' prædict' tunc Civibus civit' illius, et eor' successor' licet usi non fuerunt, vel abusi fuerint eisdem, authoritat' ejusdem parliament' ratificat' et confirmat' fuer'. Quodq' Domin' Henricus nuper Rex Angl' sextus, per literas suas patent', sub magno sigillo suo Angl' sigillat', gerent' dat' apud Westm' præd' vicesimo sexto die Octobr', anno regni sui [illegible], quas idem Major et Communitas [illegible] civit' London hic in cur' proferunt pro se, hæredibus et successoribus suis, confirmavit Majori et Communitat', ac Civibus civit' London et successor' suis, omnes et singulas suas libertat', franch', et liberas consuetud' [illegible], sicut eas [illegible] nuper Regis [illegible] melius, quietius et liberius habuissent et tenuissent, prout per easdem literas patent (int' alia) plenius apparet. Quodq' Domin' Edwardus nuper Rex Angl' quartus, per literas suas patent' sub magno sigillo suo Angl' sigillat', gerent' dat' apud Westm' præd' [illegible] anno regni sui secundo, quas idem Major et Communitas, ac Cives civit' London hic in cur' proferunt pro se et hæredibus suis confirmavit Majori et Communitat' ac Civibus civit' London et successoribus suis in perpetuum, omnes et singulas suas libertat', franch', et liberas consuetudines adeo integre et plene, sicut eas unquam aliquo tempore progenitor' ejusdem nuper Reg' Edwardi quarti melius, quietius, et liber habuissent et tenuissent. Et ulterius idem nuper Rex Edwardus quartus per easdem literas sua patent', concessit eisdem Majori et Communitat', ac Civibus, quod licet ipsi, vel prædecessor' sui, aut Major et Alderman' civit' prædict', vel prædecessor' sui præantea, vel successor' sui extunc in poster', aliqua vel aliquibus libertat' quietant' concess' ordinat' articul' seu liberar' consuetud' aut alior' eisd' literis patent' ejusdem nuper Regis Edwardi quarti, seu al' literis suis aut progenitor' suor' quondam Reg' Angl', eisdem Majori et Communitat' concess' content', aliquo casu emergente plene non usi, vel abusi fuerint, nolnit tamen idem nuper Rex Edwardus quartus' quod propt' hoc ipsi major et communitas, Alderman' et Cives, seu successores sui, forisfactur' aliquor' præmiss' incurrerent; sed quod ipsi, et eor' sucessor', universis et singulis libertat' quietant' concess', ordinat' articulis, liberis consuetud', et quibuscunque al' in chartis et literis prædict' content', taliter non usis, vel etiam abusis, et eor' quolibet extunc de cætero plene et libere gauderent, et eis uterent' sine impetition' vel impediment' ejusdem nuper Regis, seu hæred' suor', Justic', Eschætor', Vicecom', aut al' Balliv' seu minist' ipsius nuper Regis, vel al' quorumcunque, prout per easdem literas patent' ejusdem nuper Regis Edwardi quarti hic in cur' prolat' (int' alia) plenius apparet. Quodque Domin' Henricus nuper Rex Angl' septimus, per literas suas patent' sub magno sigillo suo Angl' sigillat', geren' dat' apud Westm' prædict' vicesimo tertio die Julii, anno regni sui vicesimo, quas iidem Major et Communitas, ac Cives civit' London hic in cur' proferunt pro se, hæredibus et successoribus suis ratificavit et confirmavit Majori et Communitat', ac Civibus civit' London' et eor' successor', omnia et singula libertat', privileg', quietant' et liberas consuetud', quibus ipsi Major et Communitas, et Cives seu prædecessor' sui habere, exercere, seu gaudere consuevissent, vel usi fuissent, aut debuissent, adeo plene, plan', et integre, ac si ea omnia et singula separatim et verbat' in eisdem literis patent' express' declarat' et manifestat' essent et fuissent, prout per easdem literas patent (int' alia) plenius apparet. Et idem Major et Communitas, ac Cives civit' London ulterius dicunt, quod Domin' Jacobus nuper Rex Angl', &c. per literas suas patent' sub magno sigillo suo Angl', sigillat', geren' dat', apud Honorem suum de Hampton Court vicesimo quarto die Septembris, anno regni sui Angl' sexto, quas iidem Major et Communitas, ac Cives civit' London hic in cur' proferunt, recitando, quod cum quamplurimi progenitores ipsius nuper Regis, quondam Reges Angl', de gratia sua speciali, ac pro gratis, laudabil', et multiplic', acceptabil' servit' per Majorem et Communitat', ac Cives civit' London, et prædecessor' suos temporibus retroact' fact' et impens', necnon pro divers' al' urgent' causis et consideration' eos separatim moven', dedissent, concessissent, et confirmassent Majori et Communitat', ac Civibus civit' London præd', et successor' suis, divers' libertat', privileg', franch', immunitat', authoritat', jurisdiction', ordinat', consuetud', quietant', prout per separal' literas patent' progenitor' et prædecessor' suor' quondam Regum Angl' plenius et manifestius liquebat et apparebat; idem nuper Rex Jacobus pro et in consideraт' summæ fidelitat', constant', et prompt' et laudabil' servit' per Major' et Communitat', ac Cives civit' London prædict' eidem nuper Regi, in ipsius regni sui primis auspiciis, et continue [illegible] tunc manifest', et fidelissim' fact' et impens', omnes et singulas literas patent', chartas, et confirmac' prædict' præclariss' progenitor' et antecessor' suor' eisdem Majori et Communitat' ac Civibus civit' London prædict', et prædecessor' suis, per quæcunque nomina incorporat' antea tunc temporа fact', concess', seu confirmat', ac omnes et singulas donac', concess', confirmac', restitut', consuetud', ordinac', explanac', articul' et omnes al' res quascunque, in quibuscunque literis patent' sive chartis quorumcunque progenitor', prædecess', aut antecessor' suor' Regum Angl', necnon omnia et singula indict' literis patent', chartis, concess', confirmat', seu eor' aliquibus content' recitat', specific', confirmat', seu explanat', ac omnia et singula jurisdiction', authoritat', privileg', libertat', franch', quietanc', immunitat', liberas consuetud' et hæreditament', quæcunque, quæ præd' Major et Communitas, ac Cives civit' London prædict', vel prædecessor' sui, per nomen Major' et Communitat', ac Civium civit' London, seu per nomen Major' et Aldermann' civit' London, seu per nomen Majoris, Civium, et Communitat' civit' London,

seu per nomen Majoris, et Civium civit' London, seu per nomen Majoris et Communitatis civitatis London, seu per nomen Civium civit' London, seu per nomen Baron' London, seu per nomen Baron' civit' London, seu per aliquod al' nomen quodcunque, ratione seu vigore aliquar' literar' patent', chartar', seu confirmac' aliquor' progenitor', prædecessor', aut antecessor' ejusdem nuper Regis Jacobi quondam Regis Angl', aliquo tempore, vel aliquibus temporibus habuissent, seu rationabilit' usi fuissent, aut exercuissent, rata habuit et grata, et pro se, hæred' et successor' suis acceptavit et approbavit, ac ea omnia et singula præfat' Major' et Communitat', ac Civibus civit' London' prædict' et eor' successoribus, per easdem literas suas patent' ratificavit et confirmavit habend', tenend', gaudend' [illegible] et singula præmiss', eisdem Major' et Communitat', ac Civibus civit' London prædict', et successoribus suis in perpetuum, adeo plene, libere et integre, ac in tam amplis modo et forma, ac si separatim, singulatim, et nominatim in literis patent' ill' express' nominat', declarat', recitat', et manifest' essent et fuissent, prout per easdem literas patent' (inter alia) plenius [illegible] Quodque Domin' Carolus primus [illegible] Angl', &c. per literas suas patent' [illegible] sigillo suo Angl' sigillat' gerent' [illegible] Westm' prædict' decimo octavo die [illegible] anno regni sui quarto decimo, quas id[em] Major et Communitas, ac Cives civit' London hic in cur' proferunt, omnia et singula privileg', libertat' franc', quietanc', immunitat', et liberas consuetud' quæcunque, quæ prædict' Major et Communitas, ac Cives civit' London præd', vel prædecessor' sui, per nomen Majoris et Communitat', ac Civium civit' London, seu per nomen Majoris et Aldermanor' Civium et Communitat' London, seu per nomen Majoris et Civium civit' London, seu per nomen Majoris et Communitat' civit' London, seu per nomen Civium civit' London, seu per nomen Baron' London, seu per nomen Baron' civit' London, seu per aliquod al' nomen quodcunque, ratione seu vigore literar' p[illegible] [con]firmac', in eisdem literis patent' dicti nuper Regis Caroli primi mentionat', vel usu vel præscriptione, aut alio legal' modo aliquo tempore, vel aliquibus temporibus ante tunc habuissent, seu rationabiliter usi fuissent, aut exercuissent, rat' habend' et grata, ac pro se, hæredibus, et successoribus suis acceptavit et approbavit, ac ea omnia et singula præfat' Majori et Communitat', ac Civibus civit' London, et eor' successor', per easdem literas suas patent' ratificavit et confirmavit, prout per literas patent' ill' (inter alia) plenius liquet et apparet. Quodque præd' Domin' Rex nunc per literas suas patent' sub magno sigillo suo Angl' sigillat', gerent' dat' apud Westm' præd' vicesimo quarto die Junii, anno regni sui decimo quinto, quas iidem Major et Communitas, ac Cives civit' London hic in cur' proferunt pro ipso Rege, hæredibus et successoribus suis, ratificavit et confirmavit Major' et Communitat' ac Civibus civit' London, et successor' suis, omnia et singula jurisdiction', authoritat', privileg', libertat', franch', quietanc', immunitat', et consuetud' quæcunque, quæ præfat' Major et Communitas, ac Cives civit' London, vel prædecessor' sui, per nomen Major' et Communitat', ac Civium civit' London, seu per nomen Majoris, Aldermanor', Civium et Communitat' London, seu per nomen Majoris et Civium civit' London, seu per nomen Major' et Communit' civit' London, seu per nomen Civium civit' London, seu per nomen Baron' London, seu per nomen Baron' civitat' London, seu per aliquod al' nomen quodcunque, ratione vel vigore literar' patent', chartar', seu confirmat' in eisdem literis patent' dicti Domin' Regis nunc præmentionat', vel alicujus, seu aliquor' usus' vel [illegible] [pr]æscription' vel præscriptionum, [illegible] [qu]ecunque, aliquo tempore, [illegible] ante tunc habuissent, [illegible] seu exercuissent, habe[nd'] [illegible] [gaud]end' omnia et s[ingula] [illegible] Majori et [Com]munitat' [illegible] præ- [illegible] et suc[cessor'] [illegible] ple[nius] [illegible] aut [illegible] seu [illegible] [illegible] literas [illegible] [ex]press' no- [illegible] essent [illegible] patent' [illegible] [W]arranto [illegible] [Com]munitat', ac Cives civitat' [illegible] in informatione prædicta [illegible] utunt', ac [illegible] libertat' privileg', et [illegible] unum corpus corporat' [illegible] et remise', per nomen [illegible] Civium civitat' London [illegible] placitare et implacitari [illegible] prout eis bene licuit et [illegible] iidem Major et Com[munitas] [illegible] civitat' London, de libertat', privileg' et franch' ill' super dictum Domin' Regem nunc, per tempus præd' in informatione præd' superius specificat', usurpaver' seu usurpant, prout per informationem ill' pro dicto Domin' Rege nunc superius supponitur. Quæ omnia et singula iidem Major ac Communitas, ac Cives civitat' London parat' sunt verificare; unde petunt judicium, et quod libertat', privileg', et franch' ill' eis et successoribus suis in perpetuum deinceps allocent' et adjudicent', et quod ipsi, quoad præmiss' ill' ab hac cur' dimittant', &c. Et iidem Major et Communitas, ac Cives civit' London, quoad libertat', privileg' et franch' sequent', viz. ipsos habere Vicecom' civit' et com' civit' London, et Vicecom' Midd' et nominare et eligere ex seipsis duas personas fore Vicecom', civit' prædict' et com' ejusdem civit' et Vicecom' Midd' ac ill' sic nominat' et elect' præficere et constituere Vicecom' civit' prædict' et com' ejusdem civit', et Vicecom' Midd', ac ut Vicecom' civit' præ-

dict', et com ejusdem civit', ad execut' et retorn' omnium brevium, bill', et precept' Domini Regis, pro administratione et execut' Justic' infra civit' prædict', et com' ejusdem civit' exequend', faciend', quæ ad officium vicecom' faciend' pertinent, ac ad faciend' et exequend' omnia et singula alia infra civit' et com' ejusdem civit', quæ ad officium Vicecom' faciend' pertinent, ac ut Vicecom' com' Midd' pro eodem com' deservitur, ac omnia brevia, bill', et precept' Domini Regis infra com' Midd' prædict', pro administratione et executione justiciæ ibidem exequend', et retorn' inde faciend', quæ ad officium Vicecom' faciend' pertinent; dicunt, quod dictus Dominus Rex nunc ipsos majorem et communitat', ac Cives civitat' London, occasione inde impetere seu occasionare non debet, quia dicunt, quod prædict' civit' London est, et a tempore cujus contrar' memoria homin' non exist', fuit antiqua civitas et antiqu' comit' de se, quodque præd' com' Midd' per totum tempus præd' fuit et est antiquus comit', quodque cives ejusdem civit' sunt, et a præd' tempore cujus contrar' memor' homin' non exist', fuer' un' corpus corporat' et politic, tam per nomen Major' et communitat' ac civium civit' London, quam per nomen Civium London; quodque Domin' Johannes quondam Rex Angl', per literas suas patent' sub magno sigillo suo Angl' sigillat', geren' dat' apud bonam villam super Tokam quinto die Julii, anno regni sui primo, quas iidem major et communitas, et cives civitat' London, hic in cur' proferunt, concessit civibus London' præd', Vicecomit' London et de Midd' cum omnibus rebus et consuetudinibus, quæ pertinebant ad præd' Vicecom' infra civit' et extra, per terras et per aquas, habend' et tenend' eis in perpetuum. Et præterea idem Domin' Rex Johannes, per literas suas patent' præd' concessit eisdem civibus London, quod ipsi de seipsis facerent Vicecom' quoscunque voluerint, et amoverent quando voluerint, prout per easdem literas patent' (inter alia) plenius apparet. Quodque in Magna Charta de libertatibus Angliæ, in parliament' Domini Henrici quondam Regis Angl' tertii, apud Westm' in com' Midd' anno regni sui nono tent', edit', et provis', continet', quod civit' London habeat omnes libertat' suas antiquas, et consuetud' suas. Et idem Major et communitas, ac Cives civit' London ulterius dicunt, quod idem Domin' Rex Henricus tertius, per literas suas patent' sub magno sigillo suo Angl' sigillat', geren' dat' apud Westm' præd' decimo octavo die Februarii, anno regni sui undecimo, quas iidem Major et communitas, ac Cives civit' London hic in cur' proferunt, confirmavit Civibus London Vicecom' London et de Midd' cum omnibus rebus et consuetudinib', quæ pertineb' ad præd' Vicecom' infra civitat' et extra, per terras et per aquas, prout per easdem literas patent' (int' al') plenius apparet. Quodque Domin' Edwardus quondam Rex Angl' tertius, in parliament' suo apud Westm' in com' Midd', anno regni sui primo tent', per quandam chartam suam de assensu prælator', Comit', Baron', ac totius communitat' regni sui in eodem parliamento suo apud Westm' præd' convocat' existen', ac authoritate ejusdem parliamenti, confirmavit tunc Civibus, civit' London præd' libertat' subsequen' (int' al') habendi sibi et successoribus suis in perpetuum, imprimis recitando, quod cum in Magna Charta de libertat' Angl' contineat', quod civitas London habeat omnes libertat' suas antiquas et consuetud', suas et quod iidem Cives tempore confection' dictæ chartæ, ac temporibus sancti Edwardi Regis et Confessoris, et Willielmi Conquestor' et al' progenitor' dicti regis Edwardi tertii, diversas libertat' et consuetud', tam per chartas ipsor' progenitor' suor', quam sine chartis ex antiqua consuetud' habuissent, voluit et concessit idem Rex Edwardus tertius pro se et hæredibus suis per chartam ill', authoritat' præd', quod iidem Civis haberent libertat' suas secund' formam Magn' Chartæ supradict'; et quod pro aliqua personal' transgr', vel judicio person' alicujus ministri ejusdem civit', non caperet' libertas civit' ill' in manu ejusd' Reg' Edwardi tertii, vel hæred' suor', sed hujusmodi minister, prout qualitas transgr' requireret puniretur, prout per eandem chartam geren' dat' apud Westm' præd' sexto die Martii anno regni dicti Regis Edwardi tertii primo supradict', sub magno sigillo suo Angl' sigillat', hic in cur' prolat' (int' alia) plenius apparet. Et idem Major et Communitas, ac Cives civit' London ulterius dicunt, quod ad instant' et requisition' Communitat' regni Angl' in parliamento Domin' Richardi nuper Regis Angl' secundi post conquestum, apud Westm' præ anno regni sui septimo tent', assemblat' pro majore quiet' et pace inter ligeos ejusdem nuper Regis fovend', et pro bono publico, omnes consuetud' libertat' privileg', et franch' civit' præd', tunc civibus civitat' illius et eor' successoribus, licet usi non fuerint, vel abusi fuerint, eisdem, authoritat' ejusdem parliament', ratificat' et confirmat' fuer'. Quodque Dominus Henricus nuper Rex Angl' sextus, per literas suas patent' sub magno sigillo suo Angl' sigillat', gerent' dat' apud Westm' præd' vicesimo sexto die Octobris, anno regni sui vicesimo tertio, quas iidem Major et Communitas, ac Cives civit' London hic in cur' proferunt pro se, hæredibus et successoribus suis, confirmavit Majori et communitat' ac civibus civit' London, et successoribus suis, omnes et singulas suas libertat', franch' et liberas consuetud' adeo integras et illæsas, sicut eas unquam aliquo tempore progenitor' ejusdem nuper Regis Henrici sexti melius, quietius, et liber' habuissent et tenuissent, prout per easdem literas patent' (int' al') plenius apparet. Quodq' Domin' Edwardus nuper rex Angl' quartus, per literas suas patent' sub magno sigillo suo Angl' sigillat', geren' dat' apud Westm' præd' nono die Novembr', anno regni sui secundo, quas iidem Major et Communitas ac Cives civit' London hic in cur' proferunt pro se, et hæredibus suis, confirmavit Majori et communitat', ac Civibus civit' London, et successoribus suis in perpetuum, omnes et singulas suas libertat',

franch', et liberas consuetud', adeo integr' et illæs', sicut eas unquam aliquo tempore progenitor' ejusdem nuper Regis Edwardi quarti melius, quietius, et liber' habuissent et tenuissent. Et ulterius idem nuper Rex Edwardus quartus, per easdem literas suas patent' concessit eisdem Majori et Communitat' ac Civibus, licet ipsi, vel prædecessores sui, aut Major Aldermann' civit' præd', vel prædecessor' sui præantea, vel successoris sui extunc in posterum' aliqua vel aliquibus libertat' quietant' concess', ordination' articulor', seu liberar' consuetudin', aut aliis' in eisdem literis patentibus ejusdem nuper Regis Edwardi quarti, seu al' literis suis, aut progenitor' suor' quondam Regum Angl', eisdem Majori et communitat' concess' content', aliquo casu emergente plene non usi vel abusi fuerint. Voluit tamen idem nuper Rex Edwardus quartus, quod propter hoc ipsi Major et Communitas, Alderman' et Cives, seu successor' sui, forisfactur' aliquor' præmissor' incurrerent, sed quod ipsi et eorum successor' universis et singulis libertat' quietant' concess', ordinat' articulis, liberis consuetud', et quibuscunque al' in chartis et literis præd' content', talit' non usis, vel etiam abusis, et eor' quolibet extunc de cætero plene et libere gauderent, et eis uterent' sine impetratione vel impediment' ejusdem nuper Regis, seu hæred' suorum, Justic', Eschætor', Vicecom', aut al' Balliv' seu ministr' ipsius nuper Regis, vel alior' quorumcunq', prout per easdem literas patent' ejusdem nuper Regis Edwardi quarti hic in cur' prolat' (int' al') plenius apparet. Quodque Dom' Henricus nuper Rex Angl' septimus per literas suas patent' sub magno sigillo suo Angliæ sigillat', gerend' dat' apud Westm' præd' vicesimo tertio die Julii, anno regni sui vicesimo, quas iidem Major et Communitas, ac Cives civit' London hic in cur' proferunt pro se, hæredibus et successoribus suis, ratificavit et confirmavit Major' et Communitat', ac Civibus civit' London, et eorum successoribus, omnia et singula libertat', privileg', quietant', et liberas consuetudines, quibus ipsi Major, Communitas, et Cives, seu prædecessor' sui habere, exercere, seu gaudere consuevissent, vel usi fuissent, aut debuissent, adeo plene, plane, et integre, ac si ea omnia et singula separatim et verbatim in eisdem literis patent' express' declarat' et manifestat' essent et fuissent, prout per easdem literas patent' (inter alia) plenius apparet. Quodq' Dom' Henricus nuper Rex Angl' octavus per literas suas patent' sub magno sigillo suo Angl' sigillat', geren' dat' apud Westm' præd' duodecimo die Julii, anno regni sui quinto, quas iidem Major et Communitas, ac Cives civit' London hic in cur' proferunt, omnes concessiones, et al' quæcunque in præd' literis patent' præd' Dom' Regis Johannis superius specificat' content', pro ipso Rege Henrico octavo, et hæredibus suis Majori et Communitat', ac Civibus civitat' London, et successoribus suis ratificavit et confirmavit, prout per easdem literas patent ejusdem nuper Regis Henrici octavi (inter alia) plenius apparet. Quodque Dom' Edwardus nuper Rex Angl' sextus, per literas patent' sub magno sigillo suo Angl' sigillat', geren' dat' apud Westm' præd' vicesimo primo die Februarii, anno regni sui secundo, quas iidem Major et Communitas, ac Cives civit' London præd' hic in cur' proferunt, omnes concession', et al' quæcunque in præd' literis patent' dicti Dom' Regis Johannis superius specificat' content', pro ipso nuper Rege Edwardo sexto et hæredibus suis, Major' et Communitat', ac Civibus civit' London præd', et successoribus suis ratificavit et confirmavit, prout per easdem literas patent' ejusdem nuper Regis Edwardi sexti (inter alia) plenius apparet. Quodque Dom' Maria nuper Regina Angl', per literas suas patent' sub magno sigillo suo Angl' sigillat', geren' dat' apud Westm' præd' primo die Martii, anno regni sui primo, quas iidem Major et Communitas, ac Cives civitat' London hic in cur' proferunt pro ipsa nuper Regina, hæred' et successoribus suis, omnes concessiones et al' quæcunque in præd' literis patent' dicti Dom' Regis Johannis superius specificat' content', Majori et Communitat', ac Civibus civitat' London præd' et successoribus suis ratificavit et confirmavit, prout per easdem literas patent' ejusdem nuper Reginæ (int' al') plenius apparet. Quodque Domina Elizabetha nuper Regina Angl', per literas suas patent' sub magno sigillo suo Angl' sigillat', geren' dat' apud Westm' præd' anno die Maii, anno regni sui quarto, quas iidem Major et Communitas, ac Cives civitat' London hic in cur' proferunt, pro ipsa nuper Regina Elizabetha, hæred' et successoribus suis omnes concession', et al' quæcunque in præd' literis patent' dicti Dom' Regis Johannis superius specificat' content' Majori et Communicat', ac Civibus civit' London, et successoribus suis ratificavit et confirmavit, prout per easdem literas patent' ejusdem nuper Reginæ Elizabeth' (inter alia) plenius apparet. Et idem Major et Communitas, ac Cives civitat' London ulterius dicunt, quod Dom' Jacobus nuper Rex Angl' per literas suas patentes sub magno sigill suo Angl' sigillat', geren' dat' apud Honorem suum de Hampton-Court vicesimo quarto die Septembris, anno regni sui Angl' sexto, quas iidem Major et Communitas, ac Cives civitat' London hic in cur' proferunt, recitando, quod cum quamplurim' progenitor' ipsius nuper Regis, quondam Reges Angl' de gratia sua speciali, ac pro gratis, laudabil', multiplicibus, et continuis servitus per Majorem et Communitat', ac Cives civitat' London, et prædecessores suos temporibus retroactis, fact' et impens', necnon pro diversis al' urgentibus causis et considerationibus eos separatim moventibus, dedissent, concessissent, et confirmassent Majori et Communitati, ac Civibus civitat' London præd', ac successoribus suis, diversas libertat', privileg', franc', immunitat', authoritat', jurisdiction', ordinanc', consuetudin', et quietantis, prout per separal', literas patent' progenitor' et prædecessor' suor' quondam Regum Angl' plenius et manifestius li-

quebat et apparebat, idem nuper Rex Jacobus pro et in consideratione summæ fidelitat', constant', prompt', et laudabil' servitii per Majorem et Communitat', ac Cives civitat' London prædict', eidem nuper Regi in ipsis regni sui primis auspiciis, et continue usque tunc manifestat', et fidelissim' fact' et impens', omnes et singulas literas patentes, chartas, et confirmation' præclarissimor' progenitor' et antecessor' suor' eisdem Majori et Communitat', ac Civibus civitat' London prædict'; et prædecessoribus suis per quæcunque nomina incorporat' ante tunc tempora fact', concess', seu confirmat', ac omnes et singulas donationes, concessiones, confirmation', restitution', consuetudines, ordinationes, et explanationes, articul', et omnes al' res quascunque in quibuscunque literis patentibus, sive chartis quorumcunque progenitor', prædecessor', aut antecessor' suor' Regum Angl', necnon omnia et singula in dictis literis patentibus, chartis, concessionibus, confirmationibus, seu eor' aliquibus content', recitat', specificat', confirmat', seu explanat', ac omnia et singula jurisdictiones, authoritates, privilegia, libertates, et franchis', quietant', immunitates, liberas consuetudines, et hæreditament' quæcunque, quæ præd' Major et Communitat', ac Cives civitat' London præd' vel prædecessor' sui, per nomen Majoris et Communitat', ac Civium civitat' London, seu per nomen Majoris et Aldermann' civitat' London, seu per nomen Majoris Civium et Communitat' civitat' London, seu per nomen Major' et Civium civitat' London, seu per nomen Major' et Communitat' civitat' London, seu per nomen Civium civitat' London, seu per nomen Baron' London, seu per nomen Baron' civitat' London, seu per aliquod aliud nomen quodcunq', ratione seu vigore aliquar' literar' patent', chartar', seu confirmation' aliquor' progenitor', prædecessor', aut antecessor' ejusdem nuper Regis Jacobi, quondam Regum Angl', aliquo tempore, vel aliquibus temporibus habuissent, seu rationabilit' usi fuissent, aut exercuissent, rata habuit et grata, ac pro se, hæredibus et successoribus suis acceptavit et approbavit, ac ea omnia et singula præfat' Majori et Communitat', ac Civibus civitat' London prædict', et eor' successoribus, per easdem literas suas patent' ratificavit et confirmavit, habend' et tenend', gaudend' et exercend' omnia et singula præmissa eisdem Majori et Communitat', ac Civibus civitat' London prædict', et successoribus suis in perpetuum, adeo plene, libere, et integre, ac in tam amplis modo et forma, ac si separatim, singulatim, et nominatim in literis patentibus ill' express' nominat', declarat', recitat' et manifestat' essent et fuissent, prout per easdem literas patentes (inter alia) plenius apparet. Quodque Dominus Carolus primus nuper Rex Angl', &c., per literas suas patentes sub magno sigillo suo [Ang]l' sigillat', geren' dat' apud Westm' præd' [...]mo octavo die Octobris, anno regni sui quartodecimo, quas iidem Major et Communitas, ac Cives civitat' London hic in cur' proferunt, omnia et singula privilegia, libertat', franch', quietant', immunitates, et liberas consuetudines quæcunque, quæ præd' Major et Communitas, ac Cives civitat' London præd', vel prædecessor' sui per nomen Majoris et Communitat', ac Civium civitat' London, seu per nomen Majoris et Aldermann', Civium et Communitat' London, seu per nomen Majoris et Civium civitat' London seu per nomen Majoris et Communitatis civitat' London, seu per nomen Civium civitat' London, seu per nomen Baron' London; seu per nomen Baron' civitat' London, seu per aliquod aliud nomen quodcunque, ratione seu vigore præd' literar' patent' præd' Dom' Regis Johannis, aut aliar' literar' patent' chartarum, seu confirmation' in eisdem literis patentibus dicti nuper regis Caroli primi mentionat', vel usu, vel præscription', aut alio legali modo aliquo tempore, vel aliquibus temporibus ante tunc habuissent, seu rationabilit' usi fuissent aut exercuissent, rata habens et grata eo pro se, hæredibus et successoribus suis acceptavit et approbavit, ac ea omnia et singula præfat' Majori et Communitati, ac Civibus London, et eor' successoribus, per easdem literas suas patentes ratificavit et confirmavit, prout per literas patent' illas (inter alia) plenius apparet. Quodque prædictus Dominus Rex nunc per literas suas patent' sub magno sigillo suo Angl' sigillat', geren' dat' apud Westm' prædict' vicesimo quarto die Junii anno regni sui decimo quinto, quas iidem Major et communitas, ac Cives civitat' London hic in cur' proferunt pro ipso Rege, hæredibus et successoribus suis ratificavit et confirmavit Majori et Communitati, ac civibus civitat' London, et successoribus suis, omnia et singula jurisdiction', authoritat', privilegia, libertates, franch', quietant', immunitates, et consuetudin' quæcunque, quæ præfat' Major et Communitas, ac Cives civitat' London, vel prædecessores sui per nomen Majoris, et Communitat', ac Civium civitatis London, seu per nomen Majoris, Aldermannor', Civium et Communitat' London, seu per nomen Majoris et Civium civitatis London, seu per nomen Major' et Communitat' civit' London, seu per nomen Civium civitat' London, seu per nomen Baron' London, seu per nomen Baron' civitat' London, seu per aliquod aliud nomen quodcunque, ratione vel vigore præd' literar' patent' præd' Dom' Regis Johannis, aut aliarum literar' patent', chartar', seu confirmation' in eisdem literis patentibus dicti Dom' Regis nunc præmentionat', vel alicujus seu aliquor' usus vel usuum, præscription' vel prescription', seu alio legali modo quocunque aliquo tempore, vel aliquibus temporibus ante tunc habuissent, seu rationabilit' usi fuissent, aut exercuissent, habend', tenend', gaudend', et exercend' omnia et singula præmissa præd' eisdem Majori et Communitat', ac Civibus civitat' London præd', et successoribus suis in perpetuum, adeo plene, libere, et integre, ac in tam amplis modo et forma, prout in eisdem literis patentibus superius mentionat' fore data, sive concessa, aut alit' usu, præscription', vel alio legali modo seu jure quocunque ante tunc re-

spective habit', obtent', sive gavisa fuissent, ac si separatim, singulatim, et nominatim in et per dictas literas patentes ipsius Dom' Regis nunc express', nominat', declarat', concessa et manifesta essent et fuissent, prout per easdem literas patent' (inter alia) plenius apparet.

Et iidem Major et Communitas, et Cives civitat' London ulterius dicunt, quod a tempore confection' præd' literar' patent' præd' quondam Regis Johannis hucusque iidem Major et Communitas, ac Cives civitat' London habuer' Vicecom' civit' et com' civit' London, et Vicecom' comitat' Midd', et quolibet anno nominaverunt et elegerunt ex seipsis duas personas, cives ejusdem civitat', fore Vicecom' civitat' præd', et com' ejusdem civitat' et Vicecom' com' Midd', ac ill' sic nominat' et elect' præfecerunt et constituerunt Vicecom' civitat' præd', et com' ejusdem civitat' et Vicecom' com' Midd', ac ut Vicecom' civitat' præd', et com' ejusdem civitat', ad execut' et retorn' omnium brevium, billar', et præceptor' Dom' Regis pro administratione et executione justitiæ infra civit' præd', et com' ejusd', civitat' exequend' et faciend' omnia et singula alia infra civitat' præd', et com' ejusdem civitat', quæ ad offic' Vicecom' faciend' pertinent, ac ut Vicecom' Midd' pro eodem com' deservitur', ac omnia brevia, billas, et præscripta Dom' Regis infra com' Midd' præd', pro administratione et executione justitiæ ibidem exequend', et retorn' inde faciend', quæ ad officium Vicecom' faciend' pertinent. Et eo warranto iidem Major et Communitas, ac Cives civitat' London, per tempus in informatione prædicta superius specificat', usi fuer' et adhuc utunt', ac clamant habere et uti libertat', privileg', et franch' habere Vicecom' civit' et com' civit' London, et Vicecom' comitat' Midd', et nominare et eligere ex seipsis duas person' fore Vicecom' civitat' præd', et com' ejusdem civit, et Vicecom' Midd', ac ill' sic nominat' et elect' præficere et constituere Vicecom' civit' præd', et com' ejusdem civitat', et Vicecom' Midd', ac ut Vicecom' civitat' præd', et com' ejusdem civitat', ad execut' et retorn' omnium brevium, billar', et præceptor' Dom' Regis pro administratione et executione justitiæ infra civit' præd', et com' ejusdem civit' exequend' et faciend', quæ ad officium Vicecom' faciend' pertinent, ac ad faciend' et exequend' omnia et singula alia infra civitat' præd', et com' ejusdem civitat' quæ ad offic' Vicecom' faciend' pertinent, ac ut Vicecom' Midd' pro eodem com' Midd' deservitur, ac omnia brevia, billas, et præcepta Dom' Reg' infra com' Midd' præd', pro administratione et executione justitiæ ibidem exequend', et retorn' inde faciend', quæ ad officium Vicecom' faciend' pertinent, prout eis bene licuit et licet.

Absque hoc, quod iidem Major et Communit', ac Civis civitat' London, de libertat', privileg' et franch' ill' super dictum Dom' Regem nunc per tempus præd' in informatione prædicta superius specificat', usurpaver', seu usurpant', prout per inform' illam pro dicto Dom' Rege nunc superius supponitur, quæ omnia et singula iidem Major et Communitas, ac Cives civit' London, parati sunt verificare; unde petunt judicium, et quod libertat', privileg', et franch' ill' eis et successoribus suis in perpetuum deinceps allocent', et adjudicentur, ita quod ipsi, quoad præmissa ill', ab hac cur' dimittantur, &c.

Et iidem Major et Communitas, et Cives civit' London, quoad libertat', privileg', et franch' sequend' viz. Major dictæ civitat', hujusmodi Aldermann' ejusd' civit' et qui officium Majoritat' civit' illius sustinuer', ac inde fuer' dimissi, ac tres senior' Aldermann' civit' prædict', qui diutius in offic' Aldermannat' civit' præd' steter', et onus et officium Majorat' civit' præd' non sustinuer', fore Justic' Dom' Regis ad pacem infra civitat' præd' conservand', ac ad session' pacis, et placita coron', scilicet, talia placit' coronæ, qual' Justic' Dom' Regis ad pacem conservand' assign' legitime tenere possent infra eandem civit' tenend', ac ad omnes felon', riot', rout', et conventicul' illicit' infra civit' præd' inquirend', audiend', et terminand', in informatione præd' superius specificat' dict', quod dict' Dom' Rex nunc ipsos Majorem et Communitat', at Cives civitat' London, occasione inde impetere, seu occasionare non debet, quia dicunt, quod præd' civit' London est et a tempore cujus contrar' memor' homin' non existit, fuit antiqua civitas ac antiquus comitat' de se, ac cives ejusdem civit' sunt, et a prædicto tempore, cujus contrar' memor' homin' non existit, fuer' unum corpus corporat' et politic' in re, facto, et nomine, per nomen Majoris et Communitat', ac Civium civitat' London. Quodque Dom' Carolus primus nuper Rex Angl', per literas suas patent' sub magno sigillo præd' decimo octavo die Octobris anno regni sui suo Angl' sigillat', geren' dat' apud Westm' quarto decimo, quas iidem Major et Communitas, ac Cives civit' London hic in cur' proferunt, pro ipso nuper rege, hæred' et successorib' suis, concessit Majori et Communitat', ac Civibus civit' London, et eor' successoribus, quod Major et Recordat' civit' præd', qui tunc fuer', ac Majores Recordator' civit' præd, qui pro tempore forent, actam ill' Aldermann', qui Major' civitat' illius præantea extitissent, quam ill' Aldermann', qui onus et officium et Majorat' civitat' prædict' tunc in posterum sustinerent et gererent, licet a Majorat' ill' cessarent, aut inde essent dimissi, quamdiu Aldermann' ibidem starent' et tres seniores Aldermann' civit' pro tempore existen', qui diutius in officium Aldermannat steter', et ante tunc onus et officium Majorat' civitat' illius non sustinuer', id perpetuum forent custodes, et quilibet eor' esset custos pacis ejusdem nuper Regis hæred', et successor' suorum, infra civitat' London præd', et libertat' ejusdem conservand' et custodiend', ac eosdem Majorem et Recordator', ac Aldermann' præd', ad omnia et singula statuta et ordinationes pro bono pacis dicti nuper Regis, hæred' et successorum suor', ac pro conservatione ejusdem, ac pro quiet', regimine, et gubernatione populi ipsius nuper Regis, hæred' et successor' suor', edit' et edend' in omnib' suis ar-

ticul', tam infra civitat' præd', quam libertat' ejusdem, juxta vim, formam, et effectum eorundem custodiend', et custodire faciend', ac ad omnes illos, quos juxta formam et effectum ordination' et statutor' eorundem, et eorum alicujus in civitat' prædict', et libertat' ejusdem, delinquentes invenirent, castigand' et puniend', prout secundum formam ordination' et statutor' ill' foret faciend'; et ad omnes illos, qui alicui vel aliquibus de populo ejusdem nuper Regis, hæred', vel successor' suor' de corporibus suis, vel de incendio domor' suar' minas facerent, ad sufficien' securitat' de pace, vel bono gestu suo erga ipsum nuper Regem, hæred' et successores suos, et cunctum populum ejus, hæred', vel successor' suor', inveniend' et si hujusmodi securitat' invenire recusarent, tunc eos in gaola ejusdem Domin' Regis de Newgate, vel in al' qua al' prisona hæred' vel successor' suor' in præd' civit' London, quousque hujusmodi securitat' invenirent, salvo custodiri faciend', Custodes et Justiciar' ipsius nuper Regis, et quemlibet eorum Custodem et Justiciar' ejus hæred' et successor' suor' infra civit' London præd', et libertat' ejusdem, idem nuper Rex Carolus primus, pro se, hæredibus et successoribus suis, constituit, fecit, et ordinavit per literas patentes suas præd', ac ad omnia et singula alia exequend' et peragend', quæ Justic' et Custod' pacis ejus, hæred' vel succ. infra aliquem com' regni sui Angl' exequi, sive peragere valerent, possent, aut deberent, virtute aliquor' statutor' et ordination' hujus regni sui Angl', aut virtute commissionis ejus hæred' et successor' suor', ad pacem in aliquo hujusmodi com' conservand'. Voluit etiam idem nuper Rex Carolus primus, ac per easdem literas patentes pro se, hæredibus et successoribus suis, concessit præfat' Majori et Communitati, ac Civibus civitat' London' et eorum successor', quod Major' Recordator civit' præd' pro tempore existen', et hujusmodi ut præfert', Aldermann' pro tempore existen' qui officium vel locum Majorat' civit' illius antea sustinuer' et execuer', et tres hujusmodi, ut præfat', seniores Aldermann' pro tempore existen', qui locum Majorat' prædict' non sustinuer', vel quatuor eorundem, Major', Recordator', et Aldermannorum, quorum dict' Major vel Recordator pro tempore existen' unum esse voluit forent Justiciar' ipsius nuper Regis, hæred' et successor' suor', et ipsos Justiciar' suos, hæred' et successor' suor', pro se hæredibus et successor' suis in perpetuum, assignat' ad inquirend', quoties et quando eis melius videret' expedire, per sacramentum probor' et legalium hominum tam de civitat' præd', quam de libertat' ejusdem, per quas rei veritas melius sciri posset de omnibus murdris, felon', veneficiis, incantation' scortileg', arte magica, transgr', forestallar', regretar', ingrossar', et extortionibus quibuscunque, ac de omnibus et singulis al' malefactis et offensis, de quibus Justiciar' pacis ipsius nuper Regis, hæred' et successor' suor' legitime inquirere possent aut deberent, per quoscunque et qualitercunque infra civit' præd', seu libertat' ejusdem, ante tunc habit' seu perpetrat', vel quæ ex tunc ibidem fieri vel attemptari contingerent, et tam de omnibus ill' qui in civitat' præd', et libertat' ejusdem, in conventiculis, contra pacem ipsius nuper Regis hæred' et successor' suor', in perturbatione populi sui, hæred' et successor' suor', seu vi armata irent vel equitarent, seu extunc ire vel equitare præsumerent. Et etiam de his quæ ibidem ad gentem dict' Dom' Regis, hæred', vel successor' suor' mahemand', vel interficiend' in insidiis jacerent, vel in posterum jacere præsumerent. Ac etiam de hostellar' et al' omnibus et singulis person' qui in abusu mensurar' et ponderum, sive in venditione victual' contra formam ordination' et statut', vel eor' alicujus inde pro communi utilitate regni sui Angl', et populi ejusdem nuper Regis, hæred' et successor' suor' ejusdem edit' et edend' delinquerent vel attemptarent in civit' præd', et libertat' ejusdem, seu extunc in posterum delinquere vel attemptare præsumerent. Ac etiam de quibuscunque Vicecom', Constabular', Custod' gaolæ, et al' offic', qui in execut' officiorum suor' circa præmissa, vel eor' aliqua indebite se habuer', aut in posterum indebite se habere præsumerent, aut tepidi, remiss', vel negligentes fuer', aut extunc tepidi, remiss', vel negligent' fore contingerent infra civit' præd' et libertat' ejusdem, ac de omnibus et singulis articulis et circumstant', et al' quibuscunque, per quoscunque et qualitercunque in civit' præd' et libertat' ejusdem fact' sive perpetrat', et quæ extunc ibidem fieri, vel attemptari contingerent qualitercunque præmiss', aut eor' aliqua concernen'. Et ad indictament' quæcunque, quæ coram Majore aut Recordatore, civit' præd' pro tempore existen', et hujusmodi, ut præfert', Aldermann', vel quatuor aut pluribus eorundem, quor' dict' Major' vel Recordator pro tempore existen' unum esse volut, tunc in posterum caperent' inspiciend', et ad process' inde versus omnes et singul' sic indictat', vel quos in posterum sic indictat' contingerent, quosque caperent', redderent se, vel utlagarent' faciend' et continuand', et ad omnia et singula murdra, felon', venefic', incantat', scortileg', artes magic', transgress', falsas conspiration', et al' malefact', forestall', regretar', ingrossar', extortion', conventicl', indictament' præd', cæteraque omnia et singula præmiss' secund' leges et statut' regni sui Angl', prout in hujusmodi casu fieri consuevit aut debuit, audiend' et terminand', et ad easdem delinquen', et quamlibet eorum, pro delictis suis per fines, redemption', amerciament', forisfactur', aut al' modo, prout secundum legem et consuetud' regni sui Angl', ac formam ordination' et statut' eorundem fieri consuevit aut debuit, castigand' et puniend', ac ad omnia al' et singula faciend', exercend', audiend', terminand', et exequend' infra civit' præd', ac libertat' ejusdem, quæ Justic' ad pacem per leges vel statut' hujus regni sui Angl' facere, exercere, inquirere, vel exequi possent et valerent, et in tam amplis modo et forma prout aliquis al', aut aliqui al' Justic' ad pacem in aliquibus al' com' hujus regni sui Angl' legitime facere, exercere, inquirere, pu-

nire, vel quoque modo exequi possent aut valerent, prout per easdem literas patent' (int' al') plenius apparet. Quodque præd' Dom' Rex nunc, per literas suas patent' sub magno sigillo suo Angl' sigillat', gerent' dat' apud Westm' prædict' 24 die Junii, anno regni sui decimo quinto, quas iidem Major et Communitas, ac Cives civit' London hic in cur' proferunt, omnes concession' et al' quæcunque in prædict' literis patent', prædict' nuper Regis Caroli primi superius specificat', pro eodem Domin' Regis nunc, hæred' et successor' suis, Majori et Communitat', ac Civibus civit' London præd' et suor' successor' in perpetuum, ratificavit et confirmavit, prout per easdem literas patent' ipsius Domin' Regis nunc (inter al') plenius apparet. Et iidem Major et Communitas, ac Cives civit' London ulterius dicunt, quod tempore confection' præd' literar' patent' præd' nuper Regis Caroli primi, et diu antea, et extunc hucusque fuer', et adhuc existunt Major et Recordator civit' præd', ac Aldermann' ejusdem civit', qui Major dictæ civit' extitissent, et onus Majorat' civit' illius sustin', ac tres et plures al' Aldermann' ejusdem civit', qui onus Majorat' civit' ill' non sustinuissent. Quodque a tempore confection' earundem literar' patent' præd' nuper Reg' Caroli primi hucusq', Major et Recordator civit' præd' pro tempore existen', ac hujusmodi Alderman' ejusd' civitat' pro tempore existen', qui onus Majorat' civit' ill' sustin', necnon tres senior' Alderman' civit' præd' pro tempore existen', qui diutius in officium Aldermannat' civit' præd' steter', et onus et officium Majorat' civit' ill' non sustin', virtute literar' patent' ill' fuer' Justic' ad pacem infra civit' præd' et libertat' ejusdem conservand', ac virtute literar' patent' ill', et secundum formam et effectum eorund' de tempore in tempus, per tot' tempus ill', tenuer' session' pacis, et placita coron', scilicet, talia placita coron', quæ Justic' Dom' Regis ad pacem conservand' assign' per idem tempus legitime tenuer', vel tenere potuer' infra eandem civitat'.

Et eo warranto iidem Major et Communitas, ac Cives civitat' London, per tempus in information' præd' superius specificat' usi fuer', et adhuc utuntur, et clamant habere et uti libertat', privileg' et franch', quod Major dict' civit' et hujusmodi Alderman' ejusdem civit', qui onus Majorat' [illegible] ill' sustinuer', ac inde fuerunt dimissi [illegible] tres seniores Aldermann' ejusdem civit', [illegible] in offic' Aldermannat' civit' præd' ste[illegible] [illegible] Majorat' civit' ill' non su[illegible], fuer' Justic' dicti Dom' Regis ad [illegible] præd' conservand', ac ad session' pacis, [illegible] placita coronæ, scilicet, talia placita coron', [illegible] Justic' Dom' Regis ad pacem conservand' assign' legitime tenere possent, infra eand' civit' tenend', ac ad omnes felon', riot', rout', et conventicul' illicit' infra civit' præd' inquirend', audiend', et terminand', prout eis bene licuit et licet.

Absque hoc, quod iidem Major ac Communitas, ac Cives civit' London, de libertat', privileg', et franchis' ill' super dictum Dom' Regem nunc, per tempus præd' in informatione præd' superius specificat' usurpaver', seu usurpant, prout per inform' illam pro dicto Dom' Rege nunc superius supponit'; quæ omn' et singula iidem Major et Communitas, ac Cives civit' London parati sunt verificare; unde petunt judicium, et quod libertat', privileg' et franch' ill', eis et successoribus suis in perpetuum deinceps allocentur et adjudicent', ac quod ipsi quoad præmissa illa ab hac curia dimittantur, &c.

Et quoad resid' libertat', privileg', et franch' in information' prædict' specificat', per ipsos Majorem et Communitat', ac Cives civitat' London superius minime clamat', iidem Major et Communitas, ac Cives civit' London libertat', privileg', et franch' illis nunquam usi fuerunt, seu utuntur, sed de eisdem penitus declamant, &c.

Et præd' Robertus Sawyer Attorn' dicti Dom' Regis nunc General' qui pro eod' Dom' Rege in hac parte sequitur, habito, auditu placiti præd' præfat' Majoris et Communitat', ac Civium civit' præd' petit inde diem loquendi usq; crastinum Sanctæ Trinitat'; et ei conceditur coram Dom' Rege ubicunque, &c. Idem dies dat' est præd' Majori et Communitat', ac Civib' civit' London præd', &c. Ad quod quidem crastinum Sanctæ Trinitat' coram Dom' Rege apud Westm' ven' tam præd' Robertus Sawyer Miles Attorn' Dom' Regis nunc General', qui pro eodem Dom' Rege in hac parte sequitur, quam præd' Major et Communitas, ac Cives civit' præd' per Attorn' suum præd'. Et idem Attorn' Dicti Dom' Regis nunc General', quoad libertat' privileg', et franch' præd', per ipsos superius clamat' (viz.) ipsos Majorem et Communitat', ac Cives civitat' London fore de seipsis unum corpus corporat' et politicum in re, facto, et nomine, per nomen Majoris et Communitat', ac Civium civitat' London, ac per idem nomen placitare et implacitari, respondere ac responderi, superius placitat' pro eodem Dom' Rege nunc dicit quod per aliqua per præfat' Majorem et Communitat' ac Cives civitat' London præd' superius placitando allegat', eandem libertat', privileg', et franch' eisdem Majori et Communitat' ac Civibus civitat' London præd' allocari, seu adjudicari non debent; nec iidem Major et Communitas, ac Cives de præmiss' in informac' præd' superius specificat' exonerari debent, quia dicit quod Cives civit' London præd' a tempore cujus contrar' memor' homin' non existit, non fuer' corpus corporat' et politicum in re, facto, et nomine, per nomen Majoris et Communitat' ac Civium civitat' London, modo et forma prout præfat' Major et Communitas, ac Cives civit' London præd' superius placitando allegaver'. Et hoc idem Attorn' dict' Dom' Regis nunc General' pro eodem Dom' Rege nunc pet', quod inquiratur per patriam. Et præd' Major et Communitas, et Cives civit' London præd' scilicet, &c. Et præd' Attorn' dict' Dom' Regis nunc General', quoad placitum præfat' Majoris et Communitat', ac Civium civit' London præd', quoad libertat', privileg', et franchis' præd' per ipsos superius clamat'

(viz.) ipsos Majorem et communitat' ac Cives civit' London fore de seipsis unum corpus corporat' et politicum in re, facto, et nomine, per nomen Majoris et Communitat', ac Civium civitat' London, ac per idem nomen placitare et implacitari, respondere ac responderi superius placitat', ulterius dic' quod per aliqua per præfat' Majorem et Communitat', ac Cives civit' London præd' superius placitando allegat' eadem libertat', privileg', et franchis' eisdem Majori et Communitant', ac Civibus civit' London præd' allocari, seu adjudicari non debent, nec iidem Major et Communitas, ac Cives de præmiss' in Informatione præd' superius specificat', exonerari debent; quia protestando, quod Cives ejusdem civitat', a tempore cujus contrar' memor' homin' non existit, non fuer' corpus corporat' et politicum in re, facto, et nomine, per nomen Majoris et Communitatis, ac Civium civit' London, ac per idem nomen per totum tempus illud placit aver' ac implacitat' fuerunt, responder' ac respons' fuer' et placitare et implacitari, respondere ac responderi, a toto tempore supradict' usi fuer' et consuever', prout præd' Major et Communitas, ac Cives civit' London præd' superius placitando allegaverunt: pro placito tamen idem Attorn' dict' Dom' Regis nunc General' pro eodem Dom' Rege nunc ulterius dic', quod præd' Major et Communitas, ac Cives civit' London præd' assumentes super se fore corpus corporat' et politicum, ac ratione inde potestatem et authoritatem, habere ad seipsos insimul convocand', et assembland' ad bona et salubria leges, ordines, et ordinat' legibus et statutis hujus Regni Angl' minime repugnan' sive contrar', faciend' et constituend' pro meliori regim' et gubernat' Civit' præd' ac civium et inhabitant' ejusdem civitat' ac pro conservat' pacis Dom' Regis infra civit' præd', iidem Major et Communitas, ac Cives civit' London præd', sub colore et prætextu inde, eorum privatum lucrum et commodum solum respicien', contra fiduciam in corpore corporato et politico per Dom' Regem et Leges hujus Regni Angl' reposit', assumpser' illicitam et injustam potestatem et authoritat', ad denar' de subdit' ac ligeis Dom' Regis nunc levand' ad usum ipsorum Majoris et Communitat' ac Civium civitat' London præd' propr', colore legum sive ordination' per ipsos de facto ordinat' et stabilit', absq; aliquo alio jure, titulo, sive authoritate quibuscunq; ac in prosecution' et execution' hujusmodi illegalis et injustæ potestat' et authoritat' per ipsos sic usurpat', iidem Major et Communitas, ac Cives civitat' London præd', die Jovis decimo septimo die Septembris, Anno Regni dict' Dom' Regis nunc vicesimo sexto, in eorum Communi Concilio adtunc tent' in Camera Guildhall civit' London præd' (viz.) in Paroch' Sancti Michaelis Bassishaw London insimul assemblat' fuer', condider' et publicaver' quandam Legem, per ipsos de facto inactitat', pro levatione separalium denar' summar', de omnibus subdit' ac Ligeis Dom' Regis nunc, tam liberis quam non liberis hominibus Civit' præd' et aliis extrandis ad publica Mercata infra Civitat' præd', tent' acceden' cum victual' et provisionibus suis ibidem vendend' (viz.) de qualibet persona pro quolibet onere equino (Angl' *Horse-load*) provision' in aliquod public Mercat' infra Civit' præd' ipsum importat' ibidem vendend', duorum denar' per diem, et pro qualibet canistra (Aug' *Dosser*) provision' in aliquod Mercat' præd' ibidem vendend' importat' unius denar' per diem, et pro qualibet carectata provision' tract' cum non plur' quam tribus equis in aliquod Mercat' præd' ibidem vendend' importat', quatuor denar' per diem, et pro qualibet carectata provision' tract' cum quatuor equis vel plur' in aliquod Mercat' præd' ibidem vendend' importat', sex denar' per diem, ac diversarum al' denar' sum' de quibuslibet personis, quæ aliqua victualia sive provision' ad Mercat' infra civit' London præd', seu eorum aliqua vel aliquod importarent ibidem vendend', ac per eandem legem sic per eos illegalit' fact' iidem Major et Communit' ac Cives civit' London præd' de facto ordinaver', quod eædem separal' denar' summæ solut' forent ad propr' opus et usum præfat' Majoris et Communitat', ac Civium civit' London præd', ac quod si aliquis in Mercat' præd' existen' cum victual' sive provisionibus suis ibidem vendend' recusaret, sive differret solvere respectivas ratas præd', tunc talis recusans sive differens amot' foret a loco suo Mercat' præd'. Et ulterius idem Attorn' dict' Dom' Regis nunc General' pro eodem Dom' Rege nunc dic', quod præd' Major et Communitas, ac Cives civit' London præd' sub solo colore et prætextu legis præd', sic per ipsos pro eorum privato lucro et commodo illegalit' fact', et absq; aliquo alio jure, titulo, sive authoritate quibuscunq; diversas ingentes denar' Summas, in toto se. attingen' ad quinq; mille libras per annum, per spatium septem annorum post præd' decimum septimum diem Septembris, Anno vicesimo sexto supradicto prox' sequen', et amplius, apud London præd' in Paroch' præd' de omnibus Dom' Regis ligeis et subditis ad publica Mercata per totum spatium præd' infra Civit' præd' tent', cum victualibus et provisionibus ibidem vendend' accedentibus, exegerunt, levaver', et exigi et levari fecerunt, et denarios illos ad eorum proprios usus converterunt et disposuerunt, in subversionem boni regiminis et gubernationis Civitatis præd', et in magnam oppressionem et depauperation' subditor' dic' Dom' Regis nunc ad Mercat' prædict' cum victualibus et provision' suis acceden' et venien', ad grave dampn' et nocument' omnium Ligeorum et Subdit' dict' Dom' Regis, in augmentac' preciorum omnium victual' et provision' in Mercatis præd' vendit', ac in dict' Dom' Regis nunc et Coronæ suæ Regiæ exhæredation' manifestam, ac contra fiduciam in corpore corporat' et politico per Dom' Regem ac Leges hujus Regni Angl' reposit'. Et ulterius idem Attorn' dicti Dom' Regis nunc General' pro eodem Dom' Rege nunc dic', quod ubi Sessio Parliamenti Dom' Regis nunc per Prorogation' tent' fuit apud Westm' in Com' Middlesex super vicesimum primum diem Octobris, anno Regni dicti

Dom' Regis nunc tricesimo secundo, ac ibidem continuat' usq; decimum diem Jan' tunc prox' sequen', ac super eodem decimo die Januarii, anno Regni dict' Dom' Regis nunc tricesimo secundo supradict' apud Westminst' præd' idem Parliamentum prorogat' fuit per dict' Dom' Regem nunc usq; vicesimum diem tunc instantis Januar', præd' Major et Communitas, ac Cives civitat' London præd' postea scil' die Jovis decimo tertio die Januar' anno Regni dict' Dom' Regis nunc tricesimo secundo supradict', in eorum Communi Concilio tent' in Camera Guildhall Civit' præd' viz. in Paroch' Sancti Michaelis Bassishaw London præd' assemblat', illicite, malitiose, advisate, et seditiose, et absq; aliqua legali authoritate in se assumpser' ad censend' et judicand' dict' Dom' Regem nunc, et Prorogation' Parliamenti per dict' Dom' Regem nunc sic fact'. Ac adtunc et ibidem iidem Major et Communitas ac Cives civitat' London, sic in eodem Communi Concilio assemblat', vota et suffragia sua deder' et ordinaver', quod quædam Petitio sub nomine Majoris, Aldermannorum et Commun' civit' London in Communi Concil' assemblat', dicto Dom' Regi nunc exhibit' foret, in qua quidem Petitione content' fuit, quod per præd' prorogation' Parliamenti præd' prosecutio Justic' publicæ hujus Regni ac præparatio (Angl' *the making provision*) necessar' pro præservation' dicti Dom' Regis nunc, ac ejus subditorum protestantium recepissent obstruction' (Angl' *interruption*) et iidem Major et Communitas ac Cives civitat' London, præd', in Communi Concilio præd', sicut præfertur, assemblat', illicite, malitiose, advisate, et seditiose, et ea intentione, quod eadem Petitio publicat' et dispersa foret inter subditos dict' Dom' Regis nunc fideles ad ipsos in opinion' inducend', quod idem Dom' Rex nunc per prorogation' Parliamenti præd' publicam Justic' Regni obstruxisset, et ad eosdem. Subditos dict' Dom' Regis incitand' in odium personæ dict' Dom' Regis, et gubernation' in hoc regno stabilit', et ad perturband' pacem et tranquillitat' in hoc Regno Angl' adtunc et ibidem ordinaver', quod eadem Petitio sic continen' seditiosam et scandalosam materiam præd' impress' foret, ac postea scil' die et anno ult' supradict', apud London præd' in Paroch' præd' eandem Petition' ea intentione, quod eadem publicat' et dispers' foret inter subdit' dict' Dom' Regis nunc ad affectiones suas a dict' Dom' Rege nunc et gubernation' sua alienand' et divertend', malitiose, advisate, et seditiose; impresser' et imprimi et publicari fecer' et causaver', in contempt' et scandalum dict' Dom' Regis nunc ac gubernation' suæ hujus Regni Angl', ac in promotion' et excitation' seditionis, et perturbation' pacis et tranquillitat' infra hoc Regnum Angl', et in perniciosum aliorum Dom' Regis nunc Subdit' et Ligeorum exemplum, per quod idem Major et Communitas ac Cives civit' London præd' libertat', privileg', et franchis', præd' fore de seipsis corpus corporat' et politicum, per nomen Majoris et Communitat' ac Civium civitat' London forisfecer', præd' tamen Major et Communitas ac Cives civitat' London præd' postea; scil' per tempus superius in informatione præd' specificat', libertat', privileg' et franchis' ill' super dict' Dom' Regem nunc usurpaver' et adhuc usurpant, prout per informatione præd' superius versus eos supponitur. Et hoc idem Attorn' dict' Dom' Regis nunc General' pro eodem Dom' Rege nunc parat' est verificare, unde petit judicium, et quod præd' Major et Communitas ac Cives civitat' London de præmiss' præd' convincantur, ac de libertat', privileg' et franchis' ill' abjudicentur et excludantur, &c. Et quod placitum præfat' Majoris et Communitat' ac Civium civitat' London præd', quoad libertat', privileg' et franchis' præd' per ipsos superius clamat' (viz.) ipsos habere Vicecom' Civit' et Com' civit' London, et Vicecom' Com' Midd', et nominare et eligere ex seipsis duas personas fore Vicecom' Civit' præd', et Com' ejusdem Civit', et Vicecom' Com' Midd', ac illos sic nominat' et elect' præficere et constituere Vic' Civit' præd' et Com' ejusdem Civit', et Vic' Com' Midd' ac ut Vicecom' Civitat' præd' et Com' ejusdem Civitat' ad execution' et retorn' omnium brevium, billarum et præcept' Dom' Regis pro Administration' et Execution' Justiciæ infra Civit' præd' et Com' ejusdem Civit' exequend' et faciend' quæ ad Officium Vic' faciend' pertinent, ac ad faciend' et exequend' omnia et singula alia infra civit' præd' et Com' ejusdem Civit', quæ ad Officium Vicecom' faciend' pertinent, ac Vicecom' Com' Middlesex pro eod' Com' deservitur', ac omnia brevia, billas, et præcept' Dom' Regis infra Com' Middlesex præd' pro Administratione et Executione Justiciæ ibidem exequend' et retorn' inde fac', quæ ad officium Vic' faciend' pertinent, superius placitat': Necnon quoad placitum præfat' Majoris et Communitat' ac Civium civitat' London præd' quoad libertat', privileg' franchis' per ipsos superius clamat' (viz.) Major dict' Civitat' et hujusmodi Alderman' ejusdem Civitat', qui Officium Majorat' Civit' illius sustinuer', ac inde fuer' dimissi, ac tres Alderman' sen' Civit' præd', qui diutius in officio Alderman' Civit' præd' steter'; et onus et officium Majorat' Civit' præd' non sustinuer', fore justiciar' Dom' Regis ad pacem infra Civit' præd' conservandam, ac ad Session' pacis et placita Coronæ, (scilicet) talia placita Coronæ, qual' Justiciar' Dom' Regis ad pacem conservand' assign' legitime tenere possent, infra eandem Civitat' tenend', ac ad omnia Felon' Riot', Rout' et Conventicul' illicit' infra Civitat' præd' inquirend', audiend', et terminand' superius placitat', idem Attorn' Dom' Regis nunc General', qui pro eodem Dom' Rege in hac parte sequitur, pet' licenc' inde interloquend' coram Dom' Rege usq; a die Sancti Michaelis in tres septimanas ubicunq; &c. Et ei concreditur, &c. idem dies dat' est præfat' Major' et Communitat' Civibus civit' London præd', &c.

Et præd' Major et Communitas, ac Cives civitat' London, quoad præd' placit' præd' Attorn' dicti Dom' Regis nunc generalis, in assign'

forisfactur' libertat', privileg' et franchis' sequen', videlicet, ipsos Majorem et Communitat', ac Cives civitat' London, fore de seipsis unum corpus corporat' et politicum in re, facto, et nomine, per nomen Majoris et Communitat' ac Civium civitat' London, ac per idem nomen placitare et implacitari, respondere ac responderi, per ipsos superius clamat', superius replicando placitat' protestando, quod placit' illud, ac materia in eodem content', minus sufficien' in lege existunt ad ipsos Major' et communitat', ac Cives civitat' London, de libertat', privileg', et franchis' illis abjudicand' sive excludend'; protestando etiam, quod nullus actus vel factum, neque aliqua ordinatio (Angl' *By-Law*) per Commune Concilium, vel per Majorem, Aldermannos, et Commune Concilium civitat' præd' confect' est actus vel factum corporis corporat' et politici præd'; protestandoq; etiam, quod ipsi præd' Major' et Communitas, ac Cives civitat' London, contra fiduciam in eis reposit', nunquam assumpser' super se aliquam illicitam vel injustam protestatem; ad denar' de subditis et ligeis Domini Regis levand' ad privat' lucrum et commodum ipsor' Majoris et Communitat', ac Civium civitat' London, colore legum sive ordinationum per ipsos fact' sive ordinat', prout præd' Attorn' dicti Dom' Regis nunc generalis, pro eodem Dom' Rege superius suppon'; protestandoque ulterius, quod iidem Major et Communitas, ac Cives civitat' London non levaver' seu exeger' tantas denar' summas per annum, de personis ad publica mercata infra civitat' præd' tent', cum victualibus et provisionibus ibidem vender', acceden', quant' dictus Attorn' generalis pro eodem Domino Rege superius allegavit. Pro placito tamen, quoad confection' et publication' legis pro levatione denarior' de personis ad publica mercata infra civitat' præd' tent', cum victualibus et provisionibus ibidem vendend' acceden', ac exactionem et levationi hujusmodi denar' superius fieri supposit', idem Major et Communitas, ac Cives civitat' London dicunt, quod Civitas London præd' est, a tempore cujus contrar' memoria hominum non existit, fuit summa et capitalis civitas et metropolis, ac principalis portus hujus regni Angl', et in civibus et inhabitantibus maxime populosa, et in concursu hominum tam ligeor' Dom' Regis, quam extraneor' copiosissima, emporiumque totius *Europæ* celeberrimum; quodq' habentur et tenentur, et a tempore cujus contrar' memoria hominum non existit, habebantur et tenebantur publica mercata infra civitat' præd' pro victualibus et provisionibus aliunde adduct' ibidem venden'; quodque ipsi præd' Major et Communitas, ac Cives civitat' London præd', decimo septimo die Septembris, anno vicesimo sexto supradicto in replicatione præd' mentionat', necnon continue postea, et a tempore cujus contrar' memoria hominum non existit, seizit' fuer', et adhuc seizit' existunt, de et in publicis mercatis præd' in Dom' suo, ut de fœdo, ac per totum idem tempus sumptibus suis propriis provider', ac providere consuever' et debuerunt, fora mercatoria, sive loca ubi hujusmodi mercata tent' fuer', quotiescunque necesse fuit, et stallas, stationes, et al' accommodationes pro personis ad eadem mercata venien' cum victualibus et provisionibus ibidem vendend', pro meliori et magis convenien' venditione et expositione eorundem, et supervisores, et alios officiarios mercatorum illorum, pro præservatione boni ordinis in eisdem mercatis, et meliori regulatione eorundem, et magni concursus populi adinde confluen', ac eundaverunt, et eundare consueverunt et debuerunt, fora mercatoria prædicta, et pro sustentatione dictorum sumptuum suorum per totum tempus prædictum habuer' et percéper', ac habere et percipere consuever', diversas rationabiles tolnet', ratas, sive denariorum summas de quibuscunque personis ad mercata præd', sicut præfertur, venien', pro stallis, stationibus, et aliis accommodationibus per eas pro venditione, expositione hujusmodi victualium et provisionum in mercatis illis habet'. Et iidem Major et Communitas, ac cives civitat' London ulterius dicunt, quod cives et liberi homines civitatis præd', prædicto decimo septimo die Septembris, anno vicesimo sexto supradicto, et semper fuer', et adhuc existunt valde numerosi, videlicet, quinquaginta mille homines, et plur'; quodque infra dictam civitat' London, videlicet, apud præd' Parochiam sanct' Michaelis Bassishaw, a tempore cujus contrar' memoria hominum non existit, habebatur et fuit Commune Concilium ejusdem civitatis, de tempore in tempus, quoties necesse fuit, in eadem civitate assemblat', consistens de Majore et Alderman' dictæ civitatis pro tempore existen', ac de quibusdam Civibus existen', liberis hominibus civitatis illius, non excedent' numerum ducentar' et quinquagintar' personarum, e civibus et liberis hominibus civitat' præd' annuatim elect', fore de Communi Concilio illo, qui quidem Cives sic elect' in hujusmodi Communi Concilio vocantur Communiarii (Angl' *Commons*) civitat' London. Quodque infra civitat' præd', videlicet, apud præd' parochiam sancti Michaelis Bassishaw, habetur et existit, et a tempore cujus contrar' memoria hominum non existit, habebatur et fuit talis consuetudo usitat' et approbat', videlicet, quod Major Alderman' dict' civit', ac hujusmodi Cives sic elect' fore de Com' Conc' ejusdem civitatis pro tempore existen', in Communi Concilio suo infra civitat' ill' assemblat', a toto tempore supradicto, secundum consuetudinem civitat' præd', fecer' et constituer', ac facere et constituere, consuever' et possunt, ac potuer', leges et ordinationes pro meliori regulatione et gubernatione publicor' mercator' infra civitat' præd', ac pro appunctuatione convenien' locor' et tempor', quando et ubi infra eandem civitat' mercata illa tent' fuerint, et pro assessione, et in certitudin' redu tione rationabilium tolnet', ratar', sive denar' summarum solvend' per personas ad eadem mercata venien', pro stallis, stationibus, et aliis accommodationibus per eas pro venditione, expositione victualium et provisionum in mercatis illis habit', quoties et quando eis videbitur expedi i; dum tamen leges et ordinationes hujusmodi Dom' Regi et populo suo sint bonæ fidei, et rationi consonæ, ac legibus

et statut' hujus regni Angl' minime contrar'. Quodque in Magna Charta de libertatibus Angl', in parliamento Dom' Henrici quondam Regis Angl' tertii, apud Westm' in Com' Middlesex, anno regni sui nono tent', edit' et provis', continetur, quod civitas London habeat omnes libertates suas antiquas, et consuetudines suas; et iidem Major et communitas, ac Cives civitat' London ulterius dicunt, quod Dom' Edwardus quondam Rex Angl' tertius, in parliamento suo apud Westm' in com' Midd', anno regni sui primo tent', per quandam chartam suam de assensu prælator', Comitum, Baronum, ac totius Communitatis regni sui, in eodem parliamento suo apud Westm' præd' convocat' existen', ac authoritate ejusdem parliamenti, confirmavit tunc Civibus civitat' London præd' libertates subsequen' (inter alia) habend' sibi et successoribus suis in perpet' imprimis recitando, quod cum in Magna Charta de libertatibus Angl' contineatur, quod civitas London habeat omnes libertates suas antiquas, et consuetudines suas, et quod iidem Cives tempore confectionis dictæ chartæ, ac temporibus sancti Edwardi Regis et Confessoris, et Will' Conquestoris, et al' progenitor' dicti Regis Edwardi tertii, diversas libertates, consuetudines, tam per chartas ipsor' progenitorum suorum, quam sine chartis ex antiqua consuetudine habuissent, voluit et concessit idem Rex Edwardus tertius pro se, et hæredibus suis per chartam ill', authoritate præd', quod iidem Cives haberent libertates suas secundum formam Magnæ Chartæ supradict', prout per eandem chartam geren' dat' apud Westm' præd' sexto die Martii, anno Regni dicti Regis Edwardi tertii primo supradicto, sub magno sigillo suo Angl' sigillat', hic in cur' prolat' (inter alia) plenius apparet. Et iidem Major et Communitas, ac Cives civitat' London ulterius dicunt, quod ad instant' et requisitionem Communitatis regni Angl' in parliamento Dom' Richardi nuper Regis Angl' secundi post Conquest', apud Westm' præd' anno regni sui septimo tent', assemblat' pro majori quiete et pace inter ligeos ejusdem nuper Regis fovend', et pro bono publico, omnes consuetudines, libertates, privileg', et franchis' civitat' præd' tunc Civibus civitat' præd' et eorum successoribus, authoritate ejusdem parliamenti ratificat' et confirmat' fuer'. Quodque prædictus Dominus Rex nunc, per literas suas patentes sub magno sigillo suo Angl' sigillat', geren' dat' apud Westm' præd' vicesimo quarto die Junii, anno regni sui decimo quinto, quas iidem Major et Communitas, ac Cives civitat' London hic in cur' proferunt pro ipso Rege, hæred' et successoribus suis, ratificavit et confirmavit Majori et Communitati, ac Civibus civitat' London, et successoribus suis, omnia et singula jurisdictiones, authoritat', privileg', libertates, franchis', quietantias, immunitates, et consuetudines quæcunque quæ præfat' Major et Communitas, ac Cives civitat' London, vel prædecessores sui, per nomen Majoris et Communitat', ac Civium civitat' London, seu per nomen Majoris, Alderman', Civium et Communitat' London, seu per nomen Majoris et Civium civitat' London, seu per nomen Major' et Communitat' civitat' London, seu per nomen civium civitat' London, seu per nomen Baron' London, seu per nomen Baron' Civitat' London, seu per aliquod aliud nomen quodcunque ratione vel vigore literar' patent', chartar', seu confirmation', in eisdem literis patentibus dicti Dom' Regis nunc præmentionat', vel alicujus seu aliquor' usus vel usuum, præscriptionis vel præscriptionum, seu alio legali modo quocunque, aliquo tempore, vel aliquibus temporibus ante tunc habuissent, seu rationabilit' usi fuissent, aut exercuissent, haben', tenend', gaudend', et exercend' omnia singula præmiss' præd' eisdem Majori et Communitati, ac Civibus civitat' London præd', et successoribus suis in perpetuum, adeo plene, et integre, ac in tam amplis modo et forma, prout in iisdem literis patentibus superius mentionantur fore data sive concessa, aut aliter usu, præscript', vel alio legali modo, seu jure quocunque ante tunc respective habit', obtent', sive gavisa fuissent, ac si separatim, singulatim, et nominatim in et per dictas literas patentes ipsius Dom' Regis nunc express', nominat', declarat', concess', et manifesta essent et fuissent, prout per easdem literas patentes (inter alia) plenius apparet. Et iidem Major et Communitas, ac Cives civitat' London ulterius dicunt quod post magnam illam conflagration' maximæ partis civitat' London præd', quæ fuit in mense Septembris, anno Dom' millesimo sexcentesimo sexagesimo sexto, ac alteration' in civit' et mercat' præd' perinde occasionat', diversæ controversiæ, et quæstiones ortæ fuer' infra eandem civitat' de et concernen' stabilition' publicorum mercator' infra civit' ill', et denar', summar' per ligeos Dom' Regis pro victualibus et provisionibus in mercatis illis venditioni exposit' solubil', ac superinde præd' die Jovis decimo septimo die Septembris, anno regni dicti Dom' Regis nunc vicesimo sexto supradicto, quidem Will' Hooker Miles, tunc Major civitat' præd' et Alderman' dictæ civitat', ac Communarii, sive Cives de Communi Concilio ejusdem civitatis, tunc existen' in Communi Concilio suo infra eandem civitat' (scil' in præd' camera Guildhall civitatis illius, situat' in præd' parochia sancti Michaelis Bassishaw) ad tunc assemblat' secundum consuetudinem dictæ civitat', ac authoritate ejusdem Communis Concilii, fecer' constituer', et publicaver' quendam actum, sive ordination' pro meliori regulatione et gubernatione publicorum mercator' infra civitat' præd' tent', intitulat', 'An 'Act for the Settlement and well ordering of the 'several public markets, within the city of 'London;' per quem quidem actum sive ordination' (inter alia) recitando, quod cum pro accommodation' populi mercat' (Angl' *of Market people*) cum stallis, asseribus, tectur' (Angl' *Shelter*) et aliis hujusmodi rebus necessariis, pro eor' stationibus in aliquibus mercat' infra civitat' ill', ac pro emundand', paviend', escurand', et munda custodiend', eadem; ac etiam pro sustinendo (Angl' *defraying*) inciden' onera

reparationis et manutentionis dictorum mercator', et similiter ad gratificand' et muncrand' curam et attendentiam talium personarum, qual' forent occupat' in easdem, quædam rationabiles ratæ pro dict' accommodationibus et oneribus semper solut' fuissent; et ad intentionem quod dictæ ratæ forent certe et publice factæ omnia populo mercatario (Angl' *Market People*) per quod personæ, quæ extunc per ordinem illius cur' Com' Concilii occupat' forent, tanquam collectores vel receptores earundem ratar', prævenirentur a demandando, exigendo, seu recipiendo plus quam allocat' fuit per actum sive ordination' ill', ordinat' et inactitat' fuit authoritate ejusdem Com' Concilii (inter alia) quod omnes et quælibet persona et personæ, ad aliquod dict' mercator' accedend' ad commoditates suas vendend' et utterand', extunc solverent tali personæ seu personis, quales fuer' vel forent de tempore in tempus appunctuat' ad capiend' et recipiend' proficua omnium, vel aliquor' dictor' mercator', ad usum Majoris et Communitat', ac Civium civitat' London, de et ab omni populo mercatorio adinde acceden', pro stallis, stationibus, et aliis accommodationibus suis in separal' mercatis præd', ut præfertur, secundum ratas sequen', et non amplius; videl', pro qualibet stalla sive station' de longitudine octo pedum, et latitudine quatuor pedum, pro venditione carnis aut piscis, duos solid' et sex denar' per septimanam; pro qualibet stalla sive statione de longitudine sex pedum, et latitudine quatuor pedum, duos solid' per septiman'; pro qualibet stalla sive statione de longitudine sex vel octo pedum, et latitudine quatuor pedum, pro aliis commoditatibus, tres denar' per diem; pro qualibet onere equino provision' non super stallas, vel sub publica tectur' (Angl' *Shelter*) duos denar' per diem; pro qualibet canistra (Angl' *Dosser*) consimilis provision', un' denar' per diem; pro qual' carectat' tract' cum non plur' quam tribus equis, quatuor denar' per diem; et pro qualibet caractat' tract' cum quat' equis vel pluribus, sex denar' per diem. Ac ulterius ordinat' et inactitat' fuit dicta authoritate, quod collectores aut receptores appunctuat, vel appunctuand', ut præfertur, haberent potestatem super obstinata denegatione seu dilatione alicujus populi mercatorii, ad solvend' respectivas ratas præd' illos ab eorum respectivis stationibus et locis amovere et dislocare. Et iidem Major et Communitas, ac Cives civitat' London ulterius dicunt, quod eædem ratæ per actum sive ordinationem ill', ut præfertur, solvi ordinat', præd' tempore confectionis ordinationis illius, et extunc hucusque fuerant rationabiles, et adhuc rationabiles existunt; quodque ratæ et denariorum summæ per eundem actum sive ordinationem solvi ordinat', sunt omnes ratæ, tolnet'; et denarior' summæ pro victualibus et provisionibus in mercat' præd' vendit', seu venditioni exposit' per aliquas personas a dicto tempore confectionis ejusdem ordinationis hucusque, ad usum Majoris et Communitat', ac Civium civitat' London solubil' et solut', quas quidem ratas sic solvi ordinat', et null' alias, iidem Major et Communitas, ac Cives civitat' London, a tempore actus sive ordinationis illius, ut præfertur, fact', hucusque exeger' et perceper' secundum formam et effectum ejusdem actus sive ordinationis; qui quidem actus sive ordinatio est eadem lex per ipsos Majorem et Communitat', ac Cives civitat' London superius de facto inactitat' et publicat', supposit' in præd' placito præd' Attorn' generalis superius replicando placitat' spec'; absque hoc quod aliqua lex, actus sive ordinatio pro levatione denar' præd' de personis ad mercata præd' accedent' cum victualibus et provisionibus ibid' vendend', inactitat' fact', sive publicat' fuit aliter, vel alio modo, quam iidem Major et Communitas, ac Cives civitatis London superius allegaver', prout idem Attorn' generalis pro Dicto Dom' Rege nunc superius suppon', et hoc parat' sunt verificare. Et quoad resid' præd' placiti præd' Attornat' generalis in assign' forisfactur', ut præfertur, superius replicando placitat', iidem Major et Communitat', ac Cives civitat' London dicunt, quod vicesimo quarto die Aprilis, anno regni dict' Dom' Regis nunc tricesimo, et per diversos annos tunc ult' elapsos, ac post eundem vicesimum quartum diem Aprilis, infra hoc regnum Angl', et alibi, videlicet, apud London præd', in præd' parochi sanct' Michaelis Bassishaw, proditoria et execrabilis conspiratio et conjuratio machinat' et prosecut' fuit per Papistas (Angl' *Papists*) ad interficiend' et murdrand' Dom' Regem nunc, et ad alterand', mutuand', et subvertend' antiquas gubernation' et leges ejusdem regni, et ad supprimend' veram religionem in eodem stabilit', et ad extirpandum et destruendum professores ejusdem religionis; quæ quidem conspiratio et conjuratio machinat' et prosecut' fuer', et diversis locis, et per separal' vias et media, ac per magnum numerum personarum separal' qualitat' et graduum, quæ agebant et se occupaver' in eisdem, ad exequend' et perimplend' prædicta scelerata et proditoria machinationes et proposita; quodque postea, scilicet, vicesimo septimo die Septembris, anno tricesimo supradicto, Edmundus-Bury Godfrey, Miles, tunc unus Justiciar' Dom' Regis ad pacem in com' Midd' conservandum assignat', secundum officii et juramenti sui debitum, apud parochiam sancti Martini in campis, in eodem comitat' Midd', cepit examination' et information' de præfat' conspiratione et conjuratione, ac information' quod magna illa conflagratio maximæ partis civitatis London, quæ fuisset in mense Septembris, anno Dom' millesimo sexcentesimo sexagesimo sexto, fact' fuit per Papistas; posteaque per advisamentum, assensum, consilium, instigationem, et procurationem aliquorum dictorum conspiratorum, diversæ personæ in insidiis jacuer' et insecut' fuerunt præfat' Edmund-Bury Godfrey diversis diebus, ea intentione, ad ipsum murdrand', videlicet, apud parochiam sanct' Mariæ le Savoy, in dicto comitat' Midd'; quod quidem murdrum postea, scil', duodecimo die Octobris, anno tricesimo supradicto, apud eandem paro-

chiam, per eos perpetrat' et effectum fuit ac perpetrat' et effectum fuit ea intentione, ad supprimendum examination' et information', quas ipse, ut præfertur, cepisset, et ad deterrend' et intimidand' magistrat' et al' ab agendo in ulteriori detectione conspirationis et conjurationis præd'; pro quo quidem murdro quidam Robertus Green, Girald Clericus, Henricus Bury, Laurencius Hill, Dominic Kelley, et Filibertus Vernat, postea (scilicet, termino sanct' Hilarii, annis regni dict' Dom' Regis nunc tricesimo, et tricesimo primo) in curia Dom' Regis coram ipso Rege apud Westm', in dicto com' Midd', per quandam jurat' præd' ejusdem com' Midd', debita juris forma indictat' fuerunt; ad quod quidem indictamentum, postea (scilicet, eodem termino) præd' Robertus Green, Henricus Bury, et Laurencius Hill, separatim placitaver', quod ipsi non fuer' inde culpabiles, et de eo posuer' se supra patriam; ac postea, scilicet eodem termino sanct' Hilarii, in eadem cur' apud Westm' præd', pro dict' felonia et murdro per jurat' patriæ præd', in debita juris forma triati fuerunt, et inde legitime convicti et attincti, prout per record' inde in eadem curia Dom' Regis coram ipso Rege apud Westm' præd' residen' plenius apparet. Quodque pro altis proditionibus et proditoriis conspirationibus et conjurationibus præd' quidam Edwardus Coleman et Willielmus Ireland, Thomas Pickering et Johannes Grove, ac Thomas White alias Whitebread, Willielmus Harcourt alias Harrison, Johannes Fenwick, Johannes Gavan, et Antonius Turner, ac Richardus Langhorn, Arm', existen' Papistæ, et superstition' Romanam profitentes ante præd' decimum tertium diem Januarii, anno tricesimo secundo supradicto, debito modo, et secundum legis hujus regni Angl' formam triat', convict' et attinct' fuer' (scil', præd' Edwardus Coleman termino sanct' Michaelis, anno regni Dom' Regis nunc tricesimo, in cur' Dom' Regis coram ipso Rege; eadem cur' apud Westm' in com' Midd' adtunc et adhuc existen') prout per recordum et processum inde in eadem cur' residen' plenius apparet; ac præd' Willielmus Ireland, Thomas Pickering, et Johannes Grove, ad deliberation' gaolæ Dom' Regis de Newgate, tent' pro dicto com' Midd' apud Justice Hall in le Old Baily, in suburbiis dictæ civitatis London, in mense Decembris, anno tricesimo supradicto, prout per recordum et processum inde in custod' Custodis Rotulorum dict' com' Midd' reman' plenius apparet; ac præd' Thomas White alias Whitebread, Johannes Fenwick, Willielmus Harcourt alias Harrison, Johannes Gavan, et Antonius Turner, ad deliberationem gaolæ Dom' Regis de Newgate, tent' per adjornament' pro com Midd' præd', apud præd' Justice Hall in le Old Baily, in suburbiis civitatis London, die Veneris decimo tertio die Junii, anno regni dict' Dom' Regis nunc tricesimo primo, prout per recordum et processum inde in custodia dict' Custodis Rotul' ejusdem com' Midd' remanen' plenius apparet; et præd' Rich' Langhorn ad deliberationem gaolæ Dom' Regis de Newgate, tent' per adjornament' pro dict' civit' London apud Justice Hall in le Old Baily, in parochia sanct' Sepulchri, in warda de Farringdon extra London, die Sabbati decimo quarto die Junii, anno tricesimo primo supradict', prout per record' et process' inde in custod' Custodis Rotul' dict' civitat' London remanen' plenius apparet: quodque Willielmus comes Powis, Willielmus vicecomes Stafford, Henricus dom' Arundel de Wardor, Willielmus dom' Petre, et Johannes dom' Bellasis, tricesimo die Novembris, anno regni dict' Dom' Regis nunc tricesimo supradict', apud Westm' præd' in præd' com' Midd' de altis proditionibus, et proditoriis conspirationibus et conjurationabus præd' legitime accusati, et super inde prisonæ Dom' Regis, scil', Turri London commiss' fuer', ibidem salvo custodiend', ac in custodia sic existen' idem Williel' comes Powis, Williel' vicecomes Stafford, Henricus dom' Arundel de Wardor, Willielmus dom' Petre, et Johannes dom' Bellasis, ad session' parliamen' dict' Dom' Regis nunc, apud Westm' præd' decimo quinto die Martii, anno regni sui tricesimo primo, per prorogation' tent' per Communes hujus regni Angl' in eodem parliamento assemblat', coram Magnatib' et Procerib' ejusdem regni in parliamento illo convocat' et convent', de eo quod per multos annos tunc ult' præterit' proditoria et execrabilis conspiratio et conjuratio infra hoc regnum Angl', et alibi machinat' et prosecut' fuit per Papistas, ad alterand', mutand', et subvertend' antiquas gubernation' et leges hujus regni et nationis, et ad supprimend' veram religionem in eisdem stabilit', et ad extirpand' et destruend' professores inde; quæ quidem conspiratio et conjuratio machinat' et prosecut' fuisset in diversis locis, et per separal' vias et media, et per magnum numerum personar' separal' qualitatum et graduum, quæ agebant in eisdem, et intendebant per inde ad exequend' et consummand' præd' scelerat' et proditorias machinationes et proposita. Quodque dic' Willielmus comes Powis, Willielmus vicecomes Stafford, Henricus dom' Arundel de Wardor, Willielmus dom' Petre, et Johannes dom' Bellasis, simul cum Phil' Howard' communiter voc' Cardinal de Norf. Thoma White alias Whitebread, com' voc' Provincial' Jesuitar' in Anglia, Ric' Strange nuper voc' Provincial' Jesuitar' *in Anglia*,—Vincent, com' voc' Provincial' *Dominicor' in Anglia*, Jacobo Cooper com' voc' President' Benedictine, Johanne Warner alias Clare Baronetto, Williel' Harcourt, Johanne Keins, Nicho' Blundel, —— Pool, Edwar' Mico, Thoma Bedinfield alias Benefield, Basil' Langworth, Carolo Peters, Rich' Peters, Joan' Convers, Dom' Georgio Wakeman (Anglice *Sir George Wakeman*) Thoma Fenwick, Dominic Kelley, —— Fitzgerald, —— Evers, Dom' Thoma Preston (Anglice *Sir Thomas Preston*), Willielm' Lovel, Jesuitis, Dom' Baltemore, Johanne Carrel, Johanne Townley, Rich' Langhorn, Willielm' Fogarty, Thoma Penny, Matthæo Medbourne, Edward' Coleman, Willielm' Ireland, Johanne Grove, Thoma Pickering, Johanne

Smith, et diversis aliis Jesuitis, sacerdotib', fratrib' (Angl' *Friers*) et aliis personis, ut falsi proditores Dom' Regi nunc, et huic Regno infra Tempus ult' præd' proditorie consuluissent, machinat' fuissent et egissent, ad et pro consummatione dict' improbar' pernitiosar' et proditoriar' machination', et ea de causa nequissime et proditorie agreassent, conspirassent, et determinassent imprisonare, deponere, et murdrare sacram Majestatem Dom' Regis nunc, et ipsum de regali statu, corona, et dignitate suis deprivare, et per maliciosam et advisat' Locutionem, Scriptionem, et alit' declarasset tal' sua proposita et intentiones, ac etiam hoc Regnum et Nationem Papæ et tyrannicæ suæ Gubernationi subjicere, et status et hæreditates, Protestant' subdit' Dom' Regis seizire' et int' sese partiri, ac erigere et restiteure Abbatias, Monasteria, et al' Convent' et Societates, quæ dudum per Leges hujus Regni pro superstitione et idolatria suis suppress' fuissent, et eis tradere et restituere terras et possessiones in Dom' Rege nunc et subditis suis per Leges et Statuta hujus Regni vestit', ac etiam n va Monasteria et Conventus fundare et erigere et omnes Protestant' Episcopos, et al' personas Ecclesiasticas ab officiis, beneficiis, et promotionib' suis amovere et deprivare, et eo modo personam Dom' Regis nunc destruere, Protestantem Religionem extirpare, jura, libertates et proprietates omnium probor' subditor' Dom' Regis evertere, legalem gubernationem hujus Regni subvertere, et idem Tyrannidi sedis Romanæ subjicere. Quodq; dic' Conspiratores et eorum participes et confederatores proditorie habuissent et tenuissent separales conventiones, assemblationes, et consultationes, in quibus inter eos machinat' et designat' fuissent; quæ media uterentur, et quæ personæ et Instrumenta impens' forent ad Dom' Regem nunc murdrand', et ad tunc et ibidem determinassent id efficere per venefic', displosionem (Angl' *Shooting*) perforationem (Angl' *Stabbing*) vel aliqua tal' vias et media, et obtulissent munera et promissiones de advantag' separalib' personis ad idem exequend', ac conduxissent et impendissent separales improbas personas ire ad Windsor, et alia loca ubi Dom' Rex residebat ad ipsum Dom' Regem murdrand, et distruend', quæ quidem personæ, seu earum aliqu' talia munera acceptassent, et perpetrationem inde suscepissent, et actualit' et dic' loca intentione et proposito ill' ivissent. Quodq; dic' Conspiratores ad melius perimplend' proditorias suas machinationes consuluissent ad levand', ac procurassent et levassent homines, monetam, equos, arma et ammunitionem, ac etiam applicationem fecissent ad, et tractassent et correspondissent cum Papa, ejus Cardinalib', Nunciis et Agentib', et aliis forinsecis ministris et personis, ad levand' et obtinend' supplementa (Ang' *Supplies*) homin', monet', armor', et ammunitiones, cum eisdem facere, levare et excitare guerram, rebellionem et tumultus infra hoc Regn' et idem invadere cum virib' forinsecis, et deprehendere (Angl' *to surprise*) sesire et destruere Regiæ Majestatis classem (Angl' *Navy*) fortalitia (Angl' Forts) armamentaria (Angl' *Magazines*) et loca fortia (Angl' *Places of Strength*) infra hoc Regn', super quo calamitates guerræ, murdra innocenc' subditor', viror', mulier' et liberor', conflagrationes, rapinæ, devastationes, et al' tremend' miseriæ et exitia inevitabil' insequerentur, in ruinam et destructionem hujus nationis; et quod dic' conspiratores procurassent, et acceptassent, ac deliberassent separal' instrumenta, commissiones, et potestates fact' et concess' per aut subt' Papam vel ab illicitam et usurpat' authoritatem, ad levand' et disponend' homines, monetam, arma, et al' necessaria pro eor' sceleratis et proditoriis machinationibus, ac nominatim Commissionem pro dic' Henrico Dom' Arundel de Wardor fore Dom' Cancellar' Angl', aliam Commission' dic' Willielm' Comit' Powis fore Dom' Thesaurarium Angl', aliam Commission' dic' Johanne Dom' Bellasis fore ducem General' (Angl' *General*) ad exercitus levand', al' Commissionem dic' Willielmo Dom' Petre fore locum tenent' ducis General, (Angl' *Lieutenant General*) dic' exercitus et potestatem Angl' (*a Power*) pro dic' Willielmo Vicecomite Stafford fore expenditorem (Angl' *Paymaster*) exercitus illius. Quodq; in ordine ad animand' seipsos in prosecutione dictar' sceleratar' conjurationum, conspiration' et prodition', et ad celand' et impediend' detectionem earundem, et ad seipsos a justicia et punitione securand' Conspiratores præd' participes et confederatores sui usi fuissent multis impiis et diabolicis praxib', videl', causassent sacerdotes suos administrare dic' Conspiratorib' juramentum taciturnitatis (Angl' *of Secresy*) una cum eor' sacramento, ac etiam causassent dic' Sacerdotes suos super Confessionib' dare absolutiones suas sub conditione, quod ipsi concelarent dic' Conspirationem, ac cum circa mensem Septembris tunc ult' præterit' Edmundbury Godfrey miles Justic' pacis secundum juramenti et officii sui debit' cepisset separal' examinationes et informationes concern' præfat' conspirationem et conjurationem, dic' conspiratores, seu eor' aliqui, per advisamentum, assensum, consil' et instigationem resid' eor' incitassent et procurassent diversas personas in insidiis jacere, et insequi præfat' Edmundbury Godfrey diversis dieb' ea intentione ad ipsum murdrand', quod postea per eos perpetrat' et effectum fuit (pro quib' quidem horridis criminib' et offensis Robertus Gren, Henricus Berry, et Laurentius Hill, postea attincti fuissent, ac Dominic Kelley et —— Girald, et alii fugam fecissent pro eisdem) post quod quid 'murdrum, et antequam cadaver invent' fuit, vel murdrum cognitum aliquibus nisi participibus, in eodem dic' person' false retuler' quod vivus fuit, et privatim maritat', et postquam cadaver' invent' fuit, disperser' falsam et malitiosam relationem, quod ipse seipsum murdrasset. Quod quidem murdrum commissum fuit ea intentione, ad celand' et supprimend' evidentiam quam ipse cepisset, ac de qua notitiam habuit, et intimidand' et deterrend' Magistrat' et alios

ab agendo in ulteriori detectione conspirationis et conjurationis præd', ea etiam intentione dic' Edmundbury Godfrey, dum vivus fuit, per eos ac participes et fautores suos minatus et deterritus fuit in ejus prosecutione inde, quodq' de cor' ulteriori malicia scelerate machinati fuissent perquam plurimas suggestiones impon' imputationem et culpam præd' horridor' et detestabil' criminum super Protestantes, ita quod perinde ipsimet evitarent punitiones, quas juste meruissent, et exponerent Protestantes scandalo magno, et eos subjicerent prosecutioni et oppressioni in omnibus regnis et patriis, ubi Romana Religio recepta et professa fuit. Quodque omnia ill' proditiones, crimina et offensæ præmentionat' fuer' machinat', commiss', perpetrat', acta et facta per præd' Willielm' Comitem Powis, Willielm' Vicecomitem Stafford, Willielmum Dom' Petre, Henricum Dom' Arundel de Wardor, et Johannem Dom' Bellasis, ac alios conspiratores præd' contr' Dom' Regem nunc, Coronam et Dignitat' suas, ac contr' Leges et Statuta hujus Regni secun' Lege' et consuetudinem Parliament' impetit' fuer' ac inde debite onerat', et in Prisona præd' ea occasione detent', prout per Record' et process' inde int' Recorda Parliament' remanent' plenius apparet. Et iidem Major et Communitas, ac Cives civitat' London ulterius dicunt, quod in Session' præd' Parliamenti dic' Dom' Regis nunc, apud Westm' præd' per prorogation' tent' super prædict' vicesimum primum diem Octobris, Anno Regni dicti Domini Regis nunc tricesimo secundo supradict', in replicatione præd' mentionat' ad inchoation' ejusdem Sessionis Dom' Rex nunc, ex maxima regali cura et sedulitate sua pro præservatione Religionis Protestan' et subditor' a periculis per Papisticas Conspirationes iminen', per ejus gratiosam oration' ambob' domibus ejusdem Parliamenti adtunc et ibidem fact' et allocut', inter alia recommendavit Dom' et Commun' in Parliamento illo assemblat', ad prosequend' ulteriorem examinationem Conspiration' præd' cum stricta et impartiali inquisitione, et eis tunc dixit, quod Ipse non putavit seipsum neque ipsos secur' quosque materia illa plenarie perageretur. Ac ideo quod necessar' foret, quod præd' Dom' in præd' prisona Turris London ad celerem triation' suam adducerentur, quod Justicia fieret. Et iidem Major et Communitas ac Cives civitat' London ulterius dicunt, quod postea in eadem Session' Parliamenti utraque domus Parliamenti illius in prosecution' dic' direction' Dom' Regis strictam et impartialem inquisition' de præd' conspiratione fecer', et super inquisition' ill' declaraver', quod fuisset horribilis conspiratio et conjuratio per Papistas contra personam dic' Dom' Regis et Gubernation' suam quæ tunc continuabant; ac Commun' in eodem Parliamento assemblat' ulterius declaraverunt, quod conspiratio et conjuratio ill' supportat' et prosecut' fuissent per poten' et irrequiet' molimina et machinationes, præsertim duran' tunc nuperis recessib' Parliamenti et postea in eadem Sessione Parliamenti Dom' Spirituales, Temporales ac Communes in eodem Parliamento assemblat', eorum humilem Supplicationem Angl' *Address*) eidem Dom' Regi apud Westm' præd' fecer' et exhibuer', in forma sequen', videl', Quod ipsi Subditi Regiæ suæ Majestatis obsequentissimi et fidelissimi Dom' Spirituales et Temporales, ac Communes in tunc præsenti Parliamento illo assemblat', profunde sensibiles existen' de tristi et calamitosa conditione hujus Regni, præcipue per impias et horrendas Conspirationes Papalis Factionis causat', quæ non solum destructionem Regalis Personæ Regiæ suæ Majestatis, verum etiam totalem subversionem Gubernat' et veræ Religion' in hoc Regno Angl' stabilit' conspiravisset et intendisset, ac invenien' easdem detestabiles machinationes adtunc obstinate per eandem Factionem prosecut', tam fovendo divisiones inter Majestatis suæ fideles Subdit' Protestan', quam per omnes al' nequissimas machinationes, non obstan' quamplurimis detectionibus inde (magna Dei misericordia et mirabili providentia) tunc nuper in lucem prolat', quæ omnia tremenda judicia tunc fuert super hoc Regnum impenden' pro pluribus et gravibus suis peccatis, quam meritissime ac alit', humana ratione evitari nequibant, quam per benediction' Dei particularem super consultationes et conamina magni Concilii ipsius Dom' Regis tunc in Parliamento assemblat', in omni humilitate Regiæ suæ Majestati supplicaver', quod per Proclamation' suam Regalem dies solempnit' foret dedicat', in quo tam ipsi quam omnes ipsius Dom' Regis Subdit' per jejun' et preces Deo omnipotenti reconciliationem conarentur. Ac cum cordibus humilibus et penetentibus eum implorarent, per ejus potentiam et bonitatem, ad judicia ill' divertend', et ad impia consilia et machinationes inimicorum suorum frustrand', ad corda fidelium Protestant', Subdit' dic' Dom' Regis uniend', et ad misericordiam suam et Evangelii sui lumen eidem Domino Regi et dictis Subdit' suis, et eor' Posteritat' continuand', ac præcipue ad abundantes benedictiones suas super sacram Majestatem ipsius Dom' Regis et tunc præsen' Parliament' impendend', quod consultationes et conamina eor, honorem, incolumitatem, et prosperitatem Regiæ suæ Majestati ac Populo suo producerent; et superinde dictus Dominus Rex nunc duran' dicta Sessione Parliamenti, scilicet secundo die Decembris anno Regni sui tricesimo secundo supradicto, per proclamationem suam Regalem sub magno sigillo suo Angl' sigillat' geren' dat' apud Westm' eisdem die et anno, recitando, quod cum Dom' Spirituales et Temporales ac Communes in Parliamento illo assemblat' per eor' Supplication' (Angl' Address) eidem Domino Regi exhibit', notum ei fecissent, quod ipsi pro funde sensibiles fuer' de tristi et calamitosa conditione hujus Regni per impias et horrendas Conspirationes Papalis Factionis causat', quæ non solum destructionem Regalis Personæ Regiæ suæ Majestatis, verum etiam total' subversionem Gubernat' et veræ Religionis apud ipsum Regem et Subditos suas

stabilit', conspiravisset et intendisset; quodque eædem detestibiles machinationes adtunc obstinate per eandem Factionem prosecut' fuer', tam fovendo divisiones int' ejus fideles Subdit' Protestan', quam per omnes al' nequissimas machinationes, non obstan' quamplurimis detectionibus inde (magna Dei misericordia et mirabili providentia) tunc nuper in lucem prolat', quæ omnia tremenda judicia tunc fuer' super eundem Dom' Regem et dictos Subdit' suos impendend' pro pluribus et gravibus suis peccatis, quam meritissime ac alit' humana ratione præveniri nequibant, quam, per benedictionem Dei particularem super consultationes et conamina magni Concilii ipsius Dom' Regis tunc in Parliamento 'assemblat', eidem Domino Regi humillime supplicassent, quod dies maxime solempnit' foret dedicat', in quo Rex ipsemet et omnes Subditi sui fideles per jejunium et preces Deo omnipotenti reconciliationem conarentur, ac cum cordibus humilibus et pœnitentibus eum implorarent, per ejus potentiam et bonitatem ad judicia illa divertend', et ad impia consilia et machinationes inimicorum ipsius Dom' Regis et dict' Subdit' suor' frustrand', ac corda fidelium Protestan' Subdit' dict' Dom' Regis uniend', et misericordiam suam et Evangelii sui lumen eidem Domino Regi et dictis Subdit' suis et cor' Posteritat' continuand', ac præcipue ad abundantes benedictiones suas super ipsum Dom' Regem et tunc præsen' parliament' impendend', quod consultationes et conamina cor' honorem, incolumitatem, et prosperitatem dicto Domino Regi ac populo suo producerent, idem Dominus Rex ad illam cor' humilem requisitionem promptissime inclinavit, ac per illam ejus Regalem Proclamation' mandavit generale et publicum Jejunium per totum hoc Regnum observari, in tali modo quali postea per eandem Proclamationem fuit direct' et præscript', ita quod tam idem Dominus Rex, quam populus suus, preces et supplicationes suas Deo omnipotenti emitterent ad et pro propositis præd', ac ea intentione, quod tam Religiosum Exercitium ad unum et idem tempus performaretur dictus Dominus Rex per Proclamation' ill' publicavit et declaravit omnibus Subditis suis amantibus, ac stricte præcepit et mandavit, quod die Mercurii existen' vicesimo secundo die Decembris tunc instan' jejunium ill' religiose observat' et celebrat' foret per Regnum suum Angl', Dominium Walliæ, et Villam Berwici super Twedam, et ut idem cum omni decentia et uniformitate performaretur, item Dominus Rex per advisamentum reverend' Episcopor' suor' componi, imprimi, et publicari direxerat talem formam Divini Servicii qual' ipse apt' uti censuerat in omnibus Ecclesiis et Locis ad tempus præd', et Episcopis suis dederat in mandatis ad ill' congruent' dispergend', Quæ omnia idem Dominus Rex per Proclamationem suam præd' reverent' et decent' observari expresse præcepit et mandavit, per omnes subdit' suos amantes, sicut favorem Dei Omnipotentis respexer', ac iram et indignation' ejus contra hanc terram evitarent, et sub pœna subeundi tales punitiones, qual' dictus Dominus Rex juste infligere posset super omnes, qui tam religiosum officium contemnerent seu negligerent, prout per irrotulament' ejusdem proclamationis in cur' Cancellar' ipsius Dom' Regis de recordo remanen' plenius apparet. Qui quidem dies jejunii secundum formam et effect' proclamat' præd' debite et solempnit' observat' et celebrat' fuit in et per totum hoc regnum Angl', ac præcipue apud London præd', in parochia sancti Michaelis Bassishaw. Quodque in eadem sessione parliamenti ult' mentionat' Communes hujus regni in eodem parliamento assemblat', resolution' fecerunt procedere ad triationem præd' Dominor' in prisona Turris London tunc existen', sicut præfertur, impetit', et statim inciperecum præfat' Vicecomite Stafford, ac notitiam inde Dominis parliamenti illius tunc deder', et eos requisiver' ad convenien' diem pro triatione ejusdem Vicecomitis Stafford appunctuand', et superinde præd' Vicecomes Stafford de altis proditionibus et proditoriis conspirationibus et conjurationibus præd', unde ipse, ut præfertur, impetit' fuit per Dominos Temporalis in eodem parliamento convent' ad prosecution' Commun' hujus regni in parliamento illo assemblat', in eadem sessione parliamenti triat', convict', et debita juris forma attinct' fuit, prout per record' et process' inde inter recorda parliament' remanent plenius apparet, posteaque in eadem sessione parliamenti Willielmus Scrogs Miles, tunc Capital' Justic' Dom' Regis ad placita coram ipso Rege tenend' assign' per Communes hujus regni Angl' in eodem parliamento assemblat' coram magnatibus et proceribus ejusdem regni in parliamento illo convocat' et convent' secundum legem et consuetudinem parliamenti accusat' et impetit' fuit de alta proditione, et aliis magnis criminibus et malegesturis (inter alia) quod ipse dictus Willielmus Scrogs tunc existen' Capital' Justic' cur' Domini Regis coram ipso Rege proditorie et nequit' conat' fuisset subvert' leges fundamental' et stabilit' religion' hujus regni Angl', ac loco inde introducere Papismum (Angl' *Popery*) et arbitrariam et tyrannicam gubernationem contra legem, quod ipse declarasset per diversa proditoria et improba verba, opiniones, judicia, praxes, et facta: Ac etiam quod cum fuisset horribilis et diabolica conspiratio, machinat' et prosecut' per Papistas pro murdrando Dominum Regem nunc, subvertendo leges et gubernationem hujus regni, et pro destruendo religionem Protestan' in eodem regno, quæ omnia dictus Willielmus Scrogs bene scivisset, in quantum ipsemet non solum triasset, verum etiam judicium reddidisset contra separal' hujusmodi delinquentium, nihilominus dictus Willielmus Scrogs ad diversa tempora et loca, tam in cur'ceden', quam alit', palam defamasset et scandalizasset separal' de testibus, qui probassent dictas proditiones contra diversos de conspiratoribus, et dedissent evidentiam contra diversas alias personas, quæ tunc fuer' minime triat', ac conatus fuisset defamare (Angl' *to dis-*

parage) eor' evidenciam, et allimere credentiam eorum, per quod, quantum in se fuit, proditorie et nequit' suppressisset et suffocassit detectionem dictæ Papalis conspirationis ac animasset conspiratores (ad procedend' in eadem) in magnum et manifestum periculum sacræ vitæ dicti Domini Regis nunc, et bone stabilit' gubernation' et religionis hujus regni Angl', prout per record' inde inter record' parliament' remanent' plenius apparet. At etiam in eadem sessione parliamenti, Dom' Spiritual' et Temporal', ac Communes in eod' parliamento assemblat', se declaraver' eis manifest' esse quod ad tunc fuit, et per diversos annos tunc ult' elaps', fuisset horrenda et proditoria conspiratio et conjuratio, machinat' et prosecut' per ill' de Papali religione in regno Hiberniæ pro trucidatione (Angl' *massacring)* Anglor', et subversion' religionis Protestan', et antiquæ stabilit' gubernationis regni illius; de qua quidem horrenda, et proditoria conspiratione et conjuratione Richardus Power Comes Tyrone in Regno Hiberniæ, ad eandem sessiqn' parliamenti per Communes hujus regni Angl' in eodem parliamento assemblat' coram Magnatibus et proceribus ejusdem regni Angl' in parliamento illo convocat' et convent' secundum legem et consuetudinem parliamenti impetit' fuit, ac inde debite onerat' et prisonæ Dom' Regis de le Gate-house Westm' ea occasione commissus fuit, prout per record' inde inter recorda parliament' remanen' plenius apparet. Quodque tam Domin', quam Communis in dicto parliamento assemblat' in eadem sessione parliamenti fuer' præparantis billas secundum cursum parliament' in leges inactitand' pro præservatione Domini Regis nunc, et subditorum suorum Protestan', contra proditorias conspirationes et conjurationes prædicta penden', quibus quidem separalibus impetitionibus versus eundem Richardum Power, et dictum Willielm' Scrogs, ac prædict' Willielm' Comitem Powis, Henricum Dominum Arundel de Wardour, Willielm' Dom' Petre, et Johannem Dom' Bellasis, minime determinat', ac eisdem Willielm' Comite Powis, Henrico Domino Arundel de Wardour, Willielm' Dom' Petre, Johanne Dom' Bellasis, et Richardo Power in prison' Domini Regis ex causis præd', ut præfertur, existen', idem parliament', super præd' decimum diem Januarii, anno regni dicti Dom' Regis nunc tricesimo secundo supradicto, prorogat' fuit, prout præd' Attorn' dict' Dom' Regis nunc generalis superius inde allegavit, absq; aliqua triatione dictor' Willielm' Comit' Powis, Henric' Dom' Arundel de Wardour, Willielm' Dom' Petre, Johan' Dom' Bellasis, Willielm' Scrogs, et Richard' Power, seu eorum alicujus, de altis prodition', et al' præmissis (unde ipsi respective, ut præfertur, impetit fuer', ac qui aliter quam in parliament' inde triari non potuer') fact' sive habit', ac antequam hujusmodi billæ in leges inactitat' fuer': Quæ quidem oratio dicti Dom' Regis, ac declarationis et processus Dom' et Commun' parliamenti illius duran' dicta sessione ejusdem parliament', ut præfertur, fact', ante eandem prorogationem parliamenti illius publicat' fuer', videl', apud London præd', in prædicta parochia sancti Michaelis Bassishaw, ratione quorum quidem præmissor', cives et inhabitan' præd' civitatis London' fideles subdit' dicti Dom' Regis nunc existen' maxime perterriti, et in animis affecti, ac quam plurimum inquietat' fuer' profundo sensu et apprehensione magnor' periculor' personæ Dom' Regis nunc, et gubernationi suæ hujus regni, ac religioni Protestan', et professoribus ejusdem, occasione conspiration' præd' impenden' et imminen', non aliter (prout per Dom' Spirituales et Temporales, ac Communes in dicto parliamento assemblat', in supplicatione sua præd', per Dom' Regem in proclamat' præd', ut præfert', publicat' affirmat') humana ration' evitand', quam per benedictionem Dei particularem super consultationes et conamina ejusdem parliamenti, quidam cives et inhabitantes ejusdem civitates, nomine civium et inhabitantium dict' civitatis, ante petitionem inde in prædicto placito præd' Attorn' general' superius replicando placitat' spec'. fact' seu fieri ordinat', scil', præd' decimo tertio die Januarii, anno regni dict' Dom' Regis nunc tricesimo secundo supradict', Patient' Ward Mil', tunc Majori civitatis London, et Alderman' dict' civitatis, ac Communiariis sive Civib' de Com' Concilio ejusdem civitatis, in Communi Concilio adtunc in prædicta camera Guildhall ejusdem civitatis, in parochia sancti Michaelis Bassishaw præd', secundum consuetudinem dictæ civitatis assemblat', exhibuer' quandam petitionem continen', quod ipsi cives et inhabitan' civitat' London, profunde sensibles existen' de malis et exitiis super hanc nationem in generali, ac ill' civitatem London in particulari penden', in respect' periculi personæ Dom' Regis nunc, religion' Protestan', et bene stabilit' gubernation' suæ, per continuat', infernales, et diabolicas machinationes Papistar', et alior' adhærentium suor', ac scientes nullam viam (sub Deo) tam effectual' ad præservand' Dom' Regem, ac cives et inhabitan' ill' ab extrema ruina, et destructione minat', quam per celerem sessionem tunc præsentis parliamen', cujus inopina prorogatio magnopere addidit et augebat justos timores et suspiciones animor' dictor' petitionarior'; ipsi iidem petitores obsecraver' eidem Com' Concilio, sic ut præfertur assemblat', ad informand' Regiam Majestatem de ill' eor' timoribus et apprehensionibus, ac quod fuit humile et fervens desiderium, tam eor' petitior', quam ipsor' Majoris et Aldermannor', ac Communiar' de Com' Concilio illo, quod Regiæ suæ Majestati placeret, pro totali frustratione impior' et sanguinolentor' propositor' inimicor' suor', ad permittend' ill' tunc præsens parliamentum, quod extitit prorogat' usque vicesimum diem tunc instan' Januarii, adtunc assemblare, et sedend' continuare, quousque effectualit' securaret hoc regnum contra Papism', ac reformaret (Angl' *redressed)* multiplicia gravamina, sub quibus tunc gemuit, et pro immediata securitate sua, quod iidem Major et Alderman', ac Communiarii de Com' Concilio ill', ordinarent quod-

cunque aliud, quod necessar' et expedien' eis videretur in illo tempore periculi imminen', pro incolumitate magnæ civitatis illius. Et quia per legem terræ hujus regni Angl' licitum est subdit' Dom' Regis in angustiis et difficultatib' suis ad humilit' supplicand' Dom' Regi pro remedio congruo in ea parte habend', præd' die Jovis decimo tertio die Januarii, anno regni dict' Dom' Regis nunc tricesimo secundo supradict', præd' Patient' Ward Miles, tunc Major præd' civitatis London, et Alderman' ejusdem civitat', scil', Thomas Alleyn Miles et Bar', Johannes Fredericke Miles, Johannes Lawrence Miles, Georgius Waterman Miles, Josephus Sheldon Miles, Jacobus Edwards Miles, Robertus Clayton Miles, Johannes Moore Miles, Gulielmus Pritchard Miles, Henricus Tulse Miles, Jacobus Smith Miles, Robertus Jeffrey Miles, Johannes Shorter Miles, Thomas Gould Miles, Gulielmus Rawsterne Miles, Thomas Beckford Miles, Johannes Chapman Miles, Simon Lewis Miles, Thomas Pilkington Arm', et Henricus Cornish Arm', ac Communiarii seu Cives de Com' Concilio dict' civitatis, in Com' Concilio suo infra eandem civitatem, scil', in præd' camera Guildhall civitatis illius ad tunc secund' consuetudinem dict' civitatis assemblat', vota et suffragia sua, ex animis Dom' Regi perfidelib', et pro satisfaction' civium et inhabitan' ejusdem civitat', qui petitionem eis in forma præd' exhibuissent, pro allevatione timoris et apprehensionis, et inquietudinis illor', ac ea intentione, quantum in se fuit, pro præservatione personæ Dom' Regis nunc, et gubernation' suæ hujus regni Angl', et religionis Protestan', deder', ac nemine contradicente agreaver' et ordinaver', quod quædam petitio sub nomine ipsor' Majoris, Aldermann', et Commun' civitatis London in Communi Concilio assemblat', dicto Domino Regi nunc exhibita foret; cujus quidem petitionis tenor sequitur in his Anglicanis verbis, videlicet, 'To the king's most excellent majesty: The humble Petition of the lord mayor, aldermen, and commons, of the city of London in common council assembled, most humbly sheweth, That your majesty's great council in parliament, having in their late session, in pursuance of your majesty's direction, entered upon a strict and impartial inquiry into the horrid and execrable Popish Plot, which hath been for several years last past, and still is carried on, for the destruction of your majesty's sacred person and government, and extirpation of the Protestant religion, and the utter ruin of your majesty's Protestant subjects: having so far proceeded therein, as justly to attaint, upon full evidence, one of the five Lords impeached for the same, and were in further prosecution of the remaining four Lords and other conspirators therein: and as well the Lords Spiritual and Temporal, as the Commons in your said parliament assembled, having declared, That they are fully satisfied that there now is, and for divers years last past hath been, a horrid and treasonable Plot and Conspiracy contrived and carried on by those of the Popish religion in Ireland, for massacring the English, and subverting the Protestant religion, and the antient established government of that kingdom: and your said Commons having impeached the earl of Tyrone, in order to the bringing him to justice for the same, and having under examination other conspirators in the said Irish Plot: and your said Commons having likewise impeached sir William Scroggs, chief justice of your majesty's Court of King's-bench, for treason, and other great crimes and misdemeanors, in endeavouring to subvert the laws of this kingdom by his arbitrary and illegal proceedings; and having voted impeachments against several other judges for the like misdemeanors, your petitioners, considering the continual hazards to which your sacred life, and the Protestant religion, and the peace of the kingdom are exposed, while the hopes of a Popish successor give countenance and encouragement to the conspirators in their wicked designs: and considering also the disquiet and dreadful apprehensions of your good subjects, by reason of the miseries and mischiefs which threaten them on all parts, as well from foreign powers, as from the conspiracies within your several kingdoms, against which no sufficient remedy can be provided but by your majesty and your parliament; were extremely surprized at the late prorogation, whereby the prosecution of the public justice of the kingdom, and the making the provisions necessary for the preservation of your majesty, and your Protestant subjects, have received an interruption. And they are the more affected herewith, by reason of the experience they have had of the great progress which the emboldened conspirators have formerly made in their designs, during the late frequent recesses of parliament; but that which supports them against despair is, the hopes they derive from your majesty's goodness, that your intention was and does continue by this prorogation to make way for your better concurrence with the counsels of your parliament. And your petitioners humbly hope, that your majesty will not take offence that your subjects are thus zealous, and even impatient of the least delay of the long-hoped for security, whilst they see your precious life invaded, the true religion undermined, their families and innocent posterity likely to be subjected to blood, confusion, and ruin, and all these dangers encreased by reason of the late endeavours of your majesty and your parliament, which have added provocation to the conspirators, but have had little or no effect towards securing against them; and they trust your majesty will graciously accept of this discovery, and desire of their loyal hearts to preserve your majesty and whatsoever else is dear to them, and to strengthen your majesty against all popish and pernicious counsels, which any ill-affected

'persons may presume to offer:' they do therefore most humbly pray, that your majesty will be graciously pleased (as the only means to quiet the minds, and extinguish the fears of your Protestant people, and prevent the iminent dangers which threaten your majesty's kingdoms, and particularly this your great city, which hath already so deeply suffered for the same) to permit your said parliament to sit from the day to which they are prorogued, until by their counsels and endeavours those good remedies shall be provided, and those just ends attained, upon which the safety of your majesty's person, the preservation of the Protestant religion, the peace and settlement of your kingdoms, and the welfare of this your ancient city, do so absolutely depend; for the pursuing and obtaining of which good effects, your petitioners unanimously do offer their lives and estates, and shall ever pray,' &c. Ac adtunc et ibidem ulterius agreaver' et ordinaver', quod petitio ill', post præsentation' ind' eidem Dom' Regi, impressa foret per talem personam, qual' dictus tunc Major civitat' London præd' appunctuaret; quæ quidem petitio sic fuit imprimi ordinat', ea intentione, quod publicatio falsor' et rumor' et relation' de et concernen' præd' petition' dicto Domino Regi exhibit' evitaretur, inimici Domini Regis, et conspiratores præd', a procedendo in conspiratione sua præd' deterrerentur, perturbationes, quas boni et fideles subditi dicti Domini Regis nunc in animis suis ex causis prædictis concepissent, alleviarentur, et cives et inhabitan' ejusdem civitat' melius scirent quid factum fuisset in dicto Communi Concilio de materia in petitione præd' eidem Communi Concilio, ut præfertur, exhibit' content'. Quodque præd' petitio dicto Dom' Regi sic præsentata great', postea (scil', præd' decimo tertio die Januarii, anno tricesimo secundo supradicto) eidem Dom' Regi humillime præsentat' fuit, videlicet, apud London præd', in prædicta parochia sancti Michaelis Bassishaw, ac postea (scil', decimo quinto die ejusdem mensis Januarii) per Samuelem Roycroft, quem dictus Patient' Ward tunc Major civitat' London ad inde appunctuavit, impressa fuit juxta ordinem præd' in ea parte fact', videlicet, apud London præd', in parochia prædict'; quæ quidem petitio, et impressio inde in forma prædict', et ea ex causa præd' fact', sunt eædem petitio et impressio, et publicatio inde in præd' placito præd' Attorn' Generalis superius replicando placitat' spec': Absque hoc, quod aliqua petitio de vel concernen' prorogation' parliamenti præd' fact', ordinat', publicat', seu impress' fuit, alit' vel alio modo, quam iidem Major et Communitas, ac Cives civitat' London superius allegaver', prout idem Attorn' Generalis pro dicto Domino Rege superius suppon'; et hoc similiter parat' sunt verificare. Unde iidem Major et Communitas, ac Cives civitat' London non intendant, quod ipsi per aliqua præalligat' præd' libertat' privileg' et franchis' fore de seipsis unum corpus corporat' et politicum in re, facto, et nomine, per nomen Majoris et Communitat' ac Civium civitat' London, ac per idem nomen placitare et implacitari, respondere ac responderi, per ipsos superius, ut præfertur, clamat' forisfecer', ac, ut prius, pet' judicium, et quod libertat', privileg', et franchis' ill' eis et successoribus suis in perpetuum deinceps allocentur et adjudicentur, ac quod ipsi, quoad præmiss' ill', ab hac cur' dimittantur, &c.

Et quoad exit' int' Dom' Regem, et Major' et Communitat', ac Cives civitat' London superius in forma præd' junct', idem Attorn' dict' Dom' Regis nunc general' dicit' quod Major et Communitas, ac Cives civitat' London præd', sunt partes Defendentes, vers' quos idem Attorn' dicti Dom' Regis nunc general' prosecut' est information' præd', et ea de causa pet' breve Vicecom' Hertf. (existen' Com' civit' præd' prox' adjacen') dirigend' de Venire fac' coram Dom' Rege duodecim, &c. de vicineto Vill' de Hertf. in Com' præd', quæ quidem Villa de Hertf. in com' præd' est villa et visn' in Com' Hertf. prox' adjacen' civit' London præd'. Et quia præd' Major et Communitas ac Cives civitat' præd' hoc non dedicunt, ideo præcept' est Vic' com' Hertf. præd' quod Venire fac' coram Dom' Rege a præd' die sancti Michaelis in tres septiman' ubicunq; &c. duodecim, &c. de vicineto præd', per quos, &c. et qui, &c. ad recogn', &c. quia tam, &c. Idem dies dat' est tam præfat' Roberto Sayer Miles, qui sequitur, &c. quam prædict' Majori et Communitat', ac Civibus civitat' London prædict', &c. Et præd' Attorn' dicti Dom' Regis nunc general', quoad placitum præfat' Major' et Communitat' ac Civium civitat' London præd' superius rejungendo' placitat', pet' inde diem interloquendi coram dicto Dom' Rege, a die sancti Michaelis in tres septiman' ubicunq; &c. et ei conceditur, &c. idem dies dat' est præfat' Majori et Communitat, ac Civibus civit' London præd', &c. ad quas quidem tres septim' sancti Michaelis coram dicto Dom' Rege apud Westm' venit tam præfat' Robertus Sawyer Miles, qui sequitur, &c. quam præd' Major et Communitas, ac Cives civitat' London præd' per Attorn' suum præd' Et præd' Vic' com' Hertf. non misit inde breve, ideo sicut alias præcept' est Vic' com' Hertf. præd', quod venire fac' coram dicto Dom' Rege in octab' sancti Hilar' ubicunque, &c. duodecim, &c. de vicineto de villa Hertf. præd', &c. per quos, &c. et qui, &c. ad recogn', &c. quia tam, &c. idem dat' est tam præfat' Roberto Sawyer Militi, qui sequitur, &c. quam predic' Majori et Communitat', ac Civibus civitat' London, &c.

Et præd' Attorn' dict' Dom' Regis nunc general', qui, &c. quoad placitum ipsorum Major' et Communitat', ac Civium civitat' præd', quoad confectionem et publicationem legis pro levatione denariorum de personis ad publica mercata infra civitat' præd' tent' cum victualibus et provisionibus ibidem vendend' acceden', ac exactionem et levationem, hujusmodi denar' superius fieri supposit' per ipsos Majorem et Communit', ac Cives, superius rejungendo

placitat', pro eodem Dom' Rege nunc dicit, quod per aliqua per ipsos superius inde allegat' libertat', privileg', et franchis' fore de seipsis unum corpus corporat' et politicum in re, facto, et nomine, per nomen Majoris et Communitat', ac Civium civitat' London, ac per idem nomen placitare et implacitari, respondere ac responderi per ipsos superius, ut præfertur, clamat, eisdem Majori et Communitat' ac Civibus allocari non debent, quia protestando, quod ipsi præd' Major et Communit', ac Cives civitat' London præd' decimo septimo die Septembris, anno vicesimo sexto supradicto, in replicatione præd' mentionat', necnon continue postea, et a tempore cujus contrar' memoria hominum non existit' minime seisit' fuer', seu adhuc seisit' existunt de et in publicis mercatis præd' in dominico suo, ut de feodo, nec per totum idem tempus sumptibus suis propriis providerunt, seu providere consuever' et debuer' sora mercatoria, sive loca ubi hujusmodi mercata tent' fuer' quotiescunq; necesse fuit, stallas, stationes, et alias accommodationes pro personis ad eadem mercata venien' cum victualibus et provisionibus ibidem vendend', pro meliori et magis conveniend' vendition' et exposition' eorundem, prout præd' Major et Communitas, ac Cives superius rejungendo allegaver'; protestandoq; etiam, quod rat' præd' per actum sive ordination' præd', ut præfertur, solvi ordinat' præd', tempore confectionis ordinationis illius, et extunc hucusq; non fuer' rationabiles, nec adhuc rationabiles existunt, prout iidem Major et Communitas, ac Cives superius simuliter allegaverunt. Pro placito tamen idem Attorn' dict' Domin' Regis nunc generalis dicit, quod per quendam actum in parliamento dict' Dom' Regis nunc tent' apud Westmonaster' per separales prorogationes, decimo quarto die Februarii, anno regni dict' Dom' Regis nunc vicesimo secundo (inter alia) inactitat' fuit, ad finem quod apti et commodi loci infra dictam civitat' et libertat' ejusdem, extraposit' et appunctuat' forent pro reædificand' et custodiend' mercata ampliori convenientia, quam antea fuer', ita quod principales stratæ non forent impedit' (Angl' *pestred*) et obstruct' perinde, prout antea consuet' fuit, et quod Regale Excambium, Guild-hall, le Sessions House in le Old Baily, et commun' gaolæ et prisonæ infra præd' civitat' forent amplificat' et fact' magis commoda pro publicis usu et ornament' Civitatis' et melius securitand' a periculo et casualitate conflagrationis, et quod aliquæ convenien' distantiæ, intervall' et circuitus fundi forent relict' inter Regal' Excambium, et alias domos ædificand' infra civitat' præd', quod Major, Aldermanni, et Commun' civitat' præd' in Commun' Concilio assemblat' impenderent (Ang' *should and might employ*) et per actum præd' authoritat' fuer' impendere talia loca et portion' fundi infra Civitat' præd' et libertat' ejusdem, prout per et cum dicti Dom' Regis nunc approbation' tunc fuer', vel ante decimum diem Martii, millesimo sexcentesimo sexagesimo nono, forent extraposit' et adjudicat' necessar' et convenien', tam pro publicis mercatis ibidem, quam etiam pro ornamento, amplificatione, et convenien' præd' Regal' Excambii, et aliorum locorum præmentionat', et cujuslibet vel alicujus eorundem respective, et ad intention', quod rationabilis satisfactio dat' foret proprietar', et aliis habent' aliquem statum sive intercesse in fundis et locis, quæ fuissent vel forent extraposit', capiend', et occupand' pro publicis locis mercatoriis, præd' Major, Aldermann', et Commun', per ipsos, vel alios in ea parte fore appunctuat' et authorizat', tractarent et agrearent cum proprietar' et al' interessat' in eisdem, et in casu voluntariæ recusationis, sive alicujus talis inhabilitatis, sive impediment' qual' in quodam al' actu parliamenti in eodem actu specificat', pro re-ædificatione civitat' London, nuper antea fact', mentionat' fuer', seu alius incapacitat' cujuscunq; in proprietar' inde, vel al' interessat' in eisdem, ad tractand' et agreand', præd' Major et cur' Alderman' forent et fuer' per actum præd' authorizat' et requisit' causare jur' fore impannellat' in tal' modo et forma, prout per actum præd' direct' et appunctuat' fuit, ita quod null' duo jur' præd' sic fore impannellat, venirent ex una et eadem warda, adjudicare et assidere qual' compensation', et satisfaction' in quibuslibet casibus præd' forent adjudicat', et dat' respectivis proprietar', et aliis interessat' in fundis et locis sic extraposit' capiend' et occupand' pro aliquibus usibus vel propositis, ut præfertur, in prosecutione ejusdem actus, secundum tal' eorum respectivos status et interess'. Et ulterius inactitat' fuit, quod pro omnimodis carbonibus, quæ ab et post primum diem Maii, millesimo sexcentisimo et septuagesimo, et ante vicesimum nonum diem Septembris, qui foret in anno Dom' millesimo sexcentesimo octogesimo septimo, forent importat' et adduct' in præd' portum civitat' London, seu rivum Thamesis, infra libertat' civitat' præd' super eundem rivum, solut' foret per viam impositionis superinde, secund' ratas postea mentionat' (videl') pro omnibus tal' carbonibus, qual' ibi importat' et induct' forent ab et post primum diem Maii, millesimo sexcentesimo et septuagesimo, et ante vicesimum quartum diem Junii, millesimo sexcentesimo septuagesimo septimo, solut' foret pro qualibet celdar' seu tonna inde duos solidos ultra imposition', duodecim denar' pro celdar' seu tonna per præd' actum pro re-ædificatione civitat' London appunctuat' solvend', et pro omnibus tal' carbonibus, quæ ibidem importat' et induct' forent ab et post prædict' vicesimum quartum diem Junii, millesimo sexcentesimo septuagesimo septimo, et ante præd' vicesimum nonum diem Septembris, millesimo, sexcentesimo octogesimo septimo, solut' forent pro qualibet celdar' sive tonna inde tres solidos; et iidem, vigore actus præd', forent collect', levat' et solut' in tali forma et modo, in omni et quolibet respectu, prout in et per præd' priorem actum fuit limitat' et appunctuat' pro collectione et levatione debit' duodecim denar' pro celdar' sive tonna carbonum imposit' per priorem actum præd', et omnes et quælibet po-

testat', authoritat', directiones, et provision' in vel per præd' priorem actum mentionat', vel provis' pro levatione et collectione inde: Omnesque quidem denar' sic recipiend', super comput' præd' respectivarum imposition', seu earum ulterius de tempore in tempus forent solut' in receptu Cameræ civitat' London, et abinde forent emanat' et solut' secundum directionem et appunctuation' præd' actus de anno vicesimo secundo supradicto, et non aliter; et præd' Camera civitat' London staret et onerat' foret cum toto resid' denar' praed' ibidem solut', qui non sic emanat' forent et solut'. Et ulterius inactitat' fuit, quod omnes et quaelibet summa et summae monet', quae levat' foret super reception' separal' et respectivarum imposition' praed', sive per tal' additional debit' in casu concealament' inde, prout per praed' priorem actum appunctuat' fuit, foret occupat' et disposit' modo et forma sequen', (videl') una quarta pars omnium denarior', quae ab et post praed' primum diem Maii, millesimo sexcentesimo et septuagesimo et ante praed' vicesimum quartum diem Junii, millesimo sexcentesimo septuagesimo septimo, forent levat', sive solubil' super reception' præd' imposition' duorum solid' pro qualibet celdar' vel tonna, carbonum, seu in casu concealament' inde, ut præfertur, foret occupat' et disposit' pro et erga satisfaction' pro fundis extraposit' et occupat' pro amplificatione stratarum, confection' wharfarum et portuum, publicorum mercatorum locorum, et aliorum publicorum usuum, tam in actu ill', quam in actu prærecitat', mentionat', et appunctuat', et quod una medietas omnium denar', qui ab et post vicesimum quartum diem Junii, millesimo sexcentesimo septuagesimo septimo, forent levat' seu solubil' super præd' imposit' trium solid' pro celdar' vel tonna carbonum, de tempore in tempus foret occupat' et disposit' pro satisfactione pro fundo extraposit', et occupat', ut præfertur, et tal' al' publicis usibus et proposit', qual' in actu ill', et in actu prærecitat' fuer' mentionat' et appunctuat', prout per eundem actum de anno vicesimo secundo supradicto (inter al') plenius liquet et apparet. Et præd' Attorn' dict' Dom' Regis nunc general', qui, &c. pro eodem Dom' Rege nunc ulterius dicit, quod virtute actus illius iidem Major et Communitas, ac Cives civitat' London præd', ante confectionem et publicationem legis præd', scilicet, primo die Septembris, anno regni dicti Dom' Regis nunc vicesimo sexto supradicto, apud London præd', in parochia et warda præd', habuer' et receper' pro debito et vectigali præd' de duobus solidis pro qualibet celdar' sive tonna carbonum in civitat' London sive portum ejusdem importat', ingent' denariorum summam ad proposita præd'. Et ulterius idem Attorn' Dom' Regis nunc general', qui, &c. pro eodem Dom' Rege nunc dicit, quod Major et Communitas, ac Cives civitat' London, absque aliquo jure, titulo, sive authoritat' quibuscunque, præmissis præd' non obstantibus, præd' die Jovis, scilicet, præd' decimo septimo die Septembris, anno regni dicti Dom' Regis nunc vicesimo sexto supradict', in eorum Commun' Concilio adtunc tent' in camera Guildhall civitat' London præd', videlicet, in parochia sancti Michaelis Bassishaw London insimul assemblat', fecer', consider', et publicaver' præd' legem per ipsos de facto inactitat', pro levatione separal' denar' summar' præd', de omnibus subditis ac ligeis Dom' Regis nunc, tam liberis quam non liberis hominibus civitat' præd', et aliis extraneis ad publica mercat' infra civit' praed', tent' acceden' cum victual' et provisionibus suis ibidem vendend', ac easdem separal' denar' summas, sub solo colore et prætextu legis præd' sic per ipsos, pro eorum privato lucro et commodo, illegaliter fact', et absque aliquo alio jure, titulo, sive authoritat' quibuscunque, per præd' spatium septem annorum post præd' decimum septimum diem Septembris, anno vicesimo sexto supradicto prox' sequen', et amplius, apud London præd', in parochia præd', de omnibus dict' Dom' Regis ligeis et subditis ad præd' publica mercata, per totum tempus præd', infra civitat' præd' tent', cum victual' et provisionibus ibidem vendend' accedentibus, exeger' et levaver', et exigi et levari fecer', et denar' ill' ad eorum proprios usus converterunt et disposuerunt, in subversion' boni regiminis et gubernation' civitatis præd', et in magnum oppression' et depauperation' omnium dicti Dom' Regis nunc ligeorum, ad mercata præd' cum victualibus et provisionibus suis acceden' et venien', ad grave dampnum et nocumentum omnium ligeorum et subditorum dicti Domini Regis, in augmentation' preciorum omnium victual' et provision' in mercata præd' vendit', ac in dicti Domini Regis nunc et coronæ suæ Regiae exhaeredationem manifestam, ac contra fiduc' in ipsis, ut corpore corporat' et politic', per Dom' Regem ac leges hujus regni Angl' reposit', prout praed' Attorn' dict' Dom' Regis nunc generalis pro eodem Dom' Rege nunc superius replicando allegavit; absque hoc, quod praed' Major et Communitas, ac Cives civitatis London, a tempore cujus contrar' memoria hominum non exigit, habuer', seu habere consuever' tolnet', ratas, sive denar' summas per ipsos Majorem et Communitat' ac Cives civitat' praed', superius supposit' fore per praefat' legem sive ordination' praed' assess', et in certitudinem reduct', prout per placitum ipsorum Majoris et Communitat', ac Civium civitat' London praed' superius rejungendo supponitur. Et hoc idem Attorn' General' pro eodem Dom' Rege nunc parat', est verificare; unde et ex quo iidem Major et Communitas, ac Cives, libertat', privileg' et franchis' praed' fore de seipsis corpus corporat' et politicum, ex causa praed' forisfecer', idem Attorn' General', ut prius, pro eodem Dom' Rege nunc pet' judicium, et quod praed' Major et Communitas, ac Cives civitat' London praed', de praemissis convincantur, ac de libertat', privileg' et franchis' ill' abjudicentur et excludantur, &c.

Et quoad placitum præfat' Majoris et Communitat' ac Civium civit' London præd' superius rejungendo placitat', quod resid' præd' placiti præfat' Attorn' general', in assign' foris-

actur', ut præfertur, superius replicando placitat' idem Attorn' dict' Dom' Regis nunc general', protestando, quoad præd', prorogatio dicti parliamenti per præfat' Dom' Regem fuit pro diversis necessar' et urgentibus causis, bonum et utilitatem dicti Dom' Regis et regni sui concernen', et secundum veram et indubitat' prærogativam et potestatem dicti Dom' Regis nunc; et per eandem prorogationem prosecutio publicæ justitiæ regni, et præparationis (Angl' *the making Provisions*) necessar' pro præservation' dict' Dom' Regis, et ejus subditorum Protestantium, non recepissent obstructionem (Angl' *Interruption*) prout per petitionem præd' per vota et suffragia præfat' Majoris et Communitat', ac Civium civitat' præd' in dicto Communi Concilio assembl't', sic ut præfertur ordinat' false et malitiose allegatur; pro placito tamen idem Attorn' general' pro eodem Dom' Rege nunc dic', quod placitum præfat' Majoris et Communit', ac Civium civitat' London præd' superius rejungendo in ea parte placitat', materiaque in eodem content' minime sufficien' in lege existunt ad ipsos Majorem et Communit', ac Cives civitat' præd' ad clamand' libertat', privileg', et franchis' præd', fore de seipsis corpus corporat' et politicum in re, facto, et nomine, per nomen Majoris et Communit', ac Civium civ' London præd', ac per idem nomen placit' et implacit', recip' et responderi, sibi allocand', seu adjudicand' manuten', Quodq; ipse idem Attorn' gener' ad placitum ill' modo et forma præd' placitat' pro eod. in Dom' Reg' nunc necesse non habet, nec per legem terræ tenetur aliquo modo respondere. Et hoc idem Attorn' dict' Dom' Regis nunc general' pro eodem Dom' Rege nunc parat' est verificare. Unde pro defectu sufficien' placiti ipsorum Majoris et Communitat', ac Civium civitat' præd' in hac parte idem Attorn' dicti Dom' Regis nunc general' pro eodem Dom' Rege nunc, ut prius, pet' judicium, et quod præd' Major et Communitas, ac Cives civitat' London præd' de præmissis convincantur, et de libertat', privileg', et franch' ill' adjudicentur et excludantur, &c.

Et præd' Major et Communitas, ac Cives civit' præd', quoad moration' in lege præfat' Attorn' dic' Dom' Regis nunc generalis, quoad præd' placitum ipsor' Major' et Communitat', ac Civium civitat' London superius rejungendo placit' quod præd' resid' præd' placiti dic' Attorn' general' in assign' forisfactur', ut præfertur, superius replicando placitat', ex quo ipsi. sufficien' materiam in lege in eod' placito suo ad ipsos Majorem et Communitat', ac Cives civitat' London ad clamand' præd' libertat' privileg', et franchis' fore de seipsis unum corpus corporat' et politicum in re, facto, et nomine, per nomen Major' et Communitat', ac Civium civitat' London, ac per idem nomen placitare et implacitari, respondere ac responderi per ipsos superius clamat', eis allocand' et adjudicand' manutenend' superius allegaver', quam ipsi parat' sunt verificare, quam quid' materiam præd' Attorn' dic' Dom' Regis nunc general', pro eodem Dom' Rege non dedicit, nec ad eam aliqualit' respond' sed verification' ill' admittere omnino recusat, ut prius, pet' judicium. Et quod libertat', privileg', et franchis' ill' eis et successoribus suis deinceps allocentur et adjudicentur, et quod ipsi, quoad præmiss' ill', ab hac curia dimittantur, &c.

Et quoad præd' placit' præd' Attorn' Dom' Regis nunc general' pro eod' Dom' Rege, quoad confection' et publication' legis pro levatione denar' de person' ad publica mercata infra civit' præd' tent' cum victual' et provisionibus ibidem venend' acceden', ac exaction' et levation' hujusmodi denar' superius fieri supposit' superius rejungend' placitat', iidem Major et Communitas, ac Cives civit' præd' (ut prius) dicunt, quod Major et Communitas, ac Cives civit' London præd' a tempore cujus contrar' memor' hom' non existit, habuer', et habere consuever', rationabil' tolnet' ratas, sive denar' summas de omnibus person' ad mercat' præd' cum victual' et provision' ibidem venend' tenend' pro stallis, stationibus, et al' accommodation' per eas pro vendition', expositione hujusmodi victual' et provision' in mercat' ill' habit', et de hoc pon' se super patriam.

Et præd' Robertus Sawyer Mil', Attorn' dic' Dom' Regis nunc general', qui pro eod' Dom' Rege in hac parte sequitur, dic', quod placitum præd' præfat' Major' et Communitat', ac Civium civit' London præd' superius repellando placitat', materiaque in eod' content' minus sufficien' in lege existunt ad ipsos Major' et Communitat', ac Cives civit' praed' ad clamand' libertat', privileg', et franchis' praed', fore de seipsis unum corpus corporat' et politicum in re, facto, et nomine, per nomen Major' et Communitat', ac Civium civitat' London praed', ac per idem nomen placitare et implacitari, respondere et responderi sibi allocand' seu adjudicand' manutenend', ad quod quidem placitum modo et forma praed' placitat' idem Attorn' dic' Dom' Regis nunc general' necesse non habet, nec per legem terrae tenetur aliquo modo respondere pro eo' quod idem Major et Communitas, ac Cives civit' praed' non ostender' quanta vel qualia tolnet', ratas, sive denar' summas iidem Major et Communitas, ac Cives civit' London praed', a tempore cujus contrar' memor' hominum non existit', habuer', nec allegaver' quod ipsi unquam habuer' tolnet', rat', sive denar' summas per ipsos superius supposit' fore per legem suam praed' fore reduct' in certitudinem; et hoc idem Attorn' dic' Dom' Regis nunc general' pro eodem Dom' Rege parat' est verificare; unde pro defectu sufficien' placiti praed' in hac parte, idem Attorn' dic' Dom' Regis nunc general' pro eodem Domino Rege, ut prius, pet' judicium et quoad praed' Major et Communitas, ac Cives civitat' London praed' de praemiss' praed' in placit' praed' convincantur, et de libertat', privileg', et franchis' ult' supradict' penitus excludantur et abjudicentur, &c.

Et præd' Major et Communitas, ac Cives civitat' London præd' petunt licentiam inde interloquend' coram Dom' Rege usque in octab' sancti Hilar', ubicunque, &c. et eis

conceditur. Idem dies dat' est praefat' Attorn' dic' Dom' Regis nunc general', &c. Et praed' Attorn' dic' Dom' Regis nunc general', qui pro eod' Dom' Rege in hac parte sequitur, quoad placitum praefat' Majoris et Communitat', ac Civium civitat' London praed', quoad libertat', privileg', et franchis' praed', per ipsos superius clamat', videlicet, ipsos habere Vicecom' civit' et com' civit' London, et Vicecom' com' Midd', et nominare et eligere ex seipsis duas person' fore Vic' civit' praed', et com' ejusdem civit', et Vic' com' Midd', ac ill' sic nominat' et elect' praeficere et constituere Vic' civit' praed', et com' ejusdem civit' et Vic' com' Midd' ac ut Vic' civit' praed', et com' ejusdem civit', de execution' et retorn' omnium brevium, billarum, et praeceptorum Dom' Regis pro administratione justitiae infra civit' praed', et com' ejusdem civit' exequend' et faciend' quae ad officium Vic' faciend' pertinent, et ad faciend' et exequend' omnia et singula alia infra civit' praed', et com' ejusdem civit' quae ad officium Vic' faciend' pertinent, ac ut Vic' com' Midd' pro eodem com' deservitur, ac omnia brevia, billas, et praecept' Dom' Regis infra com' Midd' praed', pro administratione et executione justiciae ibidem exequend', et retorn' inde faciend' quae ad officium Vic' faciend' pertinent superius placitat'; necnon quoad placitum praefat' Major' et Communitat', ac Civium civitat' London praed', quoad libertat', privileg', et franchis' per ipsos superius clamat', videlicet, Major dic' civitat', et hujusmodi Alderman' ejusdem civitatis, qui officium Majorat' civit' ill' sustinuer', ac inde fuer' dimissi, ac tres Alderman' senior' civit' praed' qui diutius in offic' Alderman' civit' praed' steter', et onus et officium Majorat' civit' praed' non sustinuer', fore Justic' Dom' Regis ad pacem infra civit' praed' conservand', ac ad session' pacis et placita coron', scilicet, tal' placita coron', qual' Justic' Dom' Regis ad pacem conservand' assign' legitime tenere possent infra eand' civitat' tenend' ac ad omnia felon', riot', rout', et conventicul' illicit' infra civit' praed' inquirend', audiend', et terminand' superius placitat', idem Attorn' dic' Dom' Regis nunc general', qui pro eodem Dom' Rege in hac parte sequitur, petit ulterius licenc' inde inter eloquend' coram Dom' Rege usque octab' sancti Hilarii, et ei conceditur, &c. Idem dies dat' est praefat' Majori et Communitat', ac Civibus civitat' London praed', &c. Et quoad materiam in lege, unde tam praed' Attorn' dic Dom' Regis nunc general', quam praed' Major et Communitas, ac Cives civitat' praed' posuer' se in judic' cur'; sed quia cur' dic' Dom' Regis nunc hic de judic' suo de et super praemissis reddend' nondum advisatur, dies inde dat' est tam praefat' Roberto Sawyer Mil', Attorn' dic' Dom' Regis nunc general', qui pro eodem Dom' Rege in hac parte sequitur, quam praed' Major' et Communitat', ac Civibus civitat' London, &c. coram Dom' Rege in praed' octab' sancti Hilar', ubicunque, &c. de judic' suo inde audiend', eo quod cur' Dom' Regis hic nondum, &c.

Ad quam quidem octab' sancti Hilar' coram Dom' Rege apud Westm', ven' tam praefat' Robertus Sawyer Mil', qui sequitur, &c. quam praed' Major et Communitas, ac Cives civitat' London praed', per Attorn' suum praed'. Et praed' Major et Communitas, ac Cives civitat' London praed', ex quo ipsi sufficien' materiam in lege in placito suo praed' superius repellando placitat' ad ipsos Majorem et Communitat', ac Cives civitat' London ad clamand' libertat', privileg', et franchis', fore de seipsis unum corpus corporat' et politicum in re, facto, et nomine, per nomen Majoris et Communitat', ac Civium civitat' London, ac per idem nomen placitare et implacitari, respondere ac responderi per ipsos superius clamat', eis allocand' et adjudicand' manutenend' superius allegaver', quam ipsi parat' sunt verificare; quam quidem materiam praed' Attorn' dic' Dom' Regis nunc general' pro eodem Dom' Rege non dedic', nec ad eam aliqualit' respond', sed verification' ill' admittere omnino recusat, ut prius, pet' judic', et quod libertat', privileg', et franchis' ill' eis et successoribus suis in perpetuum deinceps allocentur et adjudicentur, et quod ipsi, quoad praemiss' ill', ab hac cur' dimittantur, &c. Et praed' Attorn' dic' Dom' Regis nunc general', qui pro eodem Dom' Rege in hac parte sequitur, quoad exit' praed' int' praed' Dom Regem et praefat' Major' et Communitat', ac Cives civitat' London per patriam triand' superius junct', et quoad libertat', privileg', et franchis' praed' per ipsos superius clamat', videlicet, ipsos habere Vic' civit' et com' civit' London, et Vic' com' Mid', et nominare et eligere ex seipsis duas person' fore Vic' civit' praed', et Com' ejusdem civit', ac Vic' com' Midd', ac illas sic nominat' et elect' praeficere et constituere Vic' civit' praed' et com' ejusdem civitat', et Vic' com' Midd' ac ut Vic' civit' praed' et Com' ejusdem civit' et execution' et retorn' omnium brevium, billarum, et praeceptor' Dom' Regis pro administratione justiciae infra civit' praed', et com' ejusdem civit' exequend', et faciend' quae ad officium Vic' faciend' pertinent, ac ad faciend' et exequend' omnia et singula al' infra civit' praed' et com' ejusdem civit', quae ad officium Vic' faciend' pertinent, ac ut Vic' com' Midd' pro eodem com' deservitur', ac omnia brevia, billas, et praecept' Dom' Regis infra com' Midd' praed' pro administratione et executione justiciae ibidem exequend', et retorn' inde faciend' quae ad officium Vic' faciend' pertinent superius placitat', necnon quod libertat', privileg', et franchis' per ipsos superius clamat', videlicet, Majorem dic' civitat', et hujusmodi Alderman' ejusdem civitat', qui officium Majorat' civitat' illius sustinuer', ac inde fuer' dimissi, ac tres Alderman' sen' civitat' praed', qui diutius in officio Alderman' civit' praed' steter', et onus et officium Majorat' civit' praed' non sustinuer', fore Justiciat' Dom' Regis ad pacem infra civit' praed' conservand', ac ad session' pacis et placita coron', scilicet', tal' placita coron', qual' Justic' Dom' Regis ad pacem conservand' assign' legitime tenere possent

infra eandem civit' tenend', ac ad omnia felon', riot', rout', et conventicul' illicit' infra civit' præd' inquirend', audiend', et terminand' superius placitat' dic', quod ipse pro eodem Dom' Rege in ea parte ulterius prosequi non vult versus praefat' Majorem et Communitat', ac Cives civitat' London praed'.

Ideo cons' quod præfat' Major et Communitas, ac Cives civitat' London præd', quoad exit' int' præd' Dom' Regem, et præfat' Majorem et Communitat', ac Cives civitat' London præd', per patriam triand' superius junct', et quoad libertat', privileg', et franchis' præd' per ipsos superius clamat', videlicet', ipsos habere Vicecom' civit' et com' civit' London, et Vic' com' Midd', et nominare et eligere ex seipsis duas personas fore Vic' civit' præd' et com' ejusdem civit', et Vic' com' Midd', ac ill' sic nominat' et elect' præficere et constituere Vic' civit' præd' et com' ejusdem civit', et Vic' com' Midd', ac, ut Vic' com' civit' præd' et com' ejusdem, ad execution' et retorn' omnium brevium, billarum, et præceptor' Dom' Regis pro administratione justitiæ infra civit' præd' et com' ejusdem civit', exequend' et faciend' que ad officium Vic' faciend' pertinent, ac ad faciend' et exequend' omnia et singula al' infra civit' præd', et com' ejusdem civitat', quæ ad officium Vic' faciend' pertinent, ac ut Vic' com' Midd' pro eodem com' deservitur', ac omnia brevia, billas, et præcepta Dom' Regis infra com' Midd' præd', pro administratione et executione justitiæ ibidem exequend, et retorn' inde faciend, quæ ad officium Vic' faciend' pertinent superius placitat', necnon quoad libertat', privileg', et franchis' per ipsos superius clamat', videlicet, Majorem dic' civit', et hujusmodi Alderman' ejusdem civitat', qui officium Majorat' civit' ill' sustinuer', ac inde fuer' dimissi, ac tres Alderman' sen' civit' præd', qui diutius in offic' Alderman' civitat' præd' steter', et onus et officium Majorat' civit' præd' non sustinuer', fore Justiciar' Dom' Regis ad pacem infra civit' prædict' conservand', ac ad session' pacis et placita coron', scilicet, talia placita coron', qual' Justic' Dom' Regis ad pacem conservand' assign' legitime tenere possint infra eandam civit' tenend' ac ad omnia felon', riot', rout', et conventicul' illicit' infra civit' præd' inquirend', audiend', et terminand' superius placitat', eant inde sine die, salvo jure Dom' Regis, si al', &c. Et quoad dic' separal' materias in lege, unde tam præd' Attorn' dic' Dom' Regis nunc general', quam præd' Major et Communitas, ac Cives civitat' præd', posuer' se in judic' cur', sed quia cur' dic' Dom' Regis nunc hic de judic' suo de et super præmiss' reddend' nondum advisatur, dies inde dat' est tam præfat' Roberto Sawyer Mil', Attorn' dic' Domini Regis nunc general', qui pro eodem Domino Rege in hac parte sequitur, quam præd' Major' et Communitat', ac Civibus civitat' London, &c. coram Domino Rege a die Paschæ in quindecim dies, ubicunque, &c. de judicio suo inde audiend' eo quod cur' dic' Domini Regis hic nondum, &c. Ad quem quid' quinden' Paschæ coram Domino Rege apud Westm' ven' tam præfat' Robertus Sawyer Mil', Attorn' dict' Domini Regis nunc general', qui pro eodem Dom' Rege in hac parte sequitur, quam præfat' Major et Communitas, ac Civit' London præd' per Attorn' suum præd', sed quia cur' dic' Domini Regis nunc hic de judicio suo de et super præmiss' reddend' nondum, ad visatur, dies inde ulterior dat' est tam præfat' Roberto Sawyer Mil', qui sequitur, &c. quam præfat' Majori et Communitat', ac Civib' civitat', London præd' coram Domino Rege in crastin' Sanctæ Trinitat', ubicunque, &c. de judicib suo superinde audiend', &c. eo quod cur' Domini Regis hic nondum, &c. Ad quod quidem crastin' Sanctæ Trinitat', coram Domino Rege apud' Westm' ven' tam præfat' Robertus Sawyer Mil', Attorn' Domini Regis nunc general', qui pro eodem Domino Rege in hac parte sequitur, quam præd' Major et Communitas, ac Cives civit' London præd' per Attorn' suum præd'; et idem Attorn' dic' Domini Regis pro eodem Domino Rege pet' judic' versus præd' Major' et Communitat', ac Cives civit' London præd' in præmis' reddend', quod dic' libertat', privileg', et franchis' fore de seipsis unum corpus corporat' et politicum in re, facto, et nomine, per nomen Majoris et Communitat', ac Civium civitat' London, ac per idem nomen placitare et implacitari, respondere et responderi per ipsos superius clamat', capiantur in manus Domini Regis nunc, sup' quo, pro eo quod videtur cur' hic, quod præfat' Major et Communitas, ac Cives civit' præd', forisfecer' Domino Regi nunc libertat', privileg', et franchis' præd', ob causas in replicatione præfat' Attorn' general' superius specificat'; quodque placita præfat' Majoris et Communitat', ac Civium civitat' London præd' superius rejungendo et repellendo in ea parte placitat', materiaque in eisdem content', minus sufficien' et invalida in lege existunt ad præcludend' dict' Dom' Regem a forisfactur' præd', aut ad ipsos Majorem et Communitat', ac Cives civit' præd', ad clamand' libertat', privileg', et franchis' præd', sibi allocand' et adjudicand', manutenend', maturaque deliberatione superinde prius habit'.

Cons' est, quod libertat', privileg', et franchis' præd' fore de seipsis unum corpus corporat' et politicum in re, facto, et nomine, per nomen Majoris et Communitat', ac Civium civit' London, ac per idem nomen placitare et implacitari, respondere ac responderi, per eosdem Majorem et Communitat', ac Cives civit' London præd' superius clamat', capiantur et seisiantur in manus Domini Regis, et quod præfat' Major et Communitas ac Cives civit' London præd', capiantur ad satisfaciend' dic' Domini Regi de fine suo pro usurpatione libertat', privileg', et franchis' præd'.

"This judgment was given in 1683, but no execution ever issued; and it appears by the statute of 2 W. and M. st. 1, c. 8, either that the city continued in the actual enjoyment of

their franchises in the same manner as if no judgment had been given, or that a new charter conferring either the same or similar privileges had been granted by Charles the second or James the second.—In the 1 W. and M. an act passed, by which it was enacted, that if any person then having any office or employment, civil or military, should neglect or refuse to take the oaths thereby appointed to be taken, in such manner as by that act is directed, before the 1st of August, 1689, the office or employment of every person so neglecting or refusing should be void.—In 1690, the statute of 2 W. and M. st. 1, c. 8, was made, by which, after reciting among other things, 'That judgment had been given on an information in the nature of Quo Warranto, exhibited in the Court of King's-bench against the mayor and commonalty and citizens of the city of London, that the liberty, privilege, and franchise of the said mayor and commonalty and citizens, being a body politic and corporate, should be seized into the king's hands as forfeited;' it is enacted, 'That the said judgment, and all and every other judgment given or recorded in the said court, for seizing into the king's hand the liberty, privilege, or franchise of the mayor and commonalty and citizens of the city of London, of being of themselves a body politic and corporate, &c. shall be reversed, annulled, and made void.'

"This statute abrogates any charters that may have been made and granted to any persons constituting the corporation of the city, or any of the fraternities within it; but ratifies all proceedings in law or equity under such new charters, indemnifies the persons and officers acting under them; confirms all leases made under proper restrictions, and the freedom of every person obtained in any of the companies in the interval between the judgment and the reversal; directs that all the annual magistrates then actually in office shall continue till a new election of such annual magistrates, the time for which is appointed by the act; but if no new election should take place at that time, directs that they shall continue till the ordinary and customary time for elections, when all officers and magistrates shall be chosen as usual; and enacts, 'That all officers and ministers of the said city, that rightfully held any office or place in the said city, or liberties thereof, or in the borough of Southwark, at the time when the said judgment was given, shall be confirmed and shall have and enjoy the same as fully as they held them at the time of the said judgment, except such as have voluntarily surrendered any such office or place, or have been removed for any just cause.' Then it enacts that all persons so to be restored and continued shall take the oaths appointed to be taken by 1 W. and M. next term after such restitution.

"The session of parliament in which the st. 1 W. and M. was passed, began 13th of February, 1688.

"Sir James Smith was an alderman of the city at the time when this judgment was given, in the Quo Warranto; he did not take the oaths prescribed by this statute before the 1st of August, 1689; for which reason he was in point of fact, removed from the office of alderman by those who exercised the functions of the corporation, as it seems, some time before the statute for reversing the judgment. In consequence of that statute, sir James Smith, in 1691, brought a mandamus to be restored.

"The defendants returned, 'That sir James Smith, on the 13th of February, 1688, was one of the aldermen of the city of London, to that place and office, before that time, duly elected and preferred, according to the custom of the said city, and from the said 13th of February, 1688, to the 1st of August following, remained one of the aldermen; but that at any time before the said 1st of August he had not taken the oaths prescribed by 1 W. and M. but to take the same, before the said 1st of August, had altogether neglected; whereby, and by virtue of the said act, the said office became void; and that the said sir James Smith, at any time after this neglect, was never elected into the office of one of the aldermen; and therefore they could not restore him.'

"Though, in this return, no notice is taken of the judgment against the city, yet the effect of the latter was made, at first, the principal subject of discussion. The obligation on sir James Smith to take the oaths, it was said, depended on the question, 'Whether he was an alderman at the time when the statute requiring them was made?' If he was an alderman, the defendants had returned a good cause for not restoring him. If he was not an alderman, then he was not bound to take the oaths before the 1st of August, 1689, and consequently, by virtue of the act for reversing the judgment against the city, he was intitled to reassume the office he had held before that judgment was pronounced. But this question, whether he was an alderman or not, depended on the effect of the judgment: if by that the corporation was dissolved, he was not an alderman at the time when the oaths were to be taken; if the corporation was not dissolved, he was an alderman, and ought to have taken the oaths; not having taken them, he was removed for just cause, and consequently was within the exception of the act for reversing the judgment.—But after the case had been argued several times, it was discovered, that no notice being taken of the judgment in the return, the former could not be considered by the Court, and that, had the act for the restitution of the city not been made, the only question would have been on sir James Smith's neglect to take the oaths. But this act being a general law, the Court were bound to take notice of it, which they actually did, and made the question of sir James being an alderman or not, depend not on the effect of the judgment as really entered on the record, but as

recited in the act.—On the general question, whether a corporation could be dissolved by judgment for a forfeiture, the Court all agreed that it might, though they differed as to the proper form of such a judgment. They all agreed, however, that it was not dissolved by the judgment as recited in the act; which was, 'That the liberty, franchise, and privilege of the city of London, being a body politic, &c. should be seized.' Here the word 'of' being omitted before the word 'being,' the judgment was not against the corporate existence of the city, but against the franchises it enjoyed: and Holt said, 'That a corporation might subsist after its franchises were taken away; for that these were not essential to it, but only a privilege appertaining to it; that the essence of a corporation was to make by-laws, and govern their members, which they might do though their franchises were seized.'" 2 Kyd p. 512.

See this Case of sir James Smith in 4 Mod. 52. 1 Show. 263, 274. Carth. 217. Skin. 293, 310, 312. Holt. 168, 310. 12 Mod. 17. Tremaine, p. 511, gives the Return to the Mandamus as follows:

Mandamus pro Smith.

Respons' Majoris et Aldermanor' civitat' London infranominat' huic brevi patet in quadam Schedul' huic brevi annex'.

Nos Major et Alderman' civitat' London serenissimis Dom' Regi et Domine Regine Cur' ipsor' Regis et Regine coram ipsis Rege et Regina humillime certificamus quod Jacobus Smith Miles inbrevi huic Schedul' annex' nominat' tertio decimo die Februarii Anno Dom' millesimo sexcentesimo octogesimo octavo fuit un' Alderman' civit' pred' ad locum et officiu' illud secund' consuetud' civitat' antetunc debite electus et p'fectus Et ab eodem decimo tertio die Februarii Anno Domini millesimo sexcentesimo octogesimo octavo supradicto usque ad primum diem Augusti tunc prox' sequen' sic un' Alderman' civit' pred' remansit sit et continuavit Quodque pred' Jacobus Smith tempore ediconis cujusdam Actus fact' in Parliamento Dom' Regis et Dom' Regine nunc tent' apud Westm' in Com' Midd' Anno Regni sui primo scilicet 13° die Febr' Anno Regni sui primo Intitulat' 'An act for abrogating of the oaths of Supremacy 'and Allegiance, and appointing other oaths', et continue extunc usq; pred' primu' diem Augusti Anno Dom' 1689. pred' locum et officiu' un' Aldermanor' civit' pred' habuit et occupavit Quodq; pred' Jacobus Smith ad aliquod tempus ante pred' primum diem Augusti Anno Dom' millesimo sexcentesimo octogesimo nono supradicto non cepit sacr'a Anglice 'did not take the oaths' per eundem Actum appunctuat' fore capiend' sed sacr'a ill' capere ante pred' primu' diem Augusti Anno Dom' millesimo sexcentesimo octogesimo nono supradicto penitus omisit et neglexit per quod vigore actus p'd' pred' officiu' et locum unius Aldermanor' civitat' pred' penitus vacuum de venit Quodq; pred' Jacobus Smith ad aliquod tempus post omission' et neglect' pred' non fuit elect' in officiu' un' Aldermanor' civit' pred' Et ea de causa nos prefat', Major et Aldermani illum pred' Jacobum Smith in locum sive officiu' pred' restituere non possumus.

Respons' Major' Aldermanor' et civitat' London.

The Arguments upon this Return are in first Show. 263, and 4 Mod. 53. It was adjudged a good Return, and the Court would not grant any peremptory Mandamus.

Tremaine also gives, p. 512, the following Return of the Mayor, &c. of London to a Mandamus granted in the Case of sir Jacob Edwards:

Mandamus pro Edwards.

Respons' Majoris et Aldermanor' civitat' London infranominat' huic brevi patet in quadam Schedul' huic brevi annex'.

Nos Major et Aldermani civitat' London serenissimis Dom' Regi et Dom' Regine in Cur' ipsor' Dom' Regis et Dom' Regine coram ipsis Rege et Regina apud W. humillime certificamus qd' per quendam Actum in Parliamento ipsor' Dom' Regis et Dom' Regine nunc apud Westm' in Com' Midd' vicesimo die Martii Anno Regni sui secundo tent' edit' et p'vis' intitulat' 'An Act for reversing the judg'ment in a Quo Warranto against the City of 'London, and for restoring the City of London 'to its antient rights and privileges' recitan' quod cum quoddam Judiciu' reddit' fuisset in Cur' de Banco Regis in vel circa Termin' Trin' A° tricesimo quinto Regni nup' Regis Caroli secundi sup' quadam informatione in natura brevis de Quo Warranto Anglice 'In the nature of a Quo 'Warranto' exhibita in dicta Cur' versus Majorem et Communitat' ac cives civitat' London per quod libertas privileg' et franches' dictor' Majoris et communitat' ac civiu' existen' corporis politici et corporat' seisit' essent in manus Regis ut forisfact' Et in tantum quod dictum Judiciu' et process' sup' inde fuerunt et fuissent illegalia et arbitrar' Et per eo quod restoratio dictor' Majoris et communitatis ac civiu' antiquis libertatib' suis de quibus ipsi de privat' fuissent plurimum tendebat paci et bono stablimento Anglice *Settlement* hujus Regni per eundem Actum declarat' et inactitat' fuit authoritate ejusdem Parliamenti quod dictum Judic' redditu' in dicta Cur' de Banco Regis in dicto Termino Trinitat' Anno 35 Regni dicti nup' Regis Caroli secundi vel in aliquo alio termino et omne et quodlibet aliud Judiciu' reddit' seu recordat' in dicta Cur' per seizand' Anglice *for seizing* in manus dicti nuper Regis libertat' privileg' vel franches' Majoris et communitat' ac civiu' civitat' London existen' de seipsis corpus corporatum et politicum per nomen Majoris et communitat' ac civiu' civitat' London et per

illud nomen placitare et implacitari respondere et responderi vel in quibuscunque modo vel verbis tale Judiciu' intratum fuisset fuit esset et per eundem Actum fuit reversat' adnullat' et vacat' ad omnia intentiones et proposita quecunque Et quod vacat' Anglice *Vacates* infrarentur sup' Rotulis dicti Judic' per vacatione et reversatione ejusdem congruent' Anglice *accordingly* Et ulterius per eundem Actum declarat' et inactitat' fuit authoritate pred' quod Major et communitas ac cives civitat' London valerent et possent imperpetuum extunc postea remanere continuare et esse et prescribere fore corpus corporatum et politicum in re facto et nomine per nomen Majoris communitat' et civiu' civit' London Et per ill' nomen et omnia quelibet al' nomen et nomina incorporationis per quod vel per que ipsi ad aliquod tempus ante pred' Judiciu' incorporat' fuissent sectare placitare et implacitari respondere et responderi sine aliqua seisura vel adjudicatione Anglice *Forejudger* dictor' franches' libertat' et privileg' vel existen' inde exclus' vel amot' Anglice *ousted* per vel sup' aliquo p'textu alicujus forisfacture vel malegesture Anglice *Misdemeanour* ad aliquod tempus antetunc vel extunc postea fieri committi vel p'mitti Anglice *suffered* Et quod dci' Major et communitas ac cives dicte civitat' valerent et possent ut per legem debuerunt pacifice habere et gaudere omnia et singula cor' jura dona chartas concessiones libertates privileg' franches' consuetud' usuag' constitucónes prescripcónes immunitates mercata deb'a Anglice *Duties* tolucta terras ten'ta status et hereditamenta quecunque que legitime habuissent vel habuissent legale Jus titulum vel interesse de in vel ad tempus recordacónis vel reddicónis ejusdem Judic' seu ad tempus vel tempore dictar' p'tensar' forisfacturar' Et per eundem Actum ulterius inactitat' fuit authoritate pred' qd' omnes officiar' et ministri dicte civitat' qui juste Anglice *rightfully* tenuissent aliquod officiu' sive locum in pred' civitat' vel libertatibus ejusdem vel in burgo de Southwarke ad tempus quando Judiciu' pred' reddit' fuit per eundem Actum confirmat' fuer' haberent et gauderent eadem in tam amplo modo quam ipsi eadem tenuissent tempore reddicónis Judic' pred' (exceptis talibus qual' voluntarie sursum reddidissent aliquod hujusmodi officiu' sive locum vel remoti fuissent pro aliqua justa causa) Et quod quelibet p'sona que post dictum Judic' redditu' elect' admiss' et locat' fuisset in aliquod officiu' sive negotiu' Anglice *Employment* infra pred' civitat' sup' mortem sursum reddition' vel amotion' Anglice *Removal* ut p'fertur prior' officiarior' esse et per eundem Actum fuit confirmat' in dicto officio vel negotio suo et haberet et gauderet eodem in tam pleno et amplo modo quam si fuisset admiss' vel locat' in eodem secundum antiquas consuetudines dicte civitatis prout per eundem Actum plenius apparet Quodque infranominat' Jacobus Edwards tempore reddicónis Judic' pred' fuit unus Aldermanor' pred' Civitat' London Ad quod quidem officiu' et locum ipse antetunc secund' consuetud' ejusdem civitat' deb'e elect' et p'fect' fuisset Quodq; pred' Jacobus Edwards sic un' Aldermanor' civitat' pred' ut prefertur existen' post reddicónem Judic' pred' et ante edicónem Actus pred' scil't decimo octavo die Octobris Anno Dom' millesimo sexcentesimo octogesimo octavo libere et voluntarie sursum reddidit pred' officiu' suu' unius Aldermanor' civitat' pred' quodq; postea et ante edicón' Actus pred' scil't decimo nono die Octobris Anno Dom' millesimo sexcentesimo octogesimo octavo Quidam Thomas Lane Miles civis et liber homo civitat' pred' in pred' officiu' unius Aldermanor' civitat' pred' in loco pred' Jacobi Edwards deb'o modo secund' consuetud' ejusdem civitat' elect' et p'fect' fuit et officiu' illud semp' abinde hucusque exercuit et adhuc exercet et tempore edicónis Actus pred' fuit et adhuc existit unus Aldermanor' civitat' pred' in loco pred' Jacobi Edwards qui officiu' ill' sic ut prefertur sursum reddidit Quodque pred' Jacobus Edwards ad aliquod tempus post sursum reddition' fact' non fuit elect' in locum sive officiu' unius Aldermanor' civitat' pred' Et ea de causa Nos Major et Aldermani civitat' pred' predictum Jacobum Edwards in locum seu officiu' unius Aldermanor' civitat' pred' restituere non possumus.

Respons' Majoris et Aldermanor' civitat' London.

Tremaine likewise gives, p. 514, the following Mandamus and Return in the Case of sir William Pritchard. [See a Report of a Trial between him and Papillon, A. D. 1684, in this Collection, *infra*.]

Mandamus pro PRITCHARD.

Willielmus et Maria Dei Gra' Anglie Scotie Franc' et Hibernie Rex et Regina fidei defens', &c. Majori et Aldermanis civitat' nostre London salutem Cum sup' vicesimu' sextum diem Maii Anno Dom' millesimo sexcentesimo et nonagesimo aliquis Major Civit' London secund' provision' in quodam Actu in presenti Parliamento inchoat' et tent' apud Westm' in Com' nostro Midd' vicesimo die Martii Anno Regni nostri secundo intitulat' 'An Act for reversing 'the Judgment in a Quo Warranto against the 'City of London, and for restoring the City of 'London to its ancient Rights and Privileges,' edit' et p'vis' non fuit elect' Cumq; etiam Willielmus Pritchard Miles tempore quo Judic' sup' information' in natura de Quo Warranto exhibit' in Cur' Dom' Regis Caroli secund' nup' Regis Angl', &c. coram ipso nup' Rege Et in pred' Actu Parliament' mentionat' reddit' fuit scilt' Term' Sancte Trin' Anno Regni dci' Dom' nostri Caroli secund' nuper Regis Anglie, &c. tricesimo quinto fuit Major civit' London pred' secund' consuetud' civit' pred' debite elect' et p'fect' Cumque etiam idem Willielmus Pritchard in defectu election' Majoris civit' London' pred' vicesimo sexto die Maii Anno Dom' 1690 existen' ut p'fertur Major civit' pred' tempore reddicónis Judic' pred' Virtute pred' Actus Parlia-

ment' in loco et officio Major' civitat' pred' donec nova electio talis officiar' secund' antiquum usum et consuetud' civit' pred' fact' foret esse et continuare debet ac licet idem Willielmus Pritchard pred' 26 die Maii Et abinde hucusq; parat' fuit et obtulit super se suscipere offic' pred' Major' civitat' pred' et officiu' pred' exercere et exequi et coram vobis seu aliquo vestrum sacr'm suu' corporal' Major' civitat' pred' in ea parte prestand' et incumben' prestare obtulit vos tamen quibus hujusmodi sacr'm Major' civit' pred' administrare de Jure pertinet sacr'm ill' eidem Willielmo administrare seu ill' de eodem Willielmo Pritchard recipere renuistis vel saltem plus debite distulistis in ipsius Willielmi Pritchard dampnu' non modicum et gravamen et status sui lesion' manifestam sicut ex querela sua accepimus Unde nobis supplicavit quad sibi de remedio congruo in hac parte p'videri faceremus Nos igitur p'fat' Willielmo Pritchard plen' et celerem Justic' fieri volent' in hac parte ut est justum vobis et cuilibet vestrum mandamus sicut al's vobis mandaverimus quod sacr'm pred' per Major' civit' pred' in hac parte prestari consuet' predicto Willielmo Pritchard Major' civit' London pred' Virtute pred' Actus Parliament' ut p'fertur continuat' administrat' et eundem Willielmum sic ut p'fertur in officio ill' continuat' ad officiu' et locum Major' civit' London pred' sine dilatione admittat vel causam nobis inde in contrariu' significet' ne in vestro defectu querel' ad nos p'veniat iterat' Et qualit' hoc precept' nostrum execut' fuerit constare fac' nobis apud Westm' die Martis prox' post tres Septimanas Sancte Triu' prox' futur' hoc b're nobis tunc remitten' T. J. Holt apud Mil' apud Westm' 3 die Jul' Anno Regni nostri secundo. ASTRY.

Nos Major et Alderman' civit' London serenissimis Dom' Regi et Dom' Regine infrascript' humillime certificamus quod in et super inframeutionat' 26 diem Maii Ann. Dom' 1690 infra specificat' quidam Thomas Pilkington Miles deb'o modo ac secund' provisionem in statuto infra spec' elect' fuit in locum et officiu' Major' civitat' London pred' ac in pred' locum et officium postea scil't secund' die Junii jam ult' p'terit' legitime jurat' et admiss' fuit et officiu' et locum ill' extunc hucusque exercuit et adhuc exercet sicut de Jure debuit et debet Et ea de causa sacr'm infrascript' per Majorem civit' pred' in hac parte prestari consuet' infra nominat' Willielmo Pritchard' Mil' administrar' seu p'dum Willielmum Pritchard in locum sive officiu' Majoris civit' pred' admittere non possumus.

Respons' Major et Alderman' civit' London.

I know not of any printed report of the arguments or judgment upon either of these Writs of Mandamus and Return, in the Cases of sir Jacob Edwards and sir Wm. Pritchard: and Mr. Dealtry, who has been so obliging as to search the records of proceedings in the court of King's-bench, from the time when the writs issued to the end of Trinity Term, 3 Will. and Mary, informs me, that he does not find any account of farther proceedings upon them.

Remarks* on Mr. Wilmer's Homine Replegiando, and the Quo Warranto against the City of London. By Sir JOHN HAWLES, Solicitor General in the Reign of William III.

THIS Prosecution, though it was but criminal and not capital, did as much mischief, as it struck a terror into all Grand Juries, as any the before mentioned matters; and it was by the Homine Replegiando† issued out against him. As for the information against him, I shall say nothing, because the injustice of both will appear in the discourse of the first. Mr. Wilmer had sent a boy beyond sea by agreement, as Mr. Wilmer said, whether true or not, as to this matter is not material; a Homine Replegiando is granted against Mr. Wilmer for this, at whose prosecution is not material: for any person upon suggestion, backed by an affidavit,

* See the Remarks at the end of the Cases of Fitzharris, Colledge, and lord Shaftesbury, pp. 429, 725, and 832, of this volume.

† In relation to the proceedings against Wilmore, the following particulars are given in Narcissus Luttrell's MS "Brief Historical Relation of State Affairs," in the Library of All Souls' college:

"1682, May. Mr. John Wilmore having kidnapped a boy of 13 years of age to Jamaica, a Writ de Homine Replegiando was delivered to the sheriffs of London against him; after an alias and a pluries, and amerciaments on them for not returning it, the court of King's-bench granted an attachment against the sheriffs unless they made a return by such a day; and accordingly they did make an insufficient return by the day, viz. a 'non est inventus;' but the court being moved the 10th against the said return, granted them some small time to make a better return or else an attachment; but they having since returned *elongatus est*, on which a capias in Withernam is issued out against the said Wilmore; but it is said he absconds as yet.

"The 23d was a trial at the King's-bench bar upon an indictment against Mr. John Wilmore, for spiriting or kidnapping away a young boy under the age of 13 years, called Richard Sivitor, and sending him to Jamaica; the jury was a very good one returned out of the county of Kent; the witnesses against him were some

may have it granted. The sheriff would have returned on the writ, that the boy was sent by his own agreement and consent with Mr. Wilmer; which return was not allowed, and the sheriffs were told that they must either return they had replevied this boy, and they must have him in court, or else they would be laid by the heels; or else they must return that Mr. Wilmer had essoigned him, which is carrying him away, where the sheriff could not find him; and then a Withernam would issue against Mr. Wilmer, upon which he would be taken and kept in prison till he produced the boy: and no other return should be allowed

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to prove that there was in general such a trade as kidnapping or spiriting away children; and that he did believe there had been above 500 sent away in two years at Christmas last; then that Mr. Wilmore had been a practiser of that trade; and particularly had sent away this child to Jamaica by one captain Jones, master of a ship; that he owned he had sent away the child before the lord mayor, when summoned before him by the parent of the child, and that if they would not be content otherwise, he said they should have their child again if they would pay him what he had cost him, viz. 5*l.* his passage thither; 2*l.* in clothes, and about 6*l.* he would cost him home. These things, &c. were severally attested against him by the parents of the child, and the waterman that carried him.

"On the other side, Mr. Wilmore's witnesses urged on his behalf, that the child was very willing to go with him; as was manifest when he offered to put him away, the boy cried and said he would go with him or with another; that he bound himself apprentice to Wilmore voluntarily at Gravesend, in the presence of the mayor, (who testified the same thing) and had left the counterpart of the indenture in his hand, which was read in court; that he thought he had done a very good act of charity, having bound him to a carpenter there, and so provided for him better than the parents could. Then the Lord Chief Justice, [Pemberton] summed up the evidence, speaking very well against the horrid practice of kidnapping children, and left the matter very plain to the jury if they believed the witnesses, so that the jury, without going from the bar, brought him in guilty of the said information, and the court told them they had given a good verdict. Afterwards Walter Rynn, the said mayor of Gravesend, for his countenancing such a practice, was required to give sureties for his good behaviour, which he did: and a waterman that was brought on Wilmore's behalf, being supposed to have witnessed what he knew not, by the several contradictions and unlikelihoods in his evidence, was committed to the custody of the marshal.

'Oct. 1682. The trade of kidnapping young children having been much used of late, authority has thought fit, for the putting a stop to so prodigious a villainy, to prosecute the offenders for the same, and accordingly several have been prosecuted, the first was Mr. John Wilmore, who was long since convicted, but never heard of since conviction; then one Mr. Dessigney was tried for the same crime, and convicted and fined 500*l.* and committed till payment.

"1683, Jan. The boy that Mr. Wilmore kidnapped away to Jamaica, and for which a 'Homine Replegiando' was issued against him, is lately brought over by his order."

The Case of Mr. Dessigney or Dassigney, mentioned by Luttrell, is reported in T. Raym. 474, and 2 Shower, 221. The last-named reporter was of counsel for Dassigney, and in his argument cited two ancient and very curious records, which I will subjoin for the same reasons which induced him to transcribe them; the rareness of the suit, and the obscurity of the law therein:

"Inter Recorda Domini Regis Richardi Secundi in Thesauro Recept. Scaccarii sui sub Custodia Dominorum Commissionarior. Thesaur. et Camerar. ibidem remanent. viz. inter placita de tempore Regis Richardi Secundi inter alia subcontinetur ut sequitur, viz.

"Rotulus placitorum coram Domino Rege apud Wynton" which (sir Bartholomew Shower observes) must be the court of King's-bench held then in fact before the king; as the style remains now at this day "ubicunque tunc fuerimus in Anglia," wheresoever the king then was) "de Termino Sancti Hillarii Anno Regni Regis Rich. 2. Sextodecimo. W. CLOPTON."

Adhuc de Termino Sancti Hillar.

Cornub. ss. Dominus Rex mandavit Vicecom. Cornub. breve suum Clausum in hæc verba: Richardus Dei Gratia Rex Angliæ et Franciæ et Dominus Hiberniæ Vicecom. Cornub. salut. Cum pluries tibi præcepimus quod juste et sine dilatione replegiari facias David Tregoyes quem Thomas de Bello Campo Comes Warr. et Michael Trewynneleck ceperunt et captum tenent (ut dicitur) nisi captus esset per speciale præceptum nostrum vel capitalis Justiciarii nostri vel pro morte hominis vel pro Foresta nostra vel pro aliquo alio recto quare secund. consuetudinem Angliæ non sit replegiabilis vel tu ipse esses coram nobis in Crastino Animarum ultime preterito ubicunque tunc essemus in Anglia ostensurus quare mandata nostra præd. toties tibi inde directa exequi contempsisti; Tuque ad diem illum nobis retornan. quod præd. David elongatus fuit extra ballivam tuam per præd. Thomam de Bello Campo et Michaelem Trewynneleck ad loca ignota ita quod. visum præd. David. habere non potuisti sic nec corpus praed. David habere non potuisti, sic nec corpus præd. David replegiari fecisti, Et Ideo tibi præcipimus quod corpus præd. Michaelis in Withernamio capias et eum salvo et secure in prisona nostra custodire facias quousque præd. David juxta tenorem mandatorum nostror, prædictor. tibi pluries inde di-

than one of those two, and if they did not make one of those two returns, they should be committed. Now if the law be so, the court must be innocent, but the law ought then to be reformed in that particular; but if the law was not, as I think it is not, I think Mr. Wilmer and the nation had great injustice done them; for it was quickly seen what the mischief of that judgment was, and therefore it was endeavoured to be reformed by an act of king and council afterwards. First, I say, it is lawful for a master to covenant with a servant to serve

rectorum replegiari voluit præcipimusq; etiam tibi omnia bona et catalla terras et tenement. præd. Comitis in balliva tua in manus nostras seisiri faceres et ea salvo et secure custodires quousque præd. David permittere replegiari voluerit, Et qualiter præcepta nostra præd. fueris executus constare facias nobis a die Sancti Hillarii in quindecim dies ubicunque tunc fuerimus in Anglia; Ut ulterius super premissis facere valeamus prout de jure et secundum legem et consuetudinem regni nostri Angliæ fore viderimus faci nd. Et habeas ibi tunc hoc breve Teste W. Clopton. apud Ebor. nono die Novembris Anno regni decimo sexto.

Indorsamentum ejusdem brevis sequitur in hæc verba; Quoad capiend. Michaelis præd. infrascript. et eum ad Custodiam faciend. in prisona nostra quousque replegiari voluerit David Tregoyes et ad seisiri faciend. in manum vestram omnia bona et catalla terras et tenement. Thomæ de Bello Campo Comitis Warr. infrascript. et ea salvo et secure custodiend. inde nihil actum est ad præsens, quia Dominus Rex mihi mandavit breve suum de supersedend. interim, cujus brevis de executione istius brevis ulterius faciend. supersedi; et est breve de supersedend. huic brevi consut. Quod quidem breve sequitur in hæc verba Richardus Dei Gratia Rex Angliæ et Franciæ et Dominus Hiberniæ, Vicecom. Cornub. salutem, cum pluries tibi præcepimus quod juste et sine dilatione replegiari faceres David Tregoyes quem Thomas de Bello Campo Comes War. et Michael Trewynnekek ceperunt et captum tenent ut dicitur nisi captus sit per speciale præceptum nostrum vel capitalis Justiciarii nostri vel pro morte hominis vel pro Foresta nostra vel pro aliquo alio recto quare secundam consuetudinem regni Angliæ non sit replegiabilis vel causam nobis significes quare mandatum nostram alias tibi inde direct. exequi non potuisti, ac tu nobis significaveris quod præd. David elongatus fuit extra ballivam tuam per prædict. Comitem et Michaelem ad loca ignota ita quod visum prædict. David. habere non potuisti, sic nec corpus præd. David. replegiari fecisti, super quo per breve nostrum de Judicio tibi præcepimus quod corpus praedicti Michaelis, si inventus fuit in balliva tua caperes in Withernamio ac omnia terras et tenement. bon. et catalla praedict. Comitis in balliva tua in manum nostrum seisiri ac ea salvo custodiri necnon corpus praed. detineri faceres quousque praed. David. secundum legem et consuetudinem regni nostri Angliae replegiari posses juxta tenorem mandatorum nostrorum tibi prius inde direct. Et qualiter mandat. nostrum fuisses executus sciri faceres nobis a die Sancti Hillarii in quindecim dies proxime futur. ubicunque tunc fuerimus in Anglia per literas tuas sigillat. Jamque Johannes Dantre de Com. Gloucest. Clericus et Rogerus Ulbaren de Com. Warr. coram nobis in Cancellar. nostro personalit. constituti manuceperunt viz. uterque eorum corpus pro corpore ac sub poena trescentar. librar. pro praefat. Comite et Michaele quod ipsi praefat. David. in Curia nostra coram nobis ad quindena praedict. ubicunque tunc fuerimus in Anglia ad faciend. et recipiend. quod Curia nostra consideraverit in haec parte praeceptum habebunt et paratum, quas quidem trescentas libras idem manucaptores de terris et catallis ejus ad opus nostrum levari concesser. si idem David coram nobis ad diem praedict. non venerit in forma supradict. Ideo tibi praecipimus quod caption. Corporis praedict. Michaelis ac seisinam terrar. et tenementor. bonor. et catallor. praed. Comitis in manum nostram occasione praed. faciend. interim supersedeas, Et si ipsum Michaelem ea occasione ceperis tunc ipsum a prisona qua sit detent. si ea occasione et non alia detineat. in eadem, interim deliberari ac manum nostram e terris et tenementis bonis et catallis praed. Comitis, si per te occasione praed. et non alia capta sunt in manum nostram, interim amoveri facias per manucaptionem supradict. Et habeas coram nobis tunc hoc breve Teste meipso apud Ebor. 24 Novembris Anno Regni 16°.

Ad quem diem coram Domino Rege apud Winton venerunt praedict. Comes et Michael in propriis personis suis, et hic in Cur. praefatum David. duxerunt et Cur. hic deliberaverunt.

Et praed. David instanter in propria persona sua queritur quod praedict. Comes et Michael simul cum, &c. die Martis proxime ante festum Sanctae Mariae Virginis Anno Regni Regis 16. ipsum David. apud Tregoyes in Com. praed. ceperunt imprisonaverunt et ipsum extra Comitatum praed. duxerunt Et in prisona detinuerunt a praedict. Die Martis usque ad praefat. quindena Sancti Hillarii unde dicit quod deteriorat. est et dampnum habet ad valenciam duarum mille librarum et inde producit sectam, &c.

Et praed. Comes dicit quod praed. David. respondere non debet quia dicit quod idem David est Nativus ipsius Comitis pertinens ad Manerium suum de Carnaut in Comitatu praed. et quod ipse et omnes Antecessoris sui Domini Manerii praed. a tempore quo non extat memoria seisiti fuerunt de praedict. David. et Antecessoribus suis ut de nativis suis tanquam pertinentibus ad manerium suum praedict. et petit Judicium si praed. David. in hac casu respondere debeat, &c.

Et praedict. Michael defendit omnem injuriam et quicquid, &c. et dicit quod praedict. David est nativus praed. Comitis pertinens ad Ma-

him beyond sea; in the next place, it is lawful for a master to send his servant beyond sea according to such agreement. And if both these propositions be true, as I think no man will say they are not, it is a natural consequence to say, that the law hath provided a return upon a writ of Homine Replegiando, if it should be sued out against such master for a servant so sent beyond sea, which may indemnify the master in so doing; and that return can be no other than the special matter, which in this case was refused to be accepted. It is no argument

nerium suum de Carnaut in Com. praedict. et, quod idem Comes et omnes antecessoris sui Domini Manerii praedict. a tempore quo non extat memoria fuerunt seisit. de praedict. David. et antecessoribus suis ut de Nativis suis tanquam pertinentibus ad manerium suum praedict. Et pro eo quod idem David fuit rebellis et se justiciari noluit per ministros Domini Comites idem Michael ut serviens ejusdem Comitis et per praeceptum Domini Comites ipsum David. cepit et imprisonavit prout ei bene licuit, et petit Judicium si praed. David actionem suam praed. in hac casu versus eum manutenere debeat.

Et idem David dicit quod ipse est liber homo et liberae conditionis et non Nativus dicti Comitis prout praedict. Comes et Michael supponunt. Et de hoc ponit se super patriam, et praedict. Comes et Michael similiter, &c.

Ideo veniat inde Jurata coram Domino Rege a Die Paschae in tres septimanas ubicunque, &c. Et qui nec, &c. Idem dies dat. est partibus praedict. &c.

Et super hoc veniunt Johannes Treverlyn Johannes Tremarram Rogerus Inyll et Thomas Polsone omnes de Com. Cornub. et manuceperunt habend. Corpus praed. David. coram Domino Rege ad praefatum Terminum et sic de die in diem quousque, &c. Et quod idem David prosequi debeat praed. placitum modo et festino (sine collusione fraude et tardatione) quo poteret in propria persona sua de die in diem versus dict. Comitem et Michaelem de praed. Captione corporis sui quousque placitum inter ipsos inde terminetur, Et si return. Corporis praed. David. dicto Comiti adjudicetur super placito praed. quod tunc idem David ad possessionem ipsius Comitis se reddat et liberabit hic in Cur. per praed. manucaptores tanquam nativus ipsius Comitis.

Et iidem manucaptores recognoverunt se Haeredes et executores suos teneri solvere praed. Comiti et haeredibus suis excent. Marcas Sterlingor. si praed. David et manucaptores sui praed. omnia et singula non feceret vel facerent vel quod idem David aliquid fecerit in contrar. aliquorum praed. praemissor. et praed. manucapt. et quilibit eorum per se concessit quod praed. summa sexcentar. Marcar. de terris et catallis suis fieri possit per Vicecom. et praefato Comiti et Haeredibus suis liberari, &c. Et similiter iidem manucaptores manuceperunt quod praed. David se bene gesserit erga Dominum Regem et populum suum et praecipue erga ministros et tenentes praed. Comitis, quod eis non inferret per se nec per alios suo procuramento aliquod malum de Corporibus suis sub poena supradict. Et A. B. C. & D. pro praed. Comite et Michaele quod ipsi per se nec per alios per eorum procurationem non impedient nec aliquis eorum impediet praed. David. quin ipse prosecutionem suam praed. legitimo modo prosequi possit quoquomodo sub poena centum librar. &c.

Et continuato inde processu inter praed. David. et praed. Comitem et Michaelem per jurat. posit. in respect. coram Domino Rege usque a Die Paschae in unum mensem Anno Regni Regis Richardi Secundi decimo septimo ubicunque, &c. pro defectu jurat', &c.

Ad quem diem coram Domino Rege apud Westm. venit praed. David in propria persona sua per manucaptionem suam praed. Et praed. Comes et Michael in propriis personis suis similiter veniunt et jurat. veniunt qui tam de Assensu praed. David. quam praed. Comitis et Michaelis ad hoc electi triati et jurat' dicunt super Sacramentum suum quod praed. David est liber Homo et liberae conditionis et non Nativus praed. Comitis prout praed. David Tregoys superius allegavit et assidunt dampna occasione praed. ad quadragint libras, &c. Et super hoc consideratum est quod praed. David recuperet versus praed. Comitem et Michaelem dampna sua praed. superius per jurat. praed. ad 40 Libras taxat. et quod praed. Comes et Michael capiantur.

Inter Recorda Domini Regis Car. 2. in thesauro recept. Scacc. sui sub custodia Dominor. Commiss. ibidem remanent, viz. inter placita de tempore Regis Henrici quarti inter alia sic continetur ut sequitur, viz.

Rotulus placitor. coram Domino Rege apud Westm. de Termino Sancti Michaelis Anno Regis Hen. 4. post conq. 5. Will. Gascoigne.

Adhuc de Termino Sancti Michaelis. W. Gascoigne In dorso.

Devon. ss. Dominus Rex mandavit breve suum clausum in haec verba Henricus Dei Gratia Rex Angliae et Franciae et Dominus Hiberniae Vicecom. Devon. salutem. Cum pluries tibi praecepimus quod juste et sine dilatione replegiari faceres Willielmum filium Adae Scutt quem Simon Bryt et Johannes filius ejus ceperunt et captum tenent (ut dicitur) nisi captus sit per speciale mandatum nostrum vel Capitalis Justiciarii nostri vel pro morte hominis vel pro foresta nostra vel pro aliquo alio recto quare secund. consuetud. Angliae non sit replegiabilis; vel tu ipse fuisses coram nobis a die Sanctae Trinitatis in quindecim dies ultime preterit. ubicunque tunc fuissemus in Angliae ostensurus quare mandata nostra praed. toties inde tibi direct. exequi tu contempsisti, Tuque ad diem illum nobis retornas. quod praed. breve adeo tarde tibi libertat. fuit quod nullam executionem inde fieri potuisti propter temporis brevitatem et quod nulla alia brevia de replegiando praed. Willielmum tibi venerunt

that no such return is ever read of in any book: for the law hath determined, that some returns are good, and others bad; yet it hath not said, what are all the good returns which may be made on an Homine Replegiando, and the sheriff is no more confined to returns, than a man in the pleading of his case, which my lord Coke says may vary according to the nature of his case; and yet the law hath said what is a good plea and what a bad one, but hath not expressed all the good or bad pleas. And therefore it is no argument against such a return, that no precedent of it can be found, it is enough that no judgment can be produced against it; and the reason of both may be, that the case never happened before, that is to say that never any person was so malicious before, as to sue out an Homine Replegiando against a master for a servant sent by agreement beyond sea; and returns must be varied according to the case. Perhaps no precedent can be found of a return on that writ, that the person sought for is dead: yet all persons will agree it is a good return, it is so in replevin of cattle, and even that example falsifies the doctrine of the court, that there are but two returns on that writ allowable by law. It is not an argument for disallowing the return that the person sent beyond sea was a child not capable of making such a contract (though I believe, if the matter were looked into, he was of age so to do), for nothing of that doth, or can appear in the writ or return: it stands, therefore, simply upon this, whether the sheriff may on an Homine Replegiando return, that the person supposed to be in custody, being of full age, was by mutual agreement sent beyond sea by the person in whose custody, by the writ he is supposed to be? which I think is far from a doubt. But notwithstanding all these hardships on Juries, it was seen to be plainly impossible to procure any bills of indictment for high-treason, much less any persons to be convicted on the like evidence, except in London, where are some of the best, as well as the worst of men in the nation; and even there it was not to be done, as long as the Juries were sensible and honest men, which would be as long as the election of sheriffs was in the citizens; and, to the honour of the city, it was seen that they chose only honest men to be their sheriffs; and that when they saw the public safety depend on honest officers, though at other times they had rather pay a fine, than undergo the trouble and charges of that office, yet at that time no man, legally chosen, refused to stand, though they were reproached and punished for it: and if Mr. Box refused, it was because he would not join with North, who was imposed on the city; for which reason it was resolved to take from the city the right of chusing sheriffs, but by what means was not presently resolved on.

That the city might forfeit their right of electing, there was no great doubt; as if the sheriffs were dead, and new ones were not chosen in a convenient time, so that there was a defect of justice, or the like: but nothing of that kind could be laid to their charge; and therefore a new unheard-of matter was thought on, and set a-foot, which was, to make the city forfeit their being a corporation; and being annihilated, the grants made to them by the crown, as the right of electing sheriffs was, would revert to the crown again.

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ante receptionem dict. brevis, Ideo tibi praecipimus quod juste et sine dilatione replegiari facias praed. Williehnum filium Adae Scutt quem praefat. Simon Britt et Johannes filius ejus ceperunt et captum tenent, ut dicitur, nisi captus sit per speciale praeceptum nostrum vel Capitalis Justiciarii nostri vel pro morte hominis vel pro foresta nostra vel pro aliquo alio recto quare secundum consuetud. Angliae non sit replegiabilis vel tu ipse suis coram nobis a Di Sancti Michaelis in quindecim dies ubicunque tunc fuerimus in Anglia, ostensurus quare mandata nostra praed. toties tibi direct. exequi contempsisti, Et habeas ibi hoc breve Teste Willielmo Gascoigne apud Westmonasterium 30. die Junii anno regni nostri quarto.

• Ad quem quindena Sancti Michaelis coram Domino Rege apud Westmonasterium, Vicecom. Devon. retorn. quod praed. Willielmus filius Adae Scutt amotus est et elongat. extra ballivam suam per praed. Simon Britt et Johannem filium ejus in Com. Somerset quare de ipso Willielmo replegiand. juxta formam dict. brevis adtunc nihil facere potuit.

Ac ex parte praed. Willielmi filii Adae Scutt in Curia Regis coram ipso Rege sufficienter testatum est quod praed. Simon et filius ejus praed. latitant et discurrunt in Comitatu Somerset.

Et Ideo præceptum et vicecom. Somerset quod Corpora præd. Simonis et filii ejus in Withernamio capiat et eos salvo et secure custodiri faciat quousque iidem Simon et Johannes filius ejus prætat. Willielmum filium Adæ Scut replegiari voluerint Et qualiter, &c. constare facias, &c.

Postea scill. 22o die Januarii Anno Regni Dom. Regis nunc quarto coram Domino Rege apud Westmonasterium veniunt Willielmus Pawlet et Simon Britt Jun. de Com. Somerset et Johannes Halse et Thomas Prowse de Com. Devon. asserantes dict. Vicecom. Somerset corpus præfat. Simonis Britt occasione præd. cepisse et ipsum in prisona Domini Regis sub custodia ejusdem Vicecom. foredetent. et manuceperunt habend. corporis præd. Simonis Brit coram Domino Rege ad præfat. Term. et quilibet eorum sub pœna 40*l.* quam quidam summam quilibet eorum manucapt. separatim cogn. de terris et catallis suis ad opus Domini Regis fieri si contingat ipsos corpus præfat. Simonis Britt coram Domino Rege ad præfat. Terminum promptum non habere ad faciend. quod Curia Domini Regis consideraverit in hac parte, Et petunt breve de supersedeas præfat. Vicecom. direct. de non detinendo ulterius corpus præd. Simonis in prisona Domini Regis occasione prædicta.

Et eis conceditur, &c.

A Quo Warranto was therefore brought against the city in Hilary Term, 1681, to shew by what warrant they pretended to be a corporation, and to have their privileges mentioned in the writ; to which the city pleaded, and set forth their right; and the king replied, and set forth several matters done by them, contrary to the duty of a corporation: upon which there was a demurrer, of which judgment was not given till Trinity Term 1683. I will say nothing of the right of the proceeding, it having been largely and learnedly argued for the city; but if the matter were so clear a case, as the king's counsel and court would have it to be, how came it to pass that in Henry the 8th's time, when the king was so earnestly bent on dissolving the religious corporations, in which the public inclination joined with him, the doing it by Quo Warranto was not thought of? It was very plain, that those pretended religious did not observe the rules, nor perform the ends for which they were incorporated; and certainly their misdemeanors, against the intent of their being incorporated, were better causes of forfeiture, than was the city's petitioning for a parliament, &c. Yet that king took other methods; he had formal conveyances of their lands from most of those corporations and formal surrenders of their corporations, signed by every individual of the corporations, and those afterwards confirmed by act of parliament. And sure the late king had as much right to bring a Quo Warranto against Magdalen College for refusing, contrary to their duty, to admit the president the king nominated, if the king had a right to nominate the president (as some judges asserted he had), as king Charles the Second had against the city: and it was once in debate, Whether the proceeding against that college should be by Quo Warranto, or before the Ecclesiastical Commissioners? The last was resolved on, not as more legal or effectual, but as more expeditious; in the one, the proceedings being 'de die in diem;' in the other, from term to term. This only I will observe, that when the judgment against the city was given, which was of the greatest concern to the nation ever contested in any court of Westminster Hall, it was done by two judges only, and no reason of that judgment rendered: whereof Withins, who was one, I think, heard but one argument in the case. It is true, they said Raymond, when alive, was of the same opinion; and said Saunders, who was then past his senses, was of the same opinion; though I was told by one who was present, when the two justices came to ask his opinion in the matter, he had only sense enough to reproach them for troubling him about the matter, when they were sensible he had lost his memory. And to say truth, the delivering the sense of an absent judge, though it hath been sometimes practised, is not allowable, for sometimes they deliver another opinion than what the absent judge is of. Judge Withens did so in several cases, when he delivered the opinion of sir Edward Herbert, which sir Edward Herbert afterwards, in open court, disowned: Judge Holloway served Judge Powell the same trick, if the last said true. The long depending of the Quo Warranto had alarmed all the nation, who were yet quiet, hoping that judgment would be given for the city, as some of the judges and of the king's counsel had given out it would; but the contrary was resolved on, and therefore the nation at the time of the giving the judgment, must be amused with somewhat else, and nothing so proper as a plot: but there was difficulty in that also; for if the pretended plotters should be acquitted, it would make the matter worse; and nothing would secure that but imposing what sheriffs they pleased on the city; and accordingly North and Rich being pitched on, the one by a shameless trick, and the other by open force, were imposed on the city.

Having gained that point, the proceedings in the Quo Warranto were much quicker than before, and two arguments were only permitted in it of each side, the one in Hilary Term, the other in Easter Term; and so the case was ripe for judgment in Trinity Term following, but must be, and was ushered in, with the discovery of a pretended plot: Which so amazed the nation, that though judgment in the Quo Warranto was given two days after the pretended discovery, nobody took any notice of it for several months after it was given. The truth was, nobody durst mutter against it, or question the legality of it; it was enough to have brought any person into the plot to have done it, it would have been called flying in the face of the government, questioning the justice of the nation, and such like cant.

288. The Trial of NATHANIEL THOMPSON, WILLIAM PAIN, and JOHN FARWELL, at the Guildhall of London, for writing, printing, and publishing Letters, importing that Sir Edmundbury Godfrey murdered himself; as also for several Falsities relating to the said Matter printed in several Papers, called "The Loyal Protestant Intelligence:" 34 CHARLES II. A. D. 1682.*

ON Tuesday the 20th of June 1682, before the right honourable sir Francis Pemberton, lord chief justice of his majesty's court of King's-bench, by Nisi Prius, in the Guildhall of the city of London, came on the Trials of Nathaniel Thompson, William Pain, and John Farwell, upon an Information brought against them for several Trespasses and Misdemeanors in writing, printing, and publishing Letters importing that sir Edmundbury Godfrey murdered himself, as also for several falsities relating to the said matter printed in several papers, called the Loyal Protestant Intelligence. And the jurors names were as follow: Peter Houblon, John Ellis, William Barrett, Joshua Brooks, Gervas Byfield, Jonathan Lee, George Widdowes, William Sambrooke, William Jacomb, John Delmee, Samuel Bayly, Samuel Howard.

THE INFORMATION.

For that in Hillary term, in the 30th and 31st years of this king's reign, in the court of King's-bench at Westminster, by a jury of the county of Middlesex were indicted, Robert Green, —— Gerald,† Clerk, Henry Berry, Lawrence Hill, Dominic Kelly, and Philbert Vernatt; for that they by the instigation of the Devil, &c. the 12th of October, in the 30th year of this king's reign, at the parish of St. Mary le Strand, in the county of Middlesex aforesaid, with force and arms, in and upon sir Edmundbury Godfrey, kt. in the peace of God and the king then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault, and kill and murder him in this manner, viz. Green did fold and fasten a linen handkerchief about his neck, and therewith choaked and strangled him, of which choaking and strangling he instantly died: and the others, viz. Gerald, Berry, Hill, Kelly and Vernatt, were present, aiding, abetting, comforting, assisting and maintaining the said Green to kill and murder the said sir Edmundbury Godfrey in form aforesaid; and so they the said Green, Gerald, Berry, Hill, Kelly and Vernatt in manner and form aforesaid, him the said sir Edmundbury Godfrey, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the peace of our said lord the king, his crown and dignity: to which indictment afterwards, the said term, the said Robert Green, Henry Berry, and Lawrence Hill severally pleaded, Not Guilty, and put themselves upon the country; and after in the said term of St. Hillary, in the said court of King's-bench at Westminster, for the felony and murder aforesaid, by a jury of their country in due manner were tried, and thereof lawfully convicted and attainted, as by the record thereof in the said court of King's-bench at Westminster remaining more fully appears; which said Robert Green, Henry Berry and Lawrence Hill, were afterwards executed and suffered death, according to the form and effect of the judgment and attainder aforesaid. And whereas one Miles Prance, upon the trial of the indictment aforesaid, was produced a witness and sworn for the king, and gave material evidence against the said Green, Berry and Hill, to prove them guilty of the felony and murder aforesaid: and one William Bedloe, John Brown, Elizabeth Curtis, Zachary Skillarne, and Nicholas Cambridge, upon the trial aforesaid, were witnesses in like manner produced and sworn for the king, and gave divers material evidences against the said Green, Berry and Hill, to prove them guilty of the said felony and murder. And whereas also the said —— Gerald, Robert Green, Lawrence Hill, Dominic Kelly, and Philbert Vernatt, at the time of the felony and murder aforesaid,

* From a pamphlet entitled, "The Trial of N. Thompson, W. Pain, and J. Farwell: upon an Information exhibited by the king's attorney general against them, for writing, printing, and publishing Libels, by way of Letters and other Prints, reflecting upon the justice of the nation, in the proceedings against the murderers of sir Edmundbury Godfrey, at Guildhall, on Tuesday June the 20th, 1682. Where after a full hearing they were convicted: Together with an Account of several Affidavits read in his majesty's court of King's-bench and other matters at the time of their receiving Sentence. To which is added by way of Appendix, Several other Affidavits which further confirm the testimony of Mr. Prance, given upon the Trial of Green, Berry and Hill about that murder, with some observations touching the said Thompson, Farwell and Pain. London: Printed for Thomas Simmons at the Prince's Arms in Ludgate Street, 1682.

'I do appoint Thomas Simmons to print the 'Trial of Nathaniel Thompson, William Pain, 'and John Farwell, and that no others presume 'to print the same. FR. PEMBERTON. July the '8th, 1682.'

† See vol. 7, p. 159, of this Collection.

were Papists, and maintainers of the Romish superstitions: and the said —— Gerald, Dominic Kelly, and Philbert Vernatt have fled, and not yet appeared to the said indictment. And whereas also by the coroner's inquest taken upon the view of the body of the said sir Edmundbury Godfrey lying dead before John Cooper, gent. one of the coroners of the said county of Middlesex, by the oaths of honest and lawful men of the same county, above the number of twelve persons, it was found that certain malefactors unknown, feloniously, and of their malice prepense, him the said sir Edmundbury Godfrey did strangle and choak, of which he died. The said Nathaniel Thompson, William Pain and John Farwell, well knowing the premisses, and being persons devilishly affected, devising, practising, and with all their strength intending the peace and common tranquillity of this kingdom of England to disturb, and as much as in them lay the due course of the law to destroy, and subvert and elude, and the justice of this kingdom of England to defame and scandalize, and as well the said Miles Prance, William Bedloe, John Brown, Elizabeth Curtis, Zachary Skillarne, Nicholas Cambridge, as the said John Cooper, and the honest and lawful men sworn upon inquest aforesaid, upon view of the body aforesaid, to bring into the greatest hatred, contempt, and vile esteem with all the king's subjects, and to deter the king's subjects from finding, detecting, and proving the designs of Papists against our lord the king, and the true religion now by law established, and impiously and wickedly devising and intending them the said —— Gerald, Dominick Kelly, and Philbert Vernatt, from undergoing the pains and sentences by law upon them to be inflicted, for the murder aforesaid, and to aid and assist them (although they be Guilty) to be found Not Guilty thereof; and to deceive and beguile the king's subjects in the premises with their false affirmations and arguments, and cause and procure that it should be believed and esteemed, that the said Green, Berry, and Hill, the persons for the murder of the said sir Edmundbury Godfrey as aforesaid, convicted and executed, had been convicted and executed unjustly; and that the said sir Edmundbury Godfrey was *felo de se*, and himself had feloniously murdered. They the said Thompson, Pain and Farwell, their most impious, wicked, and diabolical intentions to fulfil and perfect afterwards, to wit, the 23d of February, in the 34th year of the reign of our now sovereign lord the king, at the parish of St. Mary le Bow, London, with force and arms, &c. falsely, unlawfully, unjustly, wickedly, and diabolically, made, composed, and caused to be printed, a certain false, scandalous, and defamatory Libel, entitled, 'A Letter to Mr. 'Miles Prance in relation to the murder of 'sir Edmundbury Godfrey:' In which said Libel amongst other things, it is contained as follows, 'And hearing that the Coroner's Jury 'or Inquest were first of opinion, and ac'cordingly declared, he was *felo de se*, and that 'there was much art and skill used to procure 'their verdict to the contrary, more particularly 'the refusing of the body, at their instance and 'request, to be opened.' And in another place of the same Libel, it is further contained as follows, 'They say, that if a man or any 'other creature be strangled or hanged, and 'his body cold, and the blood settled in the 'veins (as he must needs be, if your evidence 'be true) (meaning the evidence of the said 'Miles Prance) run twenty swords through such a body, not one drop of blood will come 'out; but on the contrary, his body, when 'found, was full of blood, in so much that '(over and above the cakes or great gobbets of 'congealed putrified blood found afterwards in 'his cloaths) the constable when he pulled the 'sword out of his body, it crashed against his 'back bone, and gobbets of blood and water 'gushed or gubbled out of that wound in abun'dance, not only in that very place where the 'sword was pulled out, but in all his passage 'to the White-house; especially, there where 'his body was lifted over two high stumps, and 'also when he was laid upon the table, the 'blood and water so issued out of that wound, 'that it run from off the table upon the floor, 'and from thence into the cellar:' So that they do aver, that that wound that he received by that sword, must of necessity be the cause of his death. And in another part of the same libel, it is further contained as follows, 'They ob'serve that Bedloe's, before the Committee of 'Lords, and your evidence in relation to this 'gentleman's death, are as different as the East 'is from the West; for you dog him out of 'St. Clement's, the other decoys him from 'Charing Cross; you swear he was strangled 'with an handkerchief near the stables going 'to the water-side; Bedloe, that he was smo'thered with a pillow in a room in the great 'court in Somerset-house; you say, he took 'horse at Soho; Bedloe says, that he took 'coach at Clarendon-house, with many more 'such like contradictions; and considering the 'old proverb, fore-warned, fore-armed; a fur'ther and fuller account of the whole mat'ter expect.' And that the said Nathaniel Thompson, William Pain, and John Farwell, their most impious, wicked and diabolical intentions to fulfil and perfect, afterwards, to wit, th[e] [3]d day of March, in the said 34th year of the reign of the said late lord the king, at the said parish of St. Mary le Bow, London, aforesaid, with force and arms, &c. falsely, unlawfully, unjustly, evilly, maliciously, scandalously, and diabolically, made, composed, and caused to be printed, another false, scandalous, and defaming libel; entitled, 'A Se'cond Letter to Miles Prance, in reply to the 'Ghost of sir Edmundbury Godfrey.' In which last mentioned libel, amongst other things, it is further contained as follows, 'Next, whereas 'my letter saith (and that truly) That the Co'roner's Jury were first of opinion, and ac'cordingly declared he was *felo de se*; and 'that much art and skill was used to procure

'their verdict to the contrary.' And in another place of the same last mentioned libel, amongst other things it is further contained as follows: 'And it would be very material, if 'the coroner would declare, what he received 'for that job, and of whom; and what evi'dence he had to induce the jury to find (as the 'inquisition imports) that he was strangled 'with a linen cloth, a matter of fact never so 'much as spoken of until you came in with 'your evidence, which was not in some weeks 'after; and I do again aver, that the body was 'required by the jury to be opened, and was re'fused; and if the body was in their and the 'coroner's power (as the Ghost insinuates) such 'power was concealed from and denied the 'jury.' And in another place of the same last mentioned libel, it is, amongst other things, contained as follows: 'He is to understand, 'that Mr. Brown, the two surgeons (meaning 'the said Zachary Skillarne and Nicholas Cam'bridge) and Mrs. Curtis, are not competent (nor 'can be material) witnesses in this case.' And in another place of the same last mentioned libel, it is further contained as follows: 'But 'Mr. Prance, it will be fully proved, that the 'body was full of blood, and that there were 'cakes or gobbets of dried blood, found in his 'cloaths, which, with his body, stunk ex'tremely: And it will be also fully and effec'tually proved that his eyes, nostrils, and cor'ners of his mouth were fly-blown.' And in another place of the same last mentioned libel, among other things, it is contained as follows: 'And as the seventh and last paragraph, which 'relates only to the difference betwixt you and 'Mr. Bedloe's evidence, I must take notice, 'that what you and he swears is very contra'dictory.' And in another place of the same last mentioned libel, amongst other things, it is further contained as follows: 'But I can'not omit to take further notice of Mrs. 'Curtis's affidavit, in relation to the wax found 'upon the clothes, in which I cannot say but 'she may swear true; but this I do aver, that 'if it be so, those drops were put upon the 'cloaths long after he was found, and after the 'jury had sat on the body: for there was no 'such thing then on the cloaths. And, I sup'pose, this was some artifice used by those, 'who either out of interest or design, were de'sirous to confirm his being murdered at So'merset-House.' And the said Attorney-General for the same lord the king, gives the court here to understand and be informed; That the said Nathaniel Thompson, William Pain, and John Farwell, in their further prosecution aforesaid, falsly, wickedly, and maliciously, their contrivances and intentions aforesaid, afterwards to wit, the 7th day of March, in the 34th year of our said lord the king, at the parish of St. Mary le Bow, London, with force and arms, &c. falsly, unlawfully, unjustly, wickedly, maliciously, scandalously, and devilishly, composed, made, and caused to be printed, a certain other false, scandalous, and defamatory libel, entitled, 'The Loyal Protestant and True 'Domestic Intelligence, or News both from City 'and Country.' In which last mentioned libel, it is contained as follows: 'That there is not 'in the said letter' (meaning the said false, scandalous, and defaming libel) entitled, 'A 'Letter to Mr. Miles Prance, in relation to the 'murder of sir Edmundbury Godfrey,' before first mentioned, 'the least item or circumstance, 'but what will be by undeniable evidence made 'out to be the truth: So the said Mr. Prance, 'having not as yet vouchsafed an answer to that 'letter, he will speedily receive a further letter 'relating to that murder; wherein the further 'truth will not only be fully set forth, and 'other circumstances set out.' And further, that the said Nathaniel Thompson, William Pain, and John Farwell, in their further prosecuting, falsly, wickedly, and maliciously, their contrivances and intentions aforesaid, with force and arms, &c. falsly, unlawfully, wickedly, maliciously, and devilishly, composed, and caused to be printed, a certain other false, scandalous, and defamatory libel, entitled, 'The Loyal Protestant Intelligence,' &c. In which last mentioned libel, amongst other things it is contained as follows: 'Whereas Dick 'Janeway, in this Day's Mercury, promises an 'answer to the late Letter to Mr. Prance, &c. 'This is to give him and all the world notice, 'that such an answer is impatiently expected 'by the author of that letter, who questions not 'but to prove every tittle of that letter, to the 'satisfaction of all mankind: And besides, he 'is very desirous that the Courantier (accord'ing to his last Packet of Advice from Rome) 'would go on, and use his interest, to procure 'the lord mayor, court of aldermen, and com'mon council of London, to inspect the truth 'of that letter; whereby it will appear ine'vitably, that there is not one papist or popishly 'affected person concerned in that letter, or in 'the proof of the particulars thereof; but the 'same (with divers other material circum'stances relating to the murder of sir Edmund'bury Godfrey, and the fraud and blind put 'upon the world in relation thereto) will be 'more fully, plainly and manifestly proved, 'without giving ill words, or scurrilous lan'guage, or reflections to any persons that 'really are, or supposed to be therein con'cerned in any circumstance whatsoever.' And that the said Nathaniel Thompson, Will. Pain, and John Farwell, in their further prosecution aforesaid, falsly, wickedly, and maliciously, their contrivances and intentions, after, to wit, the first day of April, in the 34th year of the reign of our said lord the king, with force and arms, &c. at the parish of St. Mary le Bow, London, aforesaid, falsly, unlawfully, unjustly, wickedly, maliciously, scandalously, and devilishly, made, composed, and caused to be printed, a certain other false, scandalous, and defamatory libel, entitled, 'The Loyal Protestant Intelligence,' &c. In which last mentioned libel, amongst other things, it is contained as follows; 'Last Wednesday, Natha'niel Thompson, upon summons, appeared

'before the lords of his majesty's most honourable privy council, about the letters to Mr. Miles Prance, concerning the death of sir Edmundbury Godfrey, where he justified the matter, and produced the authors, who are ready to prove (by undeniable and substantial witnesses, not in the least accused or suspected of popery, as the malicious party do suggest) that every tittle and iota of those letters are true.' And that in another part of the last mentioned libel, amongst other things, it is contained as follows: 'Mr. Thompson and the gentlemen his friends are to attend the next Wednesday at council, where they do not doubt, but that honourable board will put them into a method to prove the whole, or any particular, which their honours in their great wisdom shall think convenient to be brought to the test or examination.' And further, that the said Nathaniel Thompson, &c. the 23d day of February, in the abovesaid 34th year of our said lord the king; and divers other days and times betwixt the said 23d of February, and the aforesaid 34th year, and the day of exhibiting of the said information at the parish of St. Mary le Bow, London, aforesaid, knowingly, and every of them knowing the said several libels to be false, malicious, scandalous, and seditious, with force and arms, &c. falsly, unlawfully, unjustly, wickedly, maliciously, scandalously, seditiously, and devilishly, the said false, malicious, scandalous and seditious libels uttered and published, and each of them uttered and published in manifest contempt of the laws of this kingdom of England, and the scandal and defamation of the public justice of the same, to the evil example of all others in like case offending; and against the king's peace, his crown and dignity, &c."

Then proclamation for information being made, Mr. Thompson acquainted my lord and the jury with the effect of the information, as follows:

Mr. *Thompson*. My lord, and you gentlemen of the jury, this is an information against Nathaniel Thompson, William Pain, and John Farwell, and it is for writing and printing several scandalous libels, about the death of sir Edmundbury Godfrey: In which we set forth, that Green, Berry, and Hill, were indicted for the murder of sir E. Godfrey, and thereof convicted and attainted; and that the said Green, Berry, and Hill, were executed for it: That upon their trial for that matter several witnesses were examined, namely, Mr. Prance, Bedloe, and Curtis, and several others to prove sir E. Godfrey murdered at Somerset-house: And before the trial there was an inquest taken by the coroner of Middlesex, by which it does appear, that sir E. Godfrey was murdered by several persons unknown; and that the defendants, to reflect upon the justice of the nation, and scandalize the witnesses produced at that trial, and to make it believed that these persons died wrongfully, did write and print several scandalous libels and letters, one of them entitled, 'A Letter to Miles Prance, concerning the murder of sir Edmundbury Godfrey;' and in these letters did suggest, as if he had been *felo de se*, and do reflect upon every one of the witnesses, as if they contradicted themselves; and also do reflect upon the coroner, as though he had bribed the jury; and do undertake by these arguments, and several others (that you will hear) to prove, that sir E. Godfrey murdered himself. And that in another libel that Thompson printed, called his 'Loyal Protestant Intelligence,' he says, he will make it out by a cloud of witnesses. This we say is against the peace of the king, and defaming of the justice of the nation: If we prove this matter upon them, you are to find them guilty.

Serj. *Maynard*. My lord, the matter which you have now before you, is as impudent a thing as ever was done. Gentlemen, sir E. Godfrey was murdered, and Green and the contrivers of it have been executed for it; the matter hath passed the examination of the parliament, and the king and council and all: Now this Thompson is a printer, I may as well say a printer of libels, for he does constantly print libels against the religion established, and the justice of the nation. The jury that were impannelled upon the coroner's inquest, he says of them, that they at first did agree that he murdered himself, and afterwards did return, and find that he was murdered by others. Gentlemen, it is plain that he was murdered by others, and the particular persons have been tried for it, and found guilty. Now this person after all this, What does he do? He takes upon him to write a letter to Prance (Prance was one of the witnesses in that case) he writes it by the name of a letter, but it is a foul and wicked libel; and therein ('tis too long for me to mention the particulars) he scandalizes the public justice of the nation, he undertakes to vindicate the murderers, and to accuse the proceedings of the nation. But, gentlemen, we will prove these men guilty of framing and publishing of these wicked libels, and that is all that is needful to be done upon the point of evidence. We will call our witnesses.

Then Mr. Clare was sworn, and produced a copy of the record of the conviction and attainder of Green, Berry, and Hill, for the murder of sir Edmundbury Godfrey. As also a copy of the inquisition, taken by the Coroner of Middlesex, upon the view of the body of the said sir Edmundbury Godfrey, whereby it is found that he was murdered by them, strangled with [illegible] by [illegible] unknown. Both which (Mr. Clare having sworn to be true copies) were read.

L. C. J. (Sir Francis Pemberton.) This matter of his being thus strangled, was found before it was discovered who did the murder. It was upon the sight of the body, and they supposed it to be done by a cord, but afterwards it came to light that it was done with an handkerchief.

Mr. *Thompson.* (To the counsel of the defendants) if you will put us to prove all, we must prove that these men were executed.

Then Captain *Richardson* was sworn.

L. C. J. Were these men executed for this murder?

Capt. *Rich.* Yes, I saw them executed.

Then Mr. *Prance* was sworn.

Mr. *Thompson.* Did you give evidence upon the trial of Green, Berry, and Hill, for the murder of sir Edmundbury Godfrey?

Prance. Yes.

Mr. *Thomps.* Do you remember that Brown was a witness too?

Prance. Yes, Brown was.

Mr. *Thomps.* Was Curtis a witness, and Mr. Bedloe?

Prance. That Curtis was, I don't remember; Mr. Bedloe was.

Then *Curtis* was sworn.

Mr. *Thomps.* Were you a witness at the Trial of Green, Berry, and Hill?

Mrs. *Curtis.* Yes, I was.

Then sir John Nicholas, and sir Philip Lloyd and William Bridgman, esq. were sworn, and the two letters in the information were shewed to them.

L. C. J. Were these shewed to the defendants, Thompson, and Pain, and Farwell, at the council?

Sir *P. Lloyd.* These were the same, I know, because they are endorsed by my hand; Thompson owned the printing of both, and one other of the defendants owned the writing of one of them, and the other of the other.

L. C. J. But Thompson owned the printing of both?

Sir *P. Lloyd.* Yes, my lord.

Sol. Gen. Did Pain and Farwell own the bringing of both to Thompson to print?

Sir *P. Lloyd.* One owned the one, and the other the other.

Then Sir John Nicholas and Mr. Bridgman testified the same.

Mr. *Saunders,* of counsel for Pain, said to sir Phil. Lloyd, Did Pain or Farwell own that they brought both, or one the one, and the other the other?

Sir *P. Lloyd.* One the one, and the other the other.

Mr. *Saunders.* Then pray, sir, which was that Farwell did own?

Sir *P. Lloyd.* My lord, my own memory does not tell me which, but here are notes say that Farwell owned the first, and that Pain owned the second.

L. C. J. Do you believe them to be true?

Sir *J. Nicholas.* Yes, sir, I took the notes.

Mr. *Yalding.* Did he readily discover his authors?

Sir *P. Lloyd.* Yes he did.

Associat. The title is thus, 'A Letter to Mr. 'Miles Prance, in relation to the Murder of 'sir Edmundbury Godfrey.' Shall I read it all?

L. C. J. All of it.

Read it in these words: Mr. Prance.

"A LETTER to Mr. MILES PRANCE, in relation to the Murder of Sir Edmundbury Godfrey.

"Mr. Prance;

"Perceiving by some late pamphlets several rumours raised, as if there were endeavours used to asperse your evidence in relation to the death of sir E. B. G. and to lay that murder upon himself. And remembering the consternation, which then was in all people's minds, by the discovery at that time of a dreadful and most horrid Popish Plot, which occasioned divers to report, and most to believe (even several days before the dead body was found) that he was murdered by the Papists at Somerset-house. And hearing that the coroner's jury or inquest, were first of opinion, and accordingly declared he was *felo de se*: and that there was much art and skill used to procure their verdict to the contrary; more particularly, the refusing of the body (at their instance and request) to be opened; and opposing the assistance of the coroner of Westminster, (who is taken notice of to be a knowing and impartial man in the execution of his office;) who was desired to, and did attend for that purpose, but was dismissed with a guinea; telling him, they had no need of his service. I made it my business, partly for your's, but chiefly for the truth's sake, to make a strict enquiry into the farther causes of the aforesaid rumours, and do find these particulars very much urged, and discoursed of, (viz.)

"1. In opposition to the evidence of his being dogged up and down, and lodged in a great house at St. Clement's on Saturday the 12th of October 1678, (being the day he was first missing.) It is affirmed, he went out of his house that very Saturday morning about nine o'clock (which is the last time he ever returned thither) and about ten that forenoon was in the fields walking towards Marybone (in which parish his dead corps was afterwards found) and was there met by a brewer in St. Giles's, who discoursed with him; and about eleven of the same day he was seen passing by the lady Cook's lodgings near the Cock pit; after which, he was seen in St. Martin's-lane, went by the church, and down Church-lane into the Strand; about one passed by the door of one Mr. Ratcliff an oilman in the Strand, and soon after was met in the back court of Lincoln's-Inn by two gentlemen, who observed him to make a sudden turn, and to go out at the back door; they went out at that door also, and and did see him turn the corner wall, between which place and Turn-Stile, he was met by a barrister at law; and that a person living near Primrose-hill, declared before divers persons, that he saw him about three that Saturday in the afternoon walking in those fields, his usual walk being that way.

"II. They say, the place where, and the posture wherein he was found, are very remarkable. As to the place, it was in a ditch on the side of Primrose-hill, surrounded with divers closes, fenced with high mounds and ditches, no road near, only some deep dirty lanes, made only for conveniency for driving cows and such like cattle in and out of the grounds; and those very lanes not coming near 500 yards of the place, and impossible for any man on horseback with a dead corpse before him at midnight to approach, unless gaps were made in the mounds; as the constable and his assistants found by experience when they came on horseback thither. As to the posture, his breast was unbuttoned, his waistcoat and shirt put up, his sword run in under his left pap next his skin, the point coming out at his right shoulder about six inches, his left arm doubled under him, (on which his head seemed to lean) and his right arm stiff, stretched out upon the bank, his belly and breast being supported by the side of the bank, his knees knit together, and with his hips a little bending or doubling under him.—And they infer from thence, that he being a tall raw-boned man, (after he had been several days dead) could never be crooked so as to be crammed into a sedan, (which are very low built, and difficult to be carried with proper braces, much more as you evidenced, with cords) then straitened, and his legs opened, and mounted on horseback, and then put into the posture he was found in, and stiffened again.

"III. Now although the matters aforesaid may be said to be only circumstantial, yet they produce undeniable arguments against your evidence, viz. They say, that if a man, or any other creature, be strangled, or hanged, and his body cold, and the blood settled in the veins, (as he must needs be, if your evidence be true) run 20 swords through such a body, not one drop of blood will come out: but on the contrary, his body, when found, was full of blood, insomuch, that (over and above the cakes or great gobbets of congealed putrified blood found afterwards in his clothes) the constable when he pulled the sword out of his body, it crashed against his back-bone, and gobbets of blood and water gushed or gubbled out of that wound in abundance, not only in that very place where the sword was pulled out, but in all his passage to the White-house, especially there where his body was lifted over two high stumps; and also when he was laid upon the table the blood and water so issued out of that wound, that it ran from off the table upon the floor, and from thence into the cellar; so that they do aver that that wound that he received by that sword, must of necessity be the cause of his death. And they take notice, that so much of the sword as was in his body, was discoloured and blackish; and that part that came out at his back was of a dullish colour, and the point thereof was rusty; also, that the clothes, belt, and scabbard, were weather-beaten to rags; his body stunk extremely; his eyes, nostrils, and corners of his mouth were fly-blown; all which must naturally be by his being so long in the air.

"IV. They say, That when a man is strangled, or hanged, his eyes will be extorted, his face will be swelled and black; whereas his eyes were shut, his face was pale, only the left part of his chin, with his breast and belly being next the earth, were putrified, and looked of a blue and greenish colour, more especially about the wound; for that the blood, when hot, running to the wound, caused the greater putrefaction in that place: whereas, if the wound had been made after he was dead and cold, the rest of his body would have putrified as soon, and as much as there.

"V. They say, That the cleanness of his shoes makes against your evidence; for his shoes were cleaned, or rather glazed on the very bottoms of the soles, occasioned by his walking in the grass, and grass-seeds were observed to stick in the seams of his shoes: and besides, there was not one speck of dirt on his clothes, or legs, not so much as a horse-hair sticking thereon; whereas the constable, and those that went with him, were dirtied and moiled up to the very saddle-skirts, and not easily to be cleaned; and Mr. Prance, you know that a tall dead man on horse-back, cannot lift up his legs to save them from the dirt.

"VI. As to the looseness of his neck, and the rim or green circle about it, they say they are ridiculous and impertinent arguments against so many demonstrative ones; especially, when there is not a nurse, or any woman of age, that hath buried any relations, but will tell you it is very common for people to die with necks as loose as his was. And the rim about his neck was so far from being like one made with a cravat or handkerchief, that it seems to be occasioned by the great height and stiffness of his collar, which was fast buttoned about his neck, and on which his head rested, and was unbuttoned about ten o'clock the next day, before the coroner or jury came. But if that rim, or those bruises, that your evidence seems to make the cause of his death, were really so; then they alledge, that in such case, the whole mass of blood would have settled there, and his neck and bruises would have swelled, and have been perfect black, which was not in his case.

"VII. They also say, That all these matters are notorious, and will be proved by divers credible and undeniable eye and ear-witnesses: and besides, they observe, that Bedloe's (before the Committee of Lords) and your evidence, in relation to this gentleman's death, are as different as the East is from the West; for you dog him out of St. Clement's; the other decoys him from Charing-cross: You swear he was strangled with a handkerchief near the stables going to the water-side; Bedloe, that he was smothered with a pillow in a room in the great court in Somerset-house. You say, he took horse at Soho; Bedloe says, he took coach at Clarendon-house; with many more such like contradictions: and considering the old pro-

verb, 'Fore-warn'd, fore-arm'd.' A further and fuller account of the whole matter expect, I being loath at present to exceed the bounds of a letter. I am, Sir, your very loving friend,
Cambridge, Feb. 23, 1681. TRUEMAN.
London: Printed for M. G. at the sign of Sir E. B. G.'s Head near Fleet-bridge."

Sir *Fr. Winn.* Now read the other letter.

Associat. This is entitled, 'A second Letter to Mr. Miles Prance, in Reply to the Ghost of Sir Edmundbury Godfrey.'

"Mr. Prance;

"Since my last to you of the 23d past, I have seen a prolix, railing, and impertinent pamphlet, intitled, "Sir E. B. G.'s Ghost," and pretended to be an answer to my said letter. And conceiving you are better acquainted with ghosts than myself, I thought fit to direct my answer to that Ghost to you, and thereby shew the ridiculousness thereof as also vindicate the truths contained in my said former letter, and shew you and the world further circumstances to justify the same; and therefore, according to the method of my former letter, I shall now proceed by these heads:

"And first, not understanding what the Ghost means, by arraigning the justice of the nation, unless he would assert that all that are legally, are likewise justly hanged; and so consequently, that the mother and her two sons were justly hanged in Gloucestershire, for the murder of the lady viscountess Cambden's steward, though he afterwards appeared alive; and I do not find that ever his appearance arraigned the justice of the nation. And remitting the consideration of Mr. Brown's the surgeons, and Mrs. Curtis's evidence in relation to the blood, to its proper place; and affirming, (as the truth is) that Mrs. Celliers, Mrs. Mary Gibbon, the Newgate priests, James Magraph, and all other Irishmen, or Irish evidences, or other papist or papists, or popishly affected persons whatsoever; as also those concerned in the late sham of his having hanged himself, are strangers to, and had not the least knowledge or intimation of the contents of my said former letter, nor any way concerned therein, or in, or with any part thereof, (as the said Ghost most falsly and maliciously insinuates,) I take notice that the said Ghost seems to admit so much of the truth of the said letter, as that it was reported divers days before the dead body was found, that he was murdered in Somerset-house by the papists, and which report was made even the next morning after he was missing, (being Sunday the 13th of October, 1678.) Now I would fain have this Ghost to inform the world who first raised that report: But as to Mr. Dugdale's letter of it, I cannot give it any better answer, than that as his evidence hath since been disbelieved in matters of greater consequence; so he not producing any such letter you must give me leave also to suspect him in this. But as to the other evidences of Mr. Birch and the rest; theirs I believe to be very true; for it is no miracle that a report so cunningly raised, (without any ground) might as industriously be promulged to most parts of the kingdom, before the respective days they speak of, especially when the plot had filled all mens heads with fears and jealousies, without which it had not been in the power or art of the Ghost, or any of his tribe, to have suggested the least surmise to contradict his being *Felo de se.*

"Next; Whereas my letter saith, (and that truly) that the coroner's jury were first of opinion, and accordingly declared he was *Felo de se*, and that much art and skill was used to procure their verdict to the contrary. This Ghost instead of contradicting that truth, would insinuate, as if that letter reflected upon the reputation of the jurors, when as there was no such thing implied or intended, they being known to be honest men, of good reputation, and free from fraud or guile, and consequently the easier to be over-reached by the cunning of those and that party, whose interest it was to deceive them, and who never leave any stone unturned to attain their designs. And I cannot but observe how skilful and industrious these people still are, to hide and prevent the truth of that man's death from clearly appearing and shining forth, as without doubt it would, and must do, was not the matter now (as formerly) puzzled with legends, and long stories, nothing to the purpose. And as to the coroner's warrant for burying the body, and recited in the Ghost, it is notorious they are common tricks, used by men of his profession, who (if any money is like to come) will usually adjourn the jury, and then make such warrants (they knowing, that if the verdict be *Felo de se*, it is then out of their power to give leave to bury the corps.) And it would be very material, if the coroner would declare what he received for that job, and of whom, and what evidence he had to induce the jury to find (as the inquisition imports) that he was strangled with a linen cloth, a matter of fact never so much as spoken of, until you came in with your evidence, which was not in some weeks after. And I do again aver, that the body was required by the jurors to be opened, and was refused; and if the body was in their and the coroner's power, (as the Ghost insinuates) such power was concealed from, and denied the jury. And it is very probable the coroner of Westminster's assistance was refused, for some such indirect doings, for that there was not the least difference betwixt the coroners in relation to their jurisdictions; and the Westminster coroner came not voluntary of himself, but was importuned to be there by Mr. Wigg, and divers others of the chief inhabitants of St. Martin's parish: And particularly, the reverend Dr. Lloyd (who preached the funeral sermon) spoke to the coroner of Westminster before he went, so that it had been proper to have given the matters mentioned in that sermon, in evidence before the jury. And it is observable, the person mentioned to give the information to the doctor of the two wounds in the body, and that two

hours before it was found, was never produced; for if he had, and that sir E. B. G. had been murdered, such person might have been secured, and thereby the murderers detected. But I suppose the Ghost will not pretend either that sermon, or the pamphlet printed by Nath. Thompson to be legal, or (indeed) any evidence at all.

"And now, Mr. Prance, being come to the several paragraphs of my Letter, I shall take them in order as they are placed, and give the Ghost particular answers accordingly.

"I. As to sir E.B.G.'s perambulations therein mentioned to be on the Saturday, he was first missing, they are true in every particular, and will be proved by divers able, credible, and undeniable witnesses. And how vain it is for the ghost to ask, why these witnesses did not come in sooner at the trial of Green, Berry, and Hill, do you judge, when all the world remembers the great torrent that carried all before it in favour of the plot, and the murder of sir E. B. G. by the papists, without which (as T. O. was heard to say) his plot had failed: And when it is duly considered, that the two persons that first found the body, (for no other cause) suffered much in their persons and estates by a long and chargeable imprisonment. And all others that then seemed to doubt of the truth of that man's being murdered by the papists, were stigmatized with the odious names of papists, and encouragers (if not promoters) of the plot. It will appear no wonder, if people were unwilling to discover their knowledges, or to come voluntarily (without process) to give their evidence. And how can it be imagined those three unfortunate men, being kept close prisoners, could make enquiry after proper evidences, or against the common vogue, draw into suspicion the assertion of his being murdered by the papists?

"II. The Ghost hath so much ingenuity to grant the second paragraph of my letter, as to the place and posture he was found in, but would avoid the inaccessibleness of the place, pretending a lane near, when as that lane is, in effect, unpassable with two on a horse, and comes not within 500 yards of the place, and the mounds thither very high, and the constable and his assistants (though they lived in the parish, and well knew the way) were forced to break a gap in the mounds, though they were singly horsed. And whereas the Ghost alledges, that you do not depose he was carried to the place wholly on horseback, he hath run himself into a worse dilemma, having made no provision of men, either as to strength or number) to carry so great and weighty a corpse, in the dead of the night, over such mounds and fences; but let all inquisitive people, desirous of truth, take the pains but to go to the place, (and that without any burden on their backs) they will soon be convinced of the assertion of the difficulty (if not impossibility) of the bringing of a dead corpse thither, either on foot or on horseback. And the pretensions of the Ghost's, as to the limberness of the body and joints, does not answer that part of my letter which relates to the impossibility of his being put into a sedan. For his body, when found, was stiff; so that what limberness happened, or appeared afterwards, hath no relation to the question. For it is a certain maxim, a dead limber body cannot be stiffened. And pray, Mr. Prance, give us an account what became of this sedan, and the cords? And how you could carry it with cords; for the meanest sedan-man in the town will tell you it is impracticable, or rather impossible; and you may, if you please, make an experiment with a cord.

"III. As to the body being full of blood, when found, the Ghost endeavours to disprove that assertion, by the evidence of Mr. Brown the constable, the two surgeons, and Mrs. Curtis, and produceth the evidence given at the trial of Green, Berry, and Hill, and an extrajudicial affidavit since made by Mr. Brown, and another by Mrs. Curtis, to countenance such his denial. But, Mr. Prance, (when you see the Ghost) tell him the matter of the blood will (and I assure you and all the world it will) be proved by divers credible and undeniable evidence; and that I may pacify the Ghost in the mean time, he is to understand that Mr. Brown, the two surgeons, and Mrs. Curtis, are no competent (nor can be material) witnesses in this case. For Mr. Brown, as he did a rash and unaccountable act (to give it no worse name) in removing the body before the coroner and jury saw it, (which hath occasioned all this dispute) so he must not think to help himself by affidavits, or to justify one ill act by another: And besides, as he unadvisedly (and contrary to all law and practice) removed the body before the coroner and jury came; so he did the same in the dark, (about eight o'clock at night) when the candle was blown out; whereby it was impossible for him to look for any blood, so as to find it: And neither he or the surgeons (by any day light) saw the place where the body was found, or where the sword was pulled out, until after ten o'clock the next day: before which time much of the blood was taken up, and the rest trampled out of sight by the great concourse of the people which came thither. And as for Mrs. Curtis, she only saw the body after it was brought home, when as the body was stripped at the White-house, and a blanket borrowed there to wrap the body in. So the world may judge of her affidavit. But, Mr. Prance, it will be fully proved, that the body was full of blood; and that there were cakes, or gobbets of dry blood found in his clothes, which (with his body) stunk extremely. And it will be also fully and effectually proved, that his eyes, nostrils, and corners of his mouth were fly-blown; though the Ghost (without the least colour of reason) pretends it to be contrary to nature and reason; when as common experience daily evinces the contrary. And I do observe, that the Ghost omits to take notice of two material circumstances in this third para-

graph, viz. The first, as to the sword's crashing against the backbone. The second, as to that part of the sword which was in his body being discoloured. And pray, Mr. Prance, do you (or the Ghost) give the reasons thereof, and of it's point being rusty; as also, what was, or could be the cause of the spots in the shirt, waistcoat, and drawers, of greenish colour, mentioned in Mrs. Curtis's affidavit.

"IV. As to the fourth paragraph of my letter, I perceive the Ghost admits that when a man is strangled or hanged, his eyes will be extorted; and admits that sir E. Godfrey's eyes (when found) were shut; only he seems to quarrel with the colour of his face: And, seeing he admits his face not black (as all hanged men's are, when cold) I care not to contest, whether his face was pale or ruddy, or a little swelled, or not, those being very inconsiderable circumstances. But his denying the putrefaction charged in that paragraph, and the consequences deduced from thence, is not only a great untruth, but is directly opposite to the evidence given by Mr. Skillarne, at the trial before mentioned.

"V. As to the fifth paragraph, the Ghost is so far from answering the assertions therein, as that he only quibbles at words; and begging the question, deduces thence impertinent and ridiculous arguments. For it will be proved, that his shoes were glazed at the bottom of the soles, and which must of necessity be occasioned by his walking on the grass. And (Mr. Prance) if you and the Ghost will walk together, you will easily experience it, and so may any body else satisfy himself in this speculation. As also, as to the grass seeds that stuck in the seams of his shoes; which is so far from being impossible at that time of the year, (as the Ghost would argue) as that it will be proved by undeniable evidence. But (Mr. Prance) pray ask the Ghost how he came there without a speck of dirt; and who picked the horse-hairs off his clothes; and let him contrive (if he can) a probable or rational way for a dead man on horseback to hold up his legs, or to save them or his clothes from the dirt: For though a man may walk thither very clean, yet it is impossible at that time of the year to ride, either without being dirtied, and some horse-hairs sticking on his clothes. But perhaps the next account from the Ghost will be, that he either rid with gambadoes, or else a pair of fishermen's boots.

"VI. As to the sixth paragraph, pray Mr. Prance, tell the Ghost, his railing against Popish nurses, and Popish midwives, is no answer to the assertions in that paragraph, for all the women in the town are competent judges thereof, and I hope the Ghost will not say they are all Papists. But pray tell the ghost he takes no notice of the height of the collar, and it's being fast buttoned about his neck when found; nor the conclusion of that paragraph; and therefore I suppose he admits it to be true.

"VII. And as to the seventh and last paragraph, which relates only to the difference betwixt your's and Mr. Bedloe's evidence; I must take notice, that what you and he swear are very contradictory, and much more than I hinted in my said letter: and though part of it be as he and you were informed; yet you and he swear the informations were received from the persons actually concerned in the murder, and who had confidence enough in Mr. Bedloe (though he refused 4,000*l.* to help to kill him, and 2,000*l.* to help to carry him away) as to shew him the dead body, and so were under no temptation of mis-informing either him or yourself. And pray, Mr. Prance, will you let the world know what reward you were to have for that job; for certainly you deserved as much as Mr. Bedloe, and needed more, you having a wife and children, and he a batchelor?

"Thus, Mr. Prance, having gone through each paragraph of my letter, and answered the Ghost to your satisfaction; I should leave off here, fearing I have been too tedious already: but I cannot omit to take further notice of Mrs. Curtis's affidavit, in relation to the drops of wax found upon the clothes, in which I cannot say but she may swear true; but this I do aver, that if it be so, those drops were put upon the clothes long after he was found, and after the jury had sat on the body; for there was no such thing then on the clothes: and I suppose this was some artifice used by those, who either out of interest or design, were desirous to confirm his being murdered at Somerset-house, and to carry on the great lie, and impertinent story, then invented, and given out (amongst others) that he was laid under the high-altar there; and if my information fail not, there were other such-like tricks used, which I shall make bold to acquaint those more nearly concerned therein, than yourself; and shall give them to understand, that 'tis no wonder a man in sir E. B. G.'s circumstances, should kill himself, such accidents being no news to that family, wherein melancholy and distraction (that often produces such effects) hath been predominant, and might occasion the words he spake to sir Thomas Robinson, as to his being the first martyr.

"And now, Mr. Prance, for a conclusion, if you were guilty of the murder of sir E. B. G. how durst you (as you did) on the Friday after he was found, go to Primrose-hill to see the body, and not be afraid it should at your approach have bled afresh? and how came you (after Green, Berry, and Hill, were hanged) to declare, in answer to a solemn question, that you knew nothing of the death of sir E. B. G.? Pray remember me to your old friend and lodger Mr. Renn, my respects also to your wife, not forgetting your little daughter, who gave you so good advice before you took your journey into Nottinghamshire, and helped to take Bedingfield, who was buried fourteen months. I am, your loving Friend, TRUEMAN.

Cambridge, March 13, 1681.

London: Printed for N. Thompson, 1682."

Then the Associate read out of a paper, intitled, 'The Loyal Protestant Intelligence, &c.' Number 125. Tuesday, March 7, 1681, the following paragraph:

"March 4, 1682. Whereas the mayor of Gotham, in his pretended True Protestant Mercury of Saturday last, seems mightily offended with a letter therein mentioned to be sent to Mr. Prance, concerning the murder of sir E. B. Godfrey, and endeavours to avoid the examination of the truth of the matter of fact contained in that letter, by his old way of railing and stigmatizing all honest Church of England Men with the name of Papist, or popishly affected: he and his Whiggish Tribe, are hereby desired to take notice, that there is not in the said letter the least item or circumstance, but what will be by undeniable evidence made out to be the truth. So the said Mr. Prance having not as yet vouchsafed an answer to that letter, he will speedily receive a further letter relating to that murder; wherein the further truth will not only be fully set forth, and other circumstances set out; but also it will thereby plainly appear, that the reputation of that dead knight is so far from being therein murdered, or the justice of the nation from being questioned; as that it will concern Mr. Prance, Mr. M. G. and all parties on that side, to lay their heads together more effectually than they did on Wednesday morning last: for truth seeks no corners; and were it not for a vicious and unsanctified generation of vipers need not require an advocate. For, though a lie may prevail for a time, and eclipse the truth, yet at length truth will shine forth, with the assistance of that God, who is the author of truth itself."

Then a Paragraph out of another of the like Intelligences, was read. The Intelligence was Number 127. Saturday, March 11, 1681.

"March 9, 1682. Whereas Dick Janeway, in this day's Mercury, promises an answer to the late letter to Mr. Prance, &c. This is to give him, and all the world notice, that such an answer is impatiently expected by the author of that letter, who questions not but to prove every tittle of that letter, to the satisfaction of all mankind: and besides, he is very desirous that the Courantier (according to his last Pacquet of Advice from Rome) would go on, and use his interest to procure the lord mayor, court of aldermen, and common-council of London, to ...

or popishly affected person concerned in that letter, or in the proof of the particulars thereof; but the same (with divers other material circumstances relating to the murder of sir E. B. Godfrey, and the fraud and blind put upon the world in relation thereto) will be more fully, plainly, and manifestly proved, without giving ill words, or scurrilous language, or reflections to any persons that really are, or supposed to be therein concerned, in any circumstance whatsoever."

Mr. Serj. *Maynard*. You see what they have done; they say, *What was testified against the murderers of sir Edmundbury Godfrey, was a lie.* They go over all the evidence given against these fellows, and undertake, by undeniable witnesses, to prove the contrary.

L. C. J. To the defendant's counsel; What say you to it?

Mr. *Saunders*. I am of counsel for Pain, my lord; the charge against Pain is, That he should own, that he did bring one of these letters to be printed; I have forgot whether sir Philip Lloyd said the first or the second.

L. C. J. The second he says.

Mr. *Saunders*. If Pain did own it, I think he did more ingenuously, than when he did make it, or bring it to the press: but, my lord, it was a rash, unadvised act; but not out of any malice: my lord, we will prove that Pain was not a Papist, nor any of his family. My lord, this cannot justify or excuse them, it will only extenuate their fault. We will call some witnesses.

L. C. J. I will hear any thing in this case, be as large as you will, you shan't say you are stinted; for it is a business of mighty concern.

Mr. *Gooding*. I am of counsel, my lord, for Pain: my lord, we have made application to persons to intercede for us; we are sorry for what we have done, and have offered to give any satisfaction.

L. C. J. To me he said, he would make it out by 500 witnesses: they would make it as plain as the day.

Mr. *Thompson*. Since the last time that was appointed for the trial, they have printed, that they would prove it by threescore witnesses; and were very sorry it did not come on.

Mr. *Yalden*. I am of counsel, my lord, for Thompson, who, I think, was unfortunately drawn into the business; and that by Pain and Farwell, though they turn all upon him now. It was a great piece of ingenuity for him to discover his authors; and it had been very mischievous if they had not been discovered.

L. C. J. What say you to the two Protestant Intelligences?

Mr. *Yalden*. They are as much the author of them, as of the other. Thompson says, the authors would be able to prove it by undeniable witnesses: Thompson's Intelligence is open to any man that will put any thing into it, and he is paid for his pains.

Mr. *Osborne*. I am of counsel for Farwell, my lord, it was a foolish thing to do as we have done; but that is no satisfaction: my client says he hath several witnesses.

L. C. J. Call them, they shall be heard.

Mr. *Farwell*. I begin with Hazard, my lord, he and I went to the place.

Then *Hazard* was sworn.

Hazard. I went along with Mr. Farwell. He was at the Rainbow Coffee-house, it was in the morning, and he desired me to go to the place where sir Edmundbury Godfrey was found.

L. C. J. What day was it?

Hazard. I cannot tell, I went along with him, and stayed as long as he did, I saw sir E. Godfrey lying upon the table, his shoes were clean as if he had been on an haymow, and his eyes were closed.

L. C. J. Where was he?

Hazard. Upon a table in the White-house. There were gobbets of blood (that I will aver, my lord) by the ditch-side, and likewise at a place where there were two or three things to go over, there was more blood: I cannot tell how he was carried, or how he came there, but I saw him at the White-house.

Mr. *Williams.* Who went along with you, besides Mr. Farwell?—*Hazard.* Nobody.

Mr. *Williams.* Did he bring you to the place where the body lay?—*Hazard.* Yes.

Serj. *Maynard.* What did Farwell tell you when he desired you to go with him?

Hazard. Why, word was brought by one Hancock a wood-monger, to the Coffee-house, some would not believe him, but sent a porter to sir Edmundbury Godfrey's house, and then, when the porter came, and said the body was found, and carried to a White-house on Primrose-hill, he spake to me to go and see the body, and I fetched my coat and was there quickly.

Mr. *Williams.* When you came near the ditch, did Farwell shew you the place?

Hazard. He and others that were there.

Mr. *Williams.* I ask you this, did any body shew you the place where the body lay, besides Farwell?—*Hazard.* No.

Mr. *Osborne.* Did he go to the place directly, or about over ditches?

Hazard. Truly, I know the way to Primrose-hill as well as he. We went as direct a way as we could.

L. C. J. The straightest way to the place?

Hazard. Yes: we went over several ditches.

Sir *Fra. Winn.* As you were going over several ditches, there was no body with you, but Farwell was there?—*Hazard.* No.

Mr. *Williams.* Did you enquire of any body as you went along?

Hazard. I cannot remember such a small circumstance.

Then *William Batson* was sworn.

Mr. *Osborne.* What do you know about the blood that was in the ditch where sir E. Godfrey was found?

Mr. *Batson.* The morning after the murder was discovered, and that sir E. Godfrey was found in the fields, I went with two or three neighbours, and went to the White-house, and I saw him lie upon the table in the White-house; and coming back again, they shewed me in a ditch where they said he lay, some blood, I cannot say it was his blood; and going a little farther, I saw some more whitish blood, and this is all I can swear.

L. C. J. Was it frosty weather?

Batson. My lord, I cannot tell whether it was, but I will assure you the blood looked to me more like blood that was laid there, than any thing else.

One *Fisher* was sworn.

Mr. *Farwell.* Was you there when sir E. Godfrey was stripped?

Fisher. Yes, I stripped him of his clothes, pulled off his hose and shoes; I was carpenter to my lord Wooten, and I was sent for in October, a day or two before, and I came to get the house covered up, and to take order with my partner: and as I went, there was a report that sir E. Godfrey was found and laid up in the White-house, and when I came, the coroner and the jury were there, and I got into the room where sir E. Godfrey lay upon the table, and took his hat off; and I saw two wounds within an inch and a half one of another, one went no further than his bone, and the other went through his back. And, my lord, immediately there was an order come down from the coroner to get him stripped. They asked me if I would give an hand, I told them yes. I pulled off his shoes, and they were clean, and I pulled off three pair of stockings, and a pair of socks, his black breeches, and his drawers, and they came off very well; there was a man in the company that desired to help, so I got upon the table, and set him upright with his breech upon the table, and his feet hanging down; we unbuttoned his coat, and pulled it off, I came to his flannel shirt, and when I came to his back, there was blood. But I did not see any blood till I came to his back-part. About his throat there was something that had girt him.

L. C. J. He looked as if he were strangled, did he?

Fisher. Yes, and his neck was so weak that you might turn it any where.

L. C. J. To the defendant Farwell. How do you pretend he murdered himself? That he ran himself through?

Mr. *Farwell.* I make no inference, my lord. But I would only prove that what I write is true; I writ only the first letter; and there are three heads I am charged with upon that letter, and that about the blood is one. My lord, I was concerned they should pretend there was no blood at all; when I came there, there was near my hat full of blood.

L. C. J. Can you tell who laid it there?

Mr. *Farwell.* My lord, if you will hear two witnesses more, I will satisfy your lordship who laid it there. My lord, this man was one of them that helped to remove the body out of the ditch.

John Rawson, called by Mr. Farwell, and sworn.

Rawson. My lord, I was there taking him up, we fetched the constable, and pulled him out of the ditch, and when we had done, we pulled the sword out, and removed him to the house, and there was blood upon some posts (explaining himself to me, on a couple of stumps to go over upon) and going into the door, his back did sweep a little against the

side, and there was some water and blood lighted there, and likewise lay upon the table where he lay, and upon the floor.

Mr. *Farwell.* Did the blood of his body fall upon the floor, and go through the floor into the cellar?

Rawson. Some drops were there, I won't swear whether it were blood or no, my lord.

Mr. *Farwell.* My lord, I desire the same question may be put to Mrs. Rawson.

Mrs. *Rawson* sworn.

Mrs. *Rawson.* My lord, if you please, I have not a word to say, but there was blood and water ran through the table, that is all I can say.

Mr. *Farwell.* My lord, as to the difference between Mr. Prance's evidence, and Mr. Bedloe's, I desire I may prove the difference between them.

L. C. J. You shall make any proof you will.

John Stanley called by Mr. Farwell, and sworn.

Mr. *Farwell.* I call him to prove the copies of the Journals of the House of Lords.

L. C. J. What would you infer from the Journals?

Mr. *Farwell.* My lord, they charge me, that I should say there is a great deal of difference between the evidence Mr. Bedloe gave in the House of Lords, and the evidence that Prance gave at the trial of Green, Berry, and Hill.

L. C. J. Would you prove any evidence given by Bedloe out of the Journals?

Mr. *Farwell.* I can prove he gave that evidence before the House of Lords.

But Mr. Farwell afterwards went off from that proof, and called Mr. Hobbs, Mr. White, Mr. Chase the father, and Mr. Chase the son, and Mr. Lazinby, who were sworn.

Mr. *Farwell.* I ask Mr. Chase, what he observed about sir Edmundbury Godfrey?

Mr. *Chase* the son. My lord, on Friday morning the day after the body was found, I went to Primrose-hill, in company with my father, to see the body which they said was found; I came into the field where the company in the field said the body had been laid; the body had been then carried into the house, I looked into the ditch where they said the body was laid, I could not see blood in the ditch, but four or five yards aside off the ditch, there seemed some blood to me, which the constable said, followed the sword when it was pulled out of the body: I saw the body in the house, and saw the two wounds: he had a great contusion on the left ear, and his whole face was very much bruised.

L. C. J. Do you believe there was any violence offered to him?

Chase. My lord, I believe he was strangled, for I do not believe those injuries that were offered about him, could be after he was dead.

L. C. J. What say you, Mr. Hobbs?

Farwell. I desire he may be asked, whether he did not propose to Mr. Godfrey, that the body might be opened, that any doubt may be laid aside, concerning his being murdered in that place?—*Hobbs.* My lord,—

L. C. J. Had you any doubt, whether he was murdered or not?

Hobbs. Indeed, my lord, I thought he was strangled, that was my opinion, I cannot tell whether I was mistaken. I said to Dr. Goodall it would be very well if Mr. Godfrey would send for a surgeon and a physician from the court, and others from the city, to satisfy all persons.

Mr. *Farwell.* What colour was his face?

Hobbs. My lord, it was blotted.

L. C. J. Did it look as if violence had been used to him?

Hobbs. Ay, my lord; and the bloody vessels of his eyes were so full, as if he had been troubled with sore eyes.

Mr. *Farwell.* Did you observe any fly-blows in his face?

Hobbs. No, my lord, not that I know of.

L. C. J. What say you, Mr. Chase.

Chase. My lord, on Friday when I came to see the body at the White-house I found a great contusion, and two wounds, one yielded towards the right, the other went into the body. I troubled myself no more at that time, but the next day I was desired by Dr. Lloyd, that I would go to his house and see the body again, and there I found a swelling upon the left ear, as if a knot had been tied; there I found him beaten from this place to this, (pointing to the neck and stomach) I never saw any man beaten so in my life. Before this business was broached, Mr. Farwell did take me aside at Man's coffee-house, and did tell me what proof he could make of this business: I told him, Mr. Farwell, I love you well, don't meddle with the business, for I know it is impossible any thing can be said against it that hath the face of truth. I did so a second time (my lord) when the book came out, I found one before I went to New-market, and the other at New-market; I was very much troubled to see them. The night before Easter, the eve of Easter day, I met with Mr. Farwell at an house where I had been with a good friend of his and mine, and Farwell came and asked for me, and he came up to the room as they called for another bottle of wine, I told them it was needless, only since Mr. Farwell is come up, said I, I will drink one glass with you. And he told me then, that six months before I had given him good counsel if he had taken it.

Mr. *Farwell.* My lord, I desire Mr. Smith to be called.

L. C. J. Let him. But he came not then.

Mr. *Brown* is called by Mr. Farwell, and sworn.

Mr. *Farwell.* I desire Mr. Brown may be asked, whether his eyes were not fly-blown?

L. C. J. It is proposed to you by Mr. Farwell, whether the eyes of sir E. Godfrey were not fly-blown?

Brown. No, my lord, I did not see any fly-blows.

Mr. *Farwell*. Whether there were any specks that one might call fly-blows?

Brown. My lord, I did not see any specks that one might call fly blows.

Mr. *Farwell*. I desire that I may call two witnesses to prove that he said so.

L. C. J. What will you get by that, Mr. Farwell, to disparage your witness?

Brown. My lord, Mr. Farwell would have had me say so, but I never said so.

Then *Smith* came.

L. C. J. What do you ask Smith?

Mr. *Farwell*. Only about the blood.

Brown. My lord, he came to me another time, and told me I was wrong in my affidavit, as if he knew what I could make affidavit of better than myself.

Mr. *Farwell*. My lord, I was not the party that told him so.

Brown. He was at my house twice at Mary-bone, at the sign of the Sun.

L. C. J. Was Pain with him there?

Brown. My lord there was a man with plate buttons with him there. I don't know him.

Mr. *Smith* sworn.

L. C. J. Well, what say you, Mr. Smith, it is required of you by Mr. Farwell, here to declare whether you took up any of sir E. Godfrey's blood, and brought it home in your handkerchief?

Smith. No, my lord, I know nothing of that.

Mr. *Farwell*. I desire Rawson and his wife may be called again.

Rawson appears.

L. C. J. What say you, it is required by Mr. Farwell, whether you saw any fly-blows, in sir E. Godfrey's eyes?

Rawson. There was something like fly-blows, but I can't say they were fly-blows.

L. C. J. Did you observe the flies were busy at that time of the year?

Rawson. My lord, I did not see them. [Then the people laughed.]

Mr. *Farwell*. I desire Rawson's wife may come.

Rawson. I must fetch her then.

Rawson's wife appears.

L. C. J. Look you, Mr. Farwell requires of you to tell us, whether there were any fly blows in the eyes of sir E. Godfrey.

Mrs. *Rawson*. If it please you, my lord, there were a great many people said there were fly-blows, I took no great notice of them.

L. C. J. He asks you what you say to his mouth, and his nostrils, were there fly-blows?

Mrs. *Rawson*. If it please you, my lord, I can't say nothing to it, for I did not much mind it, but they seemed fly-blows.

L. C. J. Have you any more witnesses, Mr. Farwell?

Mr. *Farwell*. I pray Mr. Lazinby, (my lord) may be ask'd, whether men that kill themselves look as sir E. Godfrey did?

L. C. J. Mr. Lazinby, Mr. Farwell requires of you, whether you have seen men that have killed themselves look in such a manner about the neck and face?

Mr. *Lazinby*. My lord, he appeared to me to be strangled, and that which strangled him was kept about his neck till he was cold. My lord, people that are hanged and let down while warm, the blood drains away by the vessels that are broken, and their faces are rather less, and their faces become very pale; but the thing wherewith he was strangled remaining about his neck, the blood could not drain away, but it made his face look bloody. The two Mr. Chases, the king's apothecary, was there when I was there, and the blood that was some four yards from the ditch, I put my finger in it, and smelt to it, and it smelt like that which comes from a body after a fortnight's time dead, rather than a week's; my lord, it was blood and water. The water will separate from the blood.

Sir *Fran. Win*. But you believe he was strangled.

Mr. *Lazinby*. Yes; his neck from this place hither (pointing to the upper part of his neck, and then to his stomach and breast) was very much discoloured and black, and his mouth was discoloured. Now whenever a man is bruised whilst he is alive, or whilst he is warm, that part, after the person is dead, will soonest corrupt.

L. C. J. It stands to reason that the bruised part will first corrupt.

Mr. *Lazinby*. My lord, after Mr. Chase the apothecary and I had seen him at the White-house, I went up to drink a glass of beer, and Mr. Chase's son unbuttoned sir E. Godfrey's collar, which was more than I saw, when I was come in, and unbuttoning the collar, there were two great creases both above and below, so they sent for me down for to come and see it, so I put the collar together and I perceived the collar made the mark like a strait ring upon a finger, the neck being swelled above the collar and below, by the strangling with a cord or cloth.

Sir *Fr. Win*. Do you think he killed himself now, Mr. Farwell?

Mr. *Lazinby*. There was something in the cover of his eyes like matter, but I cannot say it was fly-blows. His eyes were open, my lord, and his eyes were blood-shed, as Mr. Hobbs hath given you an account, as if he had an extraordinary great cold, or a man that had a blow upon the temples or forehead.

Mr. *Farwell*. Whether were his eye-lids closed?

Mr. *Lazinby*. My lord, his eyes were open when I saw him.

Mr. *Farwell*. When I saw him about six o'clock in the morning, his eyes were shut.

Mr. *Lazinby*. I felt upon his clothes; I admired that his clothes were not wet, there hav- having been so great a storm the afternoon before.

L. C. J. And his clothes were not wet?

Mr. *Lazinby.* His clothes were as dry as mine.

Mr. *Farwell.* My lord, they made a great fire there, and dried his clothes.

L. C. J. Come, Mr. Farwell, there is no man so blind as he that won't see. Will you call any more witnesses?

Mr. *Farwell.* I will call no more witnesses; but I suppose they will offer against me that I am a Papist.

Serj. *Maynard.* No, no.

L. C. J. Truly your religion is not worth enquiring into: It is not much to the purpose what religion you are of.

Serj. *Mayn.* Gentlemen, you hear he hath been able to make no defence for himself; but for the satisfaction of the world, my lord hath taken great pains in hearing him. I shall speak but very few words, and call a witness or two of some new matter; that if it be possible to convince him, we will do it. We need not do it because his own witnesses tells you of the several bruises and wounds he had; that there were no fly-blows, no putrified matter. How can a man that stabs himself, bruise and beat himself in the manner that you have heard? There is never a witness that hath spoken on his side, but hath spoken against him, to prove himself as malicious a fellow as can be. What had he to do with this? Sir Edmundbury Godfrey was murdered, was found, inquiry made after it, and prosecution thereupon; now comes this fellow and permits several arguments against it, every one of them from matter of fact that is false, and yet publishes it to the world, that he will prove it by 500 undeniable witnesses. We will now call some witnesses to prove him as wicked a liar as lives. I say what had he to do with it, only mere malice; he would have me ask him, what religion he is of? I shall not ask him, for I don't think he is of any; none of any religion can be so wicked to own such a thing. We shall desire the favour to call a witness or two, to prove something more than hath been proved in this murder, though there was evidence enough upon the trial to prove it.

Sol. Gen. Gentlemen, Mr. Farwell does pretend that he hath only told so many lies, and hath left the world to make use of it. And hath brought witnesses to colour this matter over, in hopes to make you believe the matter is true, but Mr. Farwell hath forgot himself, his paper is quite otherwise, for he hath argued upon it, and made inferences, that therefore sir Edmundbury Godfrey murdered himself, therefore he is guilty of the highest malice in the world. He tells a great many falsities, and from those falsities hath inferred others. The paper is full of arguments.

L. C. J. Gentlemen, I did give him leave to go into what evidence he would in this case, not that I thought it material; for if he could have proved never so much, yet his malice had never been the less to have gone and aspersed the government. What had he to do to meddle with it? To what purpose should he write books concerning the matters of government, to traduce the justice of the nation? The people had suffered as malefactors, and what had he to do with it? If they had suffered innocently, he ought to have done no such thing as this is.

Serj. *Mayn.* My lord, but one witness.

L. C. J. Pray call whom you will.

Serj. *Mayn.* John Oakely. We will prove that he was waylaid that very day he was strangled.

Sol. Gen. We have no need to call any witnesses now, to overdo a thing. We may leave it here.

Jury-man. Pray, my lord, if they have any more witnesses, let us hear them.

L. C. J. It is nothing to this purpose to call any for the king, nor hath Farwell's evidence signified any thing to this. He did design, and would, no doubt of it, have been very much satisfied if he could have made but some probable evidence that sir E. Godfrey killed himself, and I was desirous to hear what they would say for themselves. But you hear what a kind of evidence it is; not a witness he hath called, but is as much against him as can be, and does evince it plainly, that the man was killed, and that he was killed by strangling; and so the evidence was upon the Trial of Green, Berry, and Hill. If he could have raised a doubt about it, yet his offence had not been mitigated by it, for a private person is not to arraign the justice of the nation; but I was willing to hear what could be said in the case, whether a doubt could be made in the world, that sir E. Godfrey was not murdered. And you see how his very evidence hath, in all things, confirmed the evidence Prance hath given that he was killed, and that he was killed by strangling. I must leave it with you, gentlemen, they are all three in this mischief, it is a combination of them to affront the public justice of the nation, and what is the end of it? The end of it is to make people believe there is no popish plot; but it is plain he was killed by the popish party; as Prance, upon his evidence against Green, and the others, attested. But if they could have made it out that he killed himself, all of them would have cried out the Popish Plot was a sham, nothing but a thing raised by the Protestants against the Papists, and all the plot must have gone for nothing. Gentlemen, I do leave it to you, whether upon this evidence you do not believe them all to be guilty of this design of traducing the justice of the nation.

The Jury thereupon, without going from the Bar, found them all three Guilty of the Information. And the people gave a great hum.*

* See in this Collection, the Cases of lord Shaftesbury p. 759 of this volume; of the Seven Bishops, A. D. 1688; and of Stone, A. D. 1796.

Nathaniel Thompson, William Pain, and John Farwell, were brought up by rule, to the bar of the court of the King's-bench to receive their Judgment: Mr. Thompson, the counsellor, moved for Judgment, and particularly prayed* they might have some corporal punishment, acquainting the court, that since their trial (though they had as much time and liberty given them by the Lord Chief Justice, to call their witnesses, and examine whom they would, as they could desire) the very next news-book Thompson put out, he took upon him to give an account, as though justice had not been done him; and further said, if there was any doubt of the fact with Mr. Thompson, or Mr. Farwell, or of Mr. Pain, there were affidavits to satisfy the world about it.

Then Mr. *Spence's* Affidavit was read.

Richard Spence, citizen and upholder of London, living in Arundel-street in the Strand, in the parish of St. Clement's-Dane, in the county of Middlesex, having been twice suppoenaed to give evidence for the king, upon an information exhibited in the crown-office against Nathaniel Thompson, William Pain, and John Farwell, and not being called at their trial to give evidence in open court, maketh oath, That upon Thursday the 10th day of October, 1678, it being the Thursday before sir E. Godfrey was missing from his own house in Hartshorn-lane in the Strand: As he this deponent was coming from St. James's market to go to his own house, about 7 of the clock at night, there were then at the Water-gate of Somerset-house, 5 or 6 men standing together, who laid hold on this deponent as he was passing by them, and they taking hold of both this deponent's arms, dragged him down about a yard within the Water-gate of Somerset-house, it being dark; but one of the said men, which this deponent believes to have been Hill, (for that this deponent knew Hill very well, as also his master Doctor Godwyn,) cried out and said this is not he, upon which they immediately let this deponent go.
RICHARD SPENCE.

July 10, 1682. Coram me, W. DOLBEN.

Whereupon the Clerk of the Crown said, that it was one captain Spence, whom he knew very well, and that he was a tall black man, and like sir E. Godfrey.

Then *John Oakley's* Affidavit was read.

John Oakley, of the parish of St. Martin's in the Fields, in the county of Middlesex, servant to Mr. Robert Breedon of Hartshorn-lane in the said parish and county, brewer, maketh oath, That on Saturday the 12th day of October, in the year of our Lord 1678, about 8 or 9 of the clock in the evening, he was in the city of London, in the company of his father Robert Oakley of Bissiter in the county of Oxon, malster, and his father came with him so far as Ludgate, where they parted. And this deponent going homewards to his master Breedon's house, coming by Somerset-house in the Strand, when he came near the gate of that house which leads down to the water-side, commonly called the Water-gate, which was about 9 of the clock at night, he there saw sir E. Godfrey, and passed close by him, and put off his hat to him, and sir E. Godfrey put off his hat again to him; and after that this deponent had passed beyond sir E. Godfrey, he this deponent turned about and looked upon him again, and sir E. Godfrey stood still, and there was a man or two near sir Edmund. And this deponent further saith, that he knew sir E. Godfrey very well, for that he saw him almost daily pass by his master Breedon's house in Hartshorn-lane, going or coming from his own dwelling-house, which was also in Hartshorn-lane. And this deponent further saith, that about 2 or 3 days after, when the rumour was that sir E. Godfrey was missing, he acquainted his fellow-servant Elizabeth Dekin, that he saw sir E. Godfrey, near the Water-gate at Somerset-house in the Strand, that very Saturday night that he was reported to have been missing from his house in Hartshorn-lane. And this deponent further saith, that he told the same thing to his uncle Ralph Oakley of the parish of Little St. Bartholomew, about a week after the time that sir E. Godfrey's body was found; and also that he told the same thing to his father the aforesaid Robert Oakley, and to several others in a short time after.
JOHN OAKLEY.

June 22, 1682. Coram me,

Sworn to again the 1st of July, 1682, before Judge Dolben, and is left filled up in the Crown-office.

After which the court consulted together, and Mr. Justice Jones having first set out the greatness of their crime, gave the judgment of the court, which was, That Thompson and Farwell should stand upon the pillory, in the Palace-yard, the last day of term, between the hours of 10 and 1 of the clock, for the space of an hour, and each of them to pay 100*l*. fine, and to be imprisoned till they had paid it. And as for Pain, he told him, because the court did not conceive him altogether so guilty, they would inflict no corporal punishment on him, but did adjudge him to pay 100*l*. fine, and to be imprisoned till he paid it.

Afterwards the court was moved to explain their Judgment, it being apprehended that it was pronounced *upon* the Pillory; and the court did declare that their intention was (and so the expression *upon* the Pillory was to be understood) that they should stand *in* the Pillory.*

* See the prayer or rather perhaps recommendation, or as it might seem direction of Thurlow, Attorney General, in the case of Horne, (A. D. 1777) in this Collection.

* As to the needlessness of this explanation, see Rex, *v*. Bowers, cited in a Note to vol. 7,

Accordingly, Wednesday the 5th of July, 1682, Thompson and Farwell stood in the Pillory in the Old Palace-yard at Westminster, with this writing over their heads:*

"For Libelling the Justice of the Nation, by "making the world believe that sir Edmundbury Godfrey murdered himself."

At the end of the account of this Trial, published in 1682, was added the following

APPENDIX, containing several other AFFIDAVITS, which further confirm the testimony of Mr. MILES PRANCE; given upon the Trial of GREEN, BERRY, and HILL, for the Murder of Sir Edmundbury Godfrey: With some Observations touching Thompson, Pain, and Farewell.

AS it hath been of late by many learned pens, made appear, That the Papists do justify and countenance, nay, esteem meritorious, rebellions, murders, and massacres, against any Protestant prince or people (whom they reckon heretics) for the advancement of their religion; so it is as well known, that if those rebellions, murders, and massacres, be discovered, they can (if they shall think them needful) have dispensations to forswear, lie, equivocate, do any thing to make the world believe that they are innocent, or make Protestants themselves appear guilty of them. That there hath been a Popish Plot, (and a desperate one too) in England, for the subversion of the Protestant Religion, and Established Government, I think no man doubts, only some persons whose interest it is, may deny. And amongst the several concurring evidences of this Popish Conspiracy, the murder of that worthy gentleman and magistrate by that party, hath not been the least. That which induced the Papists to this murder, (as well as can be guessed by those who are strangers to that wicked action) was one or both of these considerations; namely, the hopes of finding and seizing the examination of Dr. Oates about the damnable Popish Plot which he had taken, and used to carry about with him, by which they thought to stifle the Plot: or else they thought, by this murder, to affrighten all active magistrates from being vigorous in the future examination, and further prosecution of their horrid conspiracy, though (through God's providence) they have been very much disappointed in both these ends.

And the Papists are so sensible how much this murder pinches them, that after the conviction and execution of the persons for that murder, no discouragements or dangers they incur (by affronting and arraigning the public justice of the kingdom) hath been able to deter them from impudent attempts (impudent I may say, the rather, because done under a Protestant government) to sham off that murder from themselves, and making the whole prosecution to be only a design and contrivance of the Protestants against them. Witness first, that notorious sham of James Magrath, an Irishman, who (being assisted by the Popish priests, in Newgate, Mrs. Cellier, and Mrs. Gibbon, and others) pretended there were those that could make it appear, and prove, that sir Edmundbury Godfrey hanged himself, and that one Moor, who was clerk to sir Edmundbury Godfrey, cut him down, finding him hanging. Which matter being examined at the council board, and appearing to their honours to be a false and malicious contrivance, the said Magrath was dismissed with security for his appearance, and that project fell to the ground. But for the further satisfaction of the world (though I think nobody did believe that idle story) I shall here insert Mr. Moor's affidavit.

The Affidavit of *Henry Moore.*

Henry Moore, late servant and clerk to sir Edmundbury Godfrey, deceased, maketh oath, That upon Saturday the 12th of October, 1678, his said master having persons come before him about justice-business, till about nine of the clock in the forenoon: when the company were gone, he bade me help him on with his coat, which I did; and immediately he made me pull it off again, and give him another coat, which I did; and then he girt his sword about him, and went out from his house, which was the last time I saw him, till after he was found dead in the fields, which was the Thursday following. The constable of St. Giles in the Fields, and several others with him, came to my master's house, and told us, that sir E. Godfrey was found dead and laid in a ditch at Primrose-hill, and a sword thrust through him; and said he had caused him to be carried to the White-house: This being late at night, the next day my master's two brothers, and sisters, and myself, went thither; and then I saw him lye upon a table in the house where the constable had laid him; which was the first time that I saw him, after he went out of his own house, on Saturday the 12th of October, 1678. And then we brought him home to his own house; and as I am informed that there are several scandalous papers, and words given out, That sir E. Godfrey hanged himself; and that they do affirm, That I, the said Henry Moore, should say that I cut him down; I do hereby depose, That the said report is utterly false, and that I did not cut him down, nor ever said any such words to any person whatsoever; or ever said that sir E. Godfrey made away himself, or words to that effect: Which said scandals are all false and notorious lies. HENRY MOORE.

p. 1208, of this Collection. And in general as to the punishment of the Pillory, see the Note to p. 1208, of that Volume, and the passages there referred to. See also the letter of Mr. Justice Powys to Lord Chancellor Macclesfield, in the Case of Rex *v.* Hendley, (A. D. 1719) in this Collection.

June 28, 1681.

Henry Moore of Littleport in the Isle of Ely, and county of Cambridge, made oath before me William Balam, one of his majesty's justices for the said Isle; that this, which is contained in the above written affidavit, is true, and nothing but truth. In witness whereof, I have hereunto set my hand and seal, the day and year above written, WILLIAM BALAM.

Yet, though this matter had proved so unsuccessful, they could not be quiet, but must make one experiment more, and that is contrary to the former: For now they declare, that he made away himself (so far they agree with Magrath) but it was by running his sword through his own body. And Thompson, Farewell, and Pain, are the men that are to manage this new invention; and they write and print the scandalous letters and libels you find in their trial: And lest any one should dare to question the truth of them, they boast, they can prove their assertions by 500 witnesses. Every body thought the murder sufficiently proved upon the trial of Green, Berry, and Hill, and were amazed to hear such a declaration, thinking it hardly possible for men to be so impudent, publicly to declare, they had 500 witnesses to prove a matter, when they had not one, as may be seen by their trial; for every witness made against them; and further proved, that he was murdered, and that by strangling. But for these scandalous libels, they were brought before his majesty's most honourable privy council, who (upon their owning those libels) committed them to Newgate; and ordered the Attorney General to prosecute them; and accordingly you find by the trial he did; and they were convicted and have since received judgment, and that judgment hath been executed. But though the murder was clearly proved at the trial of Green, Berry, and Hill; and though after all these brags, that Thompson, Farewell, and Pain, made, That they could prove so much at their trial, they could make out nothing; and so it was not necessary to call any more witnesses for the king then; yet for the further satisfaction of the world, it hath been thought fit to print (besides what is printed with the trial, upon giving judgment) the following five affidavits all agreeing with Mr. Prance's testimony upon the trial of Green, Berry, and Hill; and as to the first four of them, see John Oakley's affidavit, printed in the trial, at p. 35.

The Affidavit of *Elizabeth Dekin.*

Elizabeth Dekin, servant to Mr. Robert Breedon, of Hartshorn-Lane, in the parish of St. Martins in the Fields, in the county of Middlesex, brewer, maketh oath, That about two or three days after the rumour was published, That sir Edmundbury was missing, her fellow servant, John Oakley, told her this deponent, That he saw sir Edmundbury Godfrey near the Water-gate at Somerset-house in the Strand, about nine of the clock that very Saturday night that he was first missing, from his house in Hartshorn-lane; and that there was then a man or two near the said sir Edmundbury Godfrey: And this deponent further saith, That her said master, Robert Breedon, asking her (before the body of sir Edmundbury Godfrey was found) what news there was about sir Edmundbury Godfrey? She, this deponent, told him, That she heard no news of him, but that her fellow servant, John Oakely had told her, That he met sir Edmundbury Godfrey near the Water-gate at Somerset-house, the very Saturday night he was first missing from his house in Hartshorn-lane. And this deponent further saith, That she then asked the said John Oakely, If he was sure it was sir Edmund? And he replied, he was very sure it was he, for he put off his hat to sir Edmundbury Godfrey, as he passed by him; and sir Edmundbury Godfrey put off his hat to him again; and he also told her, That when he had passed sir Edmundbury Godfrey, he, the said John Oakely looking back again, saw sir Edmundbury Godfrey stand still, and a man or two hard by him, ELIZABETH DEKIN.

June 22, 1682.

Coram me, JOHN MOORE, Mayor.

The Affidavit of *Robert Breedon.*

Robert Breedon of Hartshorn-lane in the parish of St. Martin's in the Fields, in the county of Middlesex, brewer, maketh oath, That one night, betwixt Saturday the 12th day of October, in the year of our Lord, 1678, and before the body of sir Edmundbury Godfrey was found, he coming home to his house about nine of the clock at night, asked his servant maid, Elizabeth Dekin, If there were yet any news of sir Edmundbury Godfrey's being found? or words to that purpose: who replied, That she heard nothing of his being found; but told him, That her fellow servant, John Oakely, did positively affirm, That he met sir Edmundbury Godfrey near the Water gate at Somerset house in the Strand, that very Saturday night about nine of the clock, being the same Saturday that he was first missed from his house in Hartshorn-lane; to which this deponent replied, Sure John is mistaken: To which Elizabeth Dekin answered, John Oakely said, he was sure it was he; for when he met him, he put off his hat to sir Edmundbury Godfrey, and sir Edmundbury Godfrey put off his hat to him again. ROBERT BREEDON.

June 22, 1682.

Coram me, JOHN MOORE, Mayor.

The Affidavit of *Ralph Oakely.*

Ralph Oakely, citizen and skinner, maketh oath that he was an inhabitant in the parish of Little St. Bartholomews, London, in the month of October 1678, and that John Oakely his nephew, was then and is now a servant to Mr. Robert Breedon, of Harts-horn Lane in the parish of St. Martin's in the Fields, in the county

of Middlesex, brewer. And this deponent farther saith, that soon after that the dead body of sir Edmundbury Godfrey was found, his said nephew, John Oakely, came to this deponent's house in a visit, being as this deponent believes, about the Sunday after that sir Edmundbury Godfrey's body was found. And they falling into discourse of sir Edmundbury Godfrey's being found murdered, his said nephew John Oakely then told him this deponent, that as he was going home to his Mr. Breedon's in Hartshorn Lane, after that he had parted with his father Robert Oakely, about Ludgate, he met sir Edmundbury Godfrey about nine o'clock, at night, near the Water-gate of Somerset-house; that Saturday night that he was first missing from his house in Hartshorn Lane, and that he then passed close by sir Edmundbury Godfrey, or words to that purpose. Whereupon this deponent asked his said nephew, are you sure that it was sir Edmundbury Godfrey that you then met near Somerset-house? How did you come to know him? to which his said nephew made answer, I know him very well, for I saw him almost daily pass by Mr. Breedon's house, and he lived in Hartshorn Lane a little below my master's brew-house, or words to that purpose.

July 4, 1682. RALPH OAKELEY.
Coram, W. DOLBEN.

The Affidavit of *Robert Oakeley.*

Robert Oakeley of Bisseter, in the county of Oxon, malster, maketh oath, that he being in London, on Saturday the 12th of October 1678 with his son John Oakeley, servant to Mr. Robert Breedon of the parish of St. Martins in the Fields, in the county of Middlesex, brewer, that this deponent did then accompany his said son John Oakeley without Ludgate, and there parted with him about nine o'clock at night, and this deponent went out of town on the Thursday following; before the body of sir Edmundbury Godfrey was found. And this deponent further saith, that some short time after, he coming to town again, the said John Oakeley his son, then toldt his deponent that upon Saturday the 12th day of October, 1678, after he had parted from this deponent upon Ludgate-Hill, as he went home to his said master's house in Hartshorn Lane, he saw sir Edmundbury Godfrey, near Somerset-house in the Strand, and then put off his hat to him, and the said sir Edmundbury Godfrey thereupon put off his hat to the said John Oakeley again, all which this deponent hath declared to several persons since that time.

June 22, 1682. ROBERT OAKELEY.
Coram me, JOHN MOORE, Mayor.

The Affidavit of *John Brown* and *William Lock.*

John Brown and William Lock, both of the parish of Marylebone in the county of Middlesex, having been since subpœned to give evidence for the king upon an information in the Crown-office, exhibited against Nathaniel Thompson, William Pain, and John Farwell, and not being called at their trial to give evidence for the king, in open Court, each of them severally for themselves maketh oath, that upon Thursday the 17th of October, 1678, the said John Brown, being then constable of Marylebone aforesaid, word was brought to him, that there was a man found dead in a ditch near Primrose-Hill, whereupon this deponent John Brown, charged this other deponent William Lock, and several others to go along with him thither; and when they came to the place where the body lay, the said deponents John Brown and William Lock, went into the said ditch, as also some other persons, which were then with them, some of which are since deceased. And the said deponents viewing the body in what posture it lay, and finding a sword thrust through the body, they each of them, the said deponents, did feel under the body, and found that the pummel of the sword-hilt did not touch the ground by a handful; but not knowing whose body it was, they the said deponents and others that were then with them, pulled the body out of the ditch, and found that it was the body of sir Edmundbury Godfrey, with whom they were very well acquainted in his life time.

June 30, 1682. JOHN BROWN.
The mark of WM. *W. L.* LOCK.
Coram me, JOHN MOORE, Mayor.

The Affidavit of *Benj. Man.*

Benjamin Man of London, gent. having been twice subpœned to give evidence for the king upon an information exhibited in the Crown-office against Nathaniel Thompson, William Pain and John Farewell: and not being called at their trial to give evidence in open Court, maketh oath, that about the time Green was charged with the murder of sir Edmundbury Godfrey, This deponent coming to the Gatehouse in the morning, found the said Green about to be put in irons, and asking the turnkeys what was the matter? They told him that Green was charged with the murder of sir E. Godfrey. And then the said deponent called to see his warrant, and this deponent reading of it, turned to Mr. Green, and said I did not think to have found you such a man, whereupon Green replied, I am a dead man, or words to that purpose.

July 3, 1682. BENJ. MAN.
Coram me, W. DOLBEN.

The Affidavit of *Robert Forset.*

Robert Forset of Marylebone, in the county of Middlesex, esq. having been twice subpœned to give evidence for the king, upon an information exhibited in the Crown-office against Nathaniel Thompson, William Pain and John Farewell: and being not called to give evidence in open Court, maketh oath, that Tuesday the 15th of October, 1678, being the Tuesday after that sir Edmundbury Godfrey was missing, he this deponent was a hunting with

his pack of hounds, at the very place where the body of sir E. Godfrey was afterwards found, and beat that very place with his hounds and the body was not then there, nor any gloves nor cane thereabout. The said deponent further saith, That the same day Mr. Henry Harwood, requested him this deponent that he would let him have his hounds the next day after being Wednesday, and he would find that hare which they could not find on Tuesday, or words to that purpose. And this deponent further saith, That he the said Harwood, hath several times since affirmed, That he did accordingly hunt in the same place and beat the same ditch, and said that the body was not there that Wednesday at noon, which said Henry Harwood is now newly dead.

July 1, 1682. ROBERT FORSET.

Coram me, W. DOLBEN.

But because it may be thought strange that Protestants should espouse the cause of the Papists, it may be fit to give some account what these persons are, who have so zealously appeared in this matter; it is to be supposed (not without some ground) that Thompson (notwithstanding his pretence that he was drawn in) knew those things he printed in the letters or several of them to be falsities, for Mr. George Larkin does swear as follows:

The Affidavit of *George Larkin*.

George Larkin of London printer, maketh oath, that having heard the body of Sir Edmundbury Godfrey was found, this deponent on the 18th of October, 1678, went to see the said body which then lay at the White-house near Primrose-hill, and there met with Nathaniel Thompson, of London, also printer, who then proposed to this deponent the writing of a narrative thereof to print, wherein he desired this deponent's assistance, and therefore wished this deponent to take good notice of the body and circumstances, and promised to do the like himself, and this deponent staid there with the said Thompson till the coroner's jury sate on the said body, and did see the said body stripped. And this deponent having conferred with the said Thompson, and agreeing with him in the circumstances; the said narrative, the same day, was written in part in the said Thompson's house, and being finished, was read over by this deponent and the said Thompson, who agreed with this deponent in the truth thereof.

March 22, 1681. GEORGE LARKIN.

Coram me, J. MOORE, Mayor.

And upon this sight of the body, and comparing of notes with Mr. Larkin, he puts out a little pamphlet intituled, 'A True and Perfect Narrative,' &c. in which there is a paragraph or two quite contrary to what he prints in the letters. pray take it in the words of it.

A True and Perfect NARRATIVE of the late terrible and bloody Murder of sir Edmundbury Godfrey, &c. (with allowance.) Printed by N. T. 1678.

On Friday the 18th of this instant, Mr. Cooper the coroner of Middlesex impannelled a jury at the White House to enquire about the occasion of the death of the said sir Edmundbury: and two surgeons (having been first sworn) removed the body in the presence of the coroner and jury, and found the wounds about it, which one of the surgeons searched with his probe, and found one of them not above an inch deep, the probe going against one of his ribs, but the other being a little below the left pap, went quite through the body, his face was of a fresh colour, though in his life time very pale, somewhat swelled, and a green circle about his neck, as if he had been strangled, his blood being settled about his throat, and the upper part of his breast, the surgeons having reviewed the body, delivered their judgments, that the wounds they found about him were not the cause of his death; but that he was suffocated before the wounds were made. And that which may fully persuade any person of the truth hereof is, that there was not one drop of blood to be found in the place where he lay, nor the least appearance of any such thing, though the ditch was dry, and it might have been easily seen if there had been any. Another thing was, that the very bottom of the soles of his shoes were as clean as if he had but just come out of his own chamber, which was an evident sign that he was carried thither.

A third thing very remarkable is, that one of the jury affirmed that a servant of his mothers (who is owner of the ground where the body lay) with a butcher and two boys, made a very strict and narrow search in all parts of that ground for a calf that was missing upon Monday and Tuesday last, and at that time there lay no dead body, belt, gloves, stick, or other thing there.

And notwithstanding he gives himself the name of the 'Loyal Protestant printer,' this is not the first time he hath been charged with printing popish books, (I take still these letters and libels to be a limb of popery) for Wednesday the 30th of October, 1678, he was committed to the Gatehouse at Westminster, by the House of Lords for that very matter. As for Mr. Farewell, he was mightily afraid he should be taken for a papist, Mr. Serjeant Maynard declared he thought he was of no religion: but if he be, I know which is most like to justify such practices. But though I cannot say any thing as to his religion, yet I have reason to think the papists had a great kindness for him, for (not to mention other things) he was trustee for Fenwick the Jesuit that was executed*, and that I think will appear by the following Affidavit, and also a kind of Will made by the said Fenwick.

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* See vol. 7, p. 311, of this Collection.

The Affidavit of *John Richardson.*

John Richardson of the parish of St. Clement's Danes in the county of Middlesex, formerly clerk to Richard Langhorn, esq. executed (aged 36 years or thereabouts) deposeth, that in or about the year 1670, Mr. John Farwell lately deputy bailiff of Westminster, was employed by the said Mr. Langhorn, in the cause between the Jesuits, Whitbread, Poulton, and others, and one Mr. John Savage in a suit in chancery concerning Newingham Abbey in Bedfordshire. And that in the year 1678, about Michaelmas day, there having for some time before been another suit in chancery depending between one Mr. Goodlad, and the Jesuits executed and others, all the papers in the said cause being removed by the said Mr. Langhorn's order, (before his imprisonment) out of his chamber. Mr. Farwell met this deponent, and said to him where are the papers in the cause between the Jesuits and Mrs. Goodlad? The deponent told him in the Temple, Mr. Farwell said he must have them brought to him to follow the suit that Mr. Langhorn had begun, so the deponent carried them to him the next day, and within some short time afterwards the said cause was finally ended, as the deponent hath been since informed. Mr. Farwell was also concerned for the Jesuits, as a trustee for 500*l.* of Fenwick's money, in Benjamin Hinton's hands, found by a jury and given as the deponent is informed to the sheriffs of London, notwithstanding which he being summoned on a commission of enquiry to Guildhall, about May last, and there examined if he had never been a trustee for any of them, he said on his oath no, yet after being charged with his being proved a trustee for this 500*l.* (before the jury) he then confessed he had forgot it, and owned he was a trustee for the 500*l.* before mentioned.

April 3, 1682. JOHN RICHARDSON.
Coram me, JOHN MOORE, Mayor.

Fenwick the Jesuit that was executed, his Will.

"I had taken from me when I was apprehended and brought to prison, two Goldsmiths notes, one of 400*l.* another of 100*l.* the money is in Benjamin Hinton's hands at Birchin-lane end in Lombard street. There were also two bonds, each of 120*l.* due to me from Mr. Samuel Tyrril, but the bonds are made payable to Mr. John Farwell and Mr. William Brewe.—There was also a bill of 50*l.* due from Mrs. Olympia Wray.—Of this I owe to Mr. Hamerton of Mark-lane 100*l.* which I had received from him with order to pay it to another gentleman but had not paid it: also 40*l.* to Mr. Ed. Stockton, which I received for him and had not paid it; also 10 or 20*l.* (truly I rather believe 15*l.*) which I received for Mr. Tho. Pordage, (who lives now beyond seas, and had an estate in Kent of 1,000*l.* a year since the king's restoration, and is now reduced to that poverty that this 20*l.* is all he has to live on) from Mr. Tho. Lushington in Kent, by five or ten pound at a time, it being in part of an annuity of 20*l.* a year to be paid quarterly.—Also 15 or 20*l.* to Alice Kettlewell who lived with the lady Petre, for which she has my note.—There are also several deeds and bonds betwixt the late lord Widdrington, and George Collingwood of Eshington in Northumberland, esq. which the said George Collingwood ordered me to deliver to capt. Ralph Widdrington, upon the payment of 100*l.* but the money not being paid, I desire the writings may be restored to the said Mr. Collingwood or his heir.—These several sums being paid, the rest of the money belongs to the house of St. Omers to which I was employed.—I desire what money is paid in satisfaction of the sums above said, may be paid into the hands of Mr. John Farwell, attorney at law of Covent-Garden, who will take care to pay it to the persons to whom it belong.—I hope care will be taken to pay my landlady my chamber rent since my imprisonment, also half a year or three quarters of a year's rent, which I was owing at the time of my apprehension, since all is taken from me and I cannot do it myself, she will tell you exactly the time, for I cannot."

As for Mr. Pain, I shall only say this, that he is brother to Nevill alias Pain, a man famous for making the traitor Coleman's elegy, and for being an agent and scribbler for Mrs. Cellier and the Papists, yet that I may do him right, I must tell the world since the prosecution of him for this matter, he hath declared himself sorry for what he hath done, and not carried it so impudently as the others.—Thus I hope by printing these affidavits, the murder of Sir Edmund Godfrey by the papists does appear so clear and unquestionable that no persons (for the future) can assume the impudence to attempt any further shams upon it, but at the same time must proclaim their folly in so vain an undertaking.

END OF VOL. VIII.

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